



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**MISCELLANEOUS CIVIL APPLICATION NO. 237 OF 2014.**

**IN THE MATTER OF THE ARBITRATION ACT, CHAPTER 49 LAWS OF KENYA.**

**MASINDE MULIRO UNIVERSITY OF**

**SCIENCE AND TECHNOLOGY :::::::::::::::::::: CLAIMANT**

**VERSUS**

**ALFATECH CONTRACTORS LIMITED ::::::::::::::::::::RESPONDENT**

**R U L I N G.**

**Background**

1. Masinde Muliro University of Science and Technology (hereinafter referred to as the claimant) through an advertisement published in the Standard Daily Newspapers of 2<sup>nd</sup> March, 2011, sought bidders for the construction of a multi-purpose hall from contractors registered in Class C or above.
2. Alfatech Contractors Limited (hereinafter referred to as the respondent) emerged the successful bidder and was issued with a letter of notification of award on 2<sup>nd</sup> June, 2011. The claimant and respondent signed a form of agreement on 29<sup>th</sup> June, 2011. The value of the contract was the sum of Ksh. 69,987,541.00. Although the contract was signed on 29<sup>th</sup> June, 2011, its commencement date was 20<sup>th</sup> June, 2011. The duration of the contract was sixty months, with the completion date being 17<sup>th</sup> August, 2012.
3. The claimant appointed a Project Manager (hereinafter referred to as the PM), one Architect Busuru R.M, the University Architect to be in charge of the project. The claimant also appointed through the Kakamega County Works Officer professionals from the Ministry of Public Works to supervise the construction works. These included an Architect, a Quantity Surveyor, a Structural/Civil Engineer and an Electrical/Mechanical Engineer. These professionals were to carry out their duties under the delegated authority of the PM. Eng. M.K Makangula was appointed an alternate PM. The PM was however the bona fide liaison person between the parties to the contract.
4. The contract was not completed within the required time lines. Parties fell out leading to termination of the contract by the claimant on 20<sup>th</sup> January, 2013. The respondent contested the termination by a letter dated 4<sup>th</sup> February, 2013. On 3<sup>rd</sup> October, 2013, the claimant took over the

site.

5. In line with clause 39 of the standard conditions of the contract, on 3<sup>rd</sup> March, 2014, the parties agreed to appoint Mr. Tom O. Oketch, a Quantity Surveyor as a mediator to try and resolve the dispute amicably. The parties did not reach an amicable solution.
6. As clause 37 of the standard conditions of contract provided for arbitration, the parties agreed to appoint the said Mr. Oketch to be the sole Arbitrator (hereinafter referred to as the Arbitral Tribunal) in the dispute.
7. A consensus was reached that the Arbitration Rules (hereinafter referred to as the rules) published by the Chartered Institute of Arbitrators, Kenya Branch would apply. Parties consented to the proceedings being by way of submission of documents with no oral evidence being tendered.
8. The Arbitral Tribunal made and published the final award on 16<sup>th</sup> July, 2014. It was in favour of the respondent. The claimant failed to settle the arbitral award which has culminated into the two applications that are before me for consideration and determination.

### **Chamber summons application**

9. The first application is by way of a chamber summons dated 10<sup>th</sup> December, 2014, filed by the respondent. It has been brought under the provisions section 36 of the Arbitration Act (hereinafter referred to as the Act) and Rule 6 of the Rules, 1997.

10. In the said application, the respondent seeks:-

- i. Leave to enforce the Arbitral award for the sum of Ksh.24,538,059.54 that was made and published in its favour on 16<sup>th</sup> July, 2014 and filed in court on 8<sup>th</sup> December, 2014.
- ii. Further or other order(s) as it (court) may deem fit and just to grant.
- iii. Orders for costs of the application.

The respondent contended that the claimant was duly notified of the arbitral award but had taken no step to settle the amount due. The respondent relied on the supporting affidavit of its Managing Director, Kenneth Mwaura.

11. On receipt of the chamber summons dated 10<sup>th</sup> December, 2014, the claimant filed a Notice of preliminary objection dated 16<sup>th</sup> February, 2015. It raises the following grounds:-

- i. That the respondent's miscellaneous application No. 237 of 2015 (sic) and/or chamber summons dated 10<sup>th</sup> December, 2014 was incurably incompetent as it was filed in breach of the mandatory provisions of section 36 of the Arbitration Act and it ought to be struck off (sic) with costs;
- ii. That the respondent has not satisfied the conditions precedent for the court's jurisdiction for recognition and enforcement of the award to become exercisable and invocable and consequently the court's jurisdiction is not there; and
- iii. That the supporting affidavit of Kenneth Mwaura sworn on 2<sup>nd</sup> December, 2014 was incurably incompetent and incapable of supporting the chamber summons dated 10<sup>th</sup> December, 2014 and ought to be struck off (sic) with costs.

### **The claimant's submissions**

12. Mr. Malebe, learned counsel for the claimant submitted that the deponent perused the court file on 13<sup>th</sup> February, 2015 and found that a copy of the arbitral award was filed. It was submitted for the claimant that the respondent failed to comply with the provisions of section 36(3) of the Act by failing to file -

(i) the original arbitral award or a duly certified copy of it; and

(ii) the original arbitration agreement or a duly certified copy of it.

13. He submitted that the arbitral agreement is the contract between the parties binding them to go through the arbitral process and the said agreement should have been filed in court.

The claimant relied on the decisions in the cases of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 others [2012] eKLR** and **Re the matter of the Interim Independent Electoral Commission [2011] eKLR** to show that this court cannot assume jurisdiction on a matter that has not been properly brought before it.

14. The claimant also relied on the case of **Glencore Grain Ltd vs. TSS Grain Millers Ltd [2002] 1 KLR** where Onyancha J, in dismissing an application seeking enforcement of an arbitral award held that:-

**“The arbitral award was not filed in its original form nor was it authenticated as required by section 36 (2) of the Arbitration Act. The failure to comply with the Act was fatal rendering the arbitral award inadmissible in evidence for purpose of recognition and/or enforcement.”**

15. The claimant further augmented its submissions with the decision in the case of **Safaricom Limited vs. Ocean view Beach Hotel Limited and 2 others [2015] eKLR** where **Kasango J, struck out a chamber summons application because the plaintiff failed to supply the original or certified copies of the award and arbitration agreement.**

#### **The respondent's submissions**

16. Mr Burugu, learned counsel for the respondent on the other hand submitted that the preliminary objection raised by the claimant has no basis as the arbitral award filed in court is an original document signed by the Arbitral Tribunal. There was therefore compliance with the provisions of section 36 (a) of the Act.

Mr. Burugu however conceded that the respondent did not file the arbitration agreement as the said document does not stand on its own. He submitted that the arbitration agreement was the first thing that was dealt with by the Arbitral Tribunal and that was not in dispute. The said agreement, he submitted, is part of the arbitral award and that the objections raised are technical in nature and do not go to the substance of the matter. It was not disputed that an arbitral award was made.

It was submitted for the respondent that one of the grounds for setting aside an arbitral award under section 35 of the Act is if it is shown that the Arbitral Tribunal was not properly appointed. In this case, the Arbitral Tribunal was properly appointed. Mr. Burugu urged this court to enforce the arbitral award.

#### **Decision on the chambers summons application and the preliminary objection raised**

17. The nature and scope of a preliminary issue is well defined in the statement of **Law J.A, in the case of Mukisa Biscuit manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 at 700 in the following words -**

**"So far, I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation."**

18. Section 36 (3) of the Act as revised, provides that:-

**"unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish (*emphasis mine*) –**

- a. **The original arbitral award or a duly certified copy of it; and**
- b. **The original arbitration agreement or a duly certified copy of it.**

19. A perusal of the court file reveals that the original arbitral award was filed in the High Court at Kakamega in Miscellaneous Civil Application No. 237 of 2014. The record however does not contain the original arbitration agreement or a duly certified copy of it. The foregoing shows that the respondent partially complied with the provisions of section 36 (3) of the Act. The said section makes it mandatory for the party applying for recognition and enforcement of an arbitral award to file the documents indicated in section 36 (3) (a) and (b) of the said Act.

20. It then follows that such a party would be obliged to comply with rule 5 of the Rules on issuance of a notice to the affected party. The said rule provides that:-

**“The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.”**

It is clear that the respondent neither issued a notice to the claimant as required under rule 5 of the Rules nor did it file an affidavit of service as required as a confirmation of service of the said notice.

21. Paragraph 2.7 of the arbitral award shows that the parties hereto entered into an arbitration agreement dated 28th April, 2014. The Act in section 4(2) provides that **"an arbitration agreement shall be in writing"**. The foregoing is a mandatory requirement.

22. I have carefully considered whether I should exercise my discretion to invoke the provisions of article 159(2)(d) of the Constitution to cure the defect. This court is however guided by the decision of the Supreme Court in the case of **Raila Odinga and others vs IEBC and others SCK Petition No. 5 of 2013 [2013] eKLR**. With regard to article 159(2) (d) of the Constitution, the said Court stated thus –

**"the essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course."**

23. I have considered the submissions by both parties, the decisions cited by the claimant and the ones I have cited above and I am satisfied that failure to comply with the provisions of section 36 (3)(a) and (b) of the Act and rule 5 of the Rules renders the chamber summons dated 10<sup>th</sup> December, 2014, fatally defective. I find that this is not a suitable case for this court on its own motion to invoke the provisions of article 159(2)(d) of the Constitution.

24. I therefore uphold the preliminary objection raised due to the respondent's non-compliance with mandatory legal provisions. Having found so, there is no need for me to delve into the other grounds raised in the preliminary objection as it will be an academic exercise.

25. For the foregoing reason, the respondent's chamber summons application dated 10<sup>th</sup> December,

2014 is hereby struck out for want of compliance.

### **Notice of motion application**

26. This court will now consider the second application brought by the claimant by way of Notice of Motion dated 16<sup>th</sup> February, 2015. The application has been brought under the provisions of articles 50 (1), 159 (2) (a) (b), (d) and (e) of the Constitution, Section 35 (2) and (3) of the Arbitration Act, Rule 7 of the Arbitration Rules, Section 3 of the Judicature Act, Section 1A, B and 3A of the Civil Procedure Act, order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the law.

The said application is supported by the affidavit of Jacqueline Wanjala, dated 16<sup>th</sup> February, 2015, her replying affidavit dated 17<sup>th</sup> February, 2015, further supporting affidavit dated 19<sup>th</sup> May, 2015 and second further affidavit dated 27<sup>th</sup> July, 2015.

27. The respondent in turn filed a replying affidavit dated 10<sup>th</sup> April, 2015 and a further affidavit dated 15<sup>th</sup> June, 2015.

28. In the said application, the claimant seeks the following prayers -

- i. **That the award of the Arbitral Tribunal in the matter of arbitration between the claimant and the respondent made and published on 16<sup>th</sup> July, 2014 and supplied and received by the claimant on 24<sup>th</sup> November, 2014, be set aside;**
- ii. **That the respondent pays and bears the claimant's costs of the Arbitral Tribunal and the application; and**
- iii. **Such further or other order that the justice of the application impels.**

29. The said application is premised on the following grounds:-

#### **I. The award is in conflict with the public policy of Kenya as:-**

*(a) It was made in violation of the Constitution of Kenya, the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the PP&DA) and the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the regulations) and where the constitution at article 227 stipulates on procurement of public goods and services and the PP&DA at Section 47 that sets out the strictures on variations of public procurements together with regulation 31 of the regulations, which were violated, but the Arbitral Tribunal ignored those statutory violations variations in reaching its decision;*

*(b) The Arbitral Tribunal admitted some of the respondent's documents after the conclusion of the time for filing and exchange of documents and went ahead to rely on those documents to award the respondent colossal amounts of money without furnishing copies of those documents to the claimant and giving it an opportunity to comment on them thus denying the applicant the right to be heard or submit on the contents of the documents;*

#### **II. The arbitral award contains decisions on matters beyond the scope of the reference to arbitration including:-**

*(a) The Arbitral Tribunal purported to vitiate, set aside, mutilate, ignore and discard the matters agreed upon by the parties as resolutions at Paragraphs 3, 6, 5 to 3.6.10 and proceeded to substitute his decision contrary to the*

*agreement of the parties.*

*(b) The parties agreed that for purposes of computation of the liquidated and ascertained damages, the effective start date was 5<sup>th</sup> May, 2013, stopping on 14<sup>th</sup> September, 2013 when the respondent was ready to hand over the site to the claimant and that the respondent shall pay the claimant Ksh. 2,640,000/= but the Arbitral Tribunal held that no liquidated and ascertained damages shall apply and were due to the claimant.*

*(c) At page 9 paragraph 3.6.9 of the arbitral award that the parties agreed that the respondents claim on extended preliminaries shall be based on thirty six weeks and that the computation claimed thereof would be Ksh.1,234,908/= but the Arbitrator purported to extend time when that was not an issue before him for determination thereby extinguishing the claimant's entitlement as per the agreement of the parties.*

*(d) The Arbitral Tribunal used the commercial rate of interest when the agreement was express on the rate of interest to be applied.*

**III.** *The arbitral award deals substantially with a dispute not falling within the terms of reference to arbitration and in particular the Arbitral Tribunal proceeded to award compensation for the tools, equipment and hoarding in the sum of Ksh. 4,894,071.43 when the issue presented to it was whether the tools and equipment were held unjustifiably.*

### **The claimant's submissions**

30. Mr. Malebe robustly argued the claimant's application and submitted thus:-

- i. The contract emanated from a public procurement, performance therefore had to be in conformity with the PP&DA. The arbitral award however offended the provisions of section 35 (2) (b) (ii) of the Act for non compliance with PP&DA. He submitted that the arbitral award was against public policy for the foregoing reason.

He cited the case of **Christ for all Nations vs. Apollo Insurance Co. Ltd. [2002] EA 366** where it was held that an award would be contrary to public policy if it is in conflict with the Constitution, other laws, written or unwritten and inimical to the national interest of Kenya or contrary to justice and morality.

He submitted that the Arbitral Tribunal acknowledged the fact that the contract in issue was in accordance with the PP&DA and that under section 27 (4) of the PP&DA it is very clear that responsibility for compliance was on both the claimant and the respondent.

31. On variation of works, Mr. Malebe submitted that there were unlawful variations to the contract which did not accord with the provisions of section 47 of the PP&DA and regulation 31 thereof, which at the time the contract in issue was in force, provided that variation should not exceed 15% of the initial contract and that execution must be within the contract period.

32. It was submitted for the claimant that the Arbitral Tribunal found that variation of works was 42% of the original contract sum and that the Arbitral Tribunal should have limited the arbitral award to the dictates of PP&DA. The claimant cited the cases of **Niazons (K) Limited vs. China Road & Bridge Corporation (Kenya), Civil Appeal No. 187 of 1999** to show that there can be no estoppel against statute. Another decision cited was that of **Republic vs. Kenya Ports Authority and others ex-parte Rosmik Trading Company Limited and others** where it was held that the court cannot enforce ultra vires matters.

The claimant further cited the decision in **Standard Chartered bank Kenya Ltd vs. Intercom Services Ltd [2004] eKLR** where it was held that the court cannot shut its eye to an illegality.

33. Mr. Malebe further submitted that public procurement should be cost effective as provided in article 227 of the Constitution. He cited the case of **Evangelical Mission for Africa and another vs. Kimani Gachuhi & Another [2015] eKLR** to support that submission.
34. Another line of argument by the claimant was that the Arbitral Tribunal went beyond the scope of reference, thus the prayer for setting aside the arbitral award in accordance with section 35 (2) (iv) of the Arbitration Act. The claimant contended that the Arbitral Tribunal was also the Mediator and that the parties had reached a consensus to the effect that all resolutions agreed during mediation were to form part of the arbitral award. As such the resolutions arrived at during mediation were binding and it was wrong for the Arbitral Tribunal to sideline the resolutions.
35. It was submitted for the claimant that issues of preliminaries were agreed on and that parties settled for an amount of Ksh.1,234,980.00, but the Arbitral Tribunal awarded an amount of Ksh.4,265,240.00.
36. It was further submitted that parties had agreed that Central Bank interest rates should apply to delayed payments but the Arbitral Tribunal awarded more than half the interest the respondents were entitled to. It was submitted that the Arbitral Tribunal awarded compound interest instead of simple interest which was contemplated by the parties.

The claimant cited the decision in the case of **Kenya Agricultural and Livestock Research organization vs. Njama Limited [2015] eKLR** where it was held that interest should be in conformity to the agreement and not above the scope agreed on. The claimant also relied on the case of **the Board of Governors Ng'iya Girls High School vs. Meshack Ochieng t/a Mecko Enterprises [2014] eKLR** where the arbitral award on compound interest was set aside as the respondent therein had contemplated the award of simple interest.

37. The claimant further submitted that an award of Ksh. 4.8 Million was made under the award of use of equipment and tools. It was submitted that since the contract was terminated, the tools were not used.
38. The claimant also submitted that the Arbitral Tribunal relied on some documents submitted to it by the respondent which were not brought to the attention of the claimant during the arbitral proceedings.

The claimant prayed for the arbitral award to be set aside for the foregoing reasons.

#### **The respondent's submissions**

39. Mr. Burugu, learned counsel for the respondent vehemently opposed the claimant's application and submitted that the claimant was trying to deny the respondent the fruits of its labour by submitting that the arbitral award was against public policy for non-compliance with the provisions of sections 27(4) and 47 of the PP&DA and regulation 31 thereof. He submitted that parties went before the Arbitral Tribunal and agreed on the issues to be determined.
40. The respondent relied on the case of **Airtel Networks Kenya Ltd vs. Nyutu Agrovet Limited [2011] eKLR** where in paragraph 42, the Judge referred to the judgment in **Christ for all Nations vs. Apollo Insurance Co. Ltd [2002] 2 EA 366** where Ringera J, as he then was, equated an argument on public policy to an unruly horse.
41. On the value of the work done, Mr. Burugu submitted that the Arbitral Tribunal found that the respondent was entitled to the amount awarded as value of the work that had benefitted the

claimant. He submitted that it is not in the interest of justice for the respondent to be denied his money for work done. The valuation of the work done was a matter for approval by the claimant's Tender Committee of which the respondent was not a party. Default on the part of the claimant cannot therefore be placed at the foot of the respondent.

42. It was submitted for the respondent that the resolutions arrived at during mediation were put in as part of the record of the arbitral proceedings but that the Arbitral Tribunal was not bound by agreements made during mediation. The respondent relied on the judgment in the case of **Senator Johnstone Muthama vs. Tanathi Water Services Board & 2 others [2014] e KLR, where Odunga J, referred to a passage on alternative dispute Resolution in Northern Carolina to differentiate between mediation and arbitration.**

43. On the issue of the Arbitral Tribunal applying the wrong interest for late payments, the respondent submitted that the claimant should have availed themselves of the provisions of section 34 of the Act, by writing to the Arbitral Tribunal within 30 days of the publication of the arbitral award for the interest applied to be corrected. A remedy therefore exists in that regard.

44. Mr. Burugu further submitted that the Arbitral Tribunal gave a considered award for each and every issue and that was in accordance with the Rules. A claim that the Arbitral Tribunal went beyond its scope is misconceived. He prayed for the award made to the respondent not to be disturbed and for the claimant's application to be dismissed.

#### **Analysis and determination of the issues in dispute**

45. This court appreciates the extensive research undertaken by learned counsel for both parties to fortify their arguments and persuade the court that their submissions should carry the day. The affidavits sworn and documentation filed in court by representatives of both parties also shed a lot of light in this matter.

46. This court lists the following issues that call for determination:-

- i. **Is the arbitral award in conflict with the public policy of Kenya as envisaged under section 35 (2) (b) (ii) of the Act?**
- ii. **Did the Arbitral Tribunal make decisions on matters beyond the scope of the reference?**
- iii. **Was the interest awarded above that agreed upon?**
- iv. **Did the Arbitral Tribunal admit documents in the arbitral proceedings from the respondent without the knowledge of the claimant?**

47. In determining the above issues, this court will be guided by the Constitution of Kenya, the Act and rules thereof, the PP&DA and regulations thereof and other applicable laws, the submissions of both counsel, documentation filed in court by both counsel, replying affidavits deposed by representatives of both parties, the arbitral award, judicial precedents and Mutsill and Boyd in their book, Commercial Arbitration, 2nd edition at page 554, The said treatise indicates that:-

**"An award will be entirely void if the parties never made a binding arbitration agreement; if the matters in dispute fell outside the scope of the agreement; if the Arbitrator was not validly appointed, or lacked the necessary qualifications; or if the whole of the relief granted lay outside the powers of the arbitrator. The award will be partially void if the relief granted related to a matter which was not referred or if for some other reason it was outside the jurisdiction of the arbitrator. In all these situations, the primary active remedy is for the court to declare that the award is void, in whole or in part".**

48. Section 35 (2) (ii) (iv) of the Act provides that an arbitral award may be set aside by the High Court only if -

**"the arbitral award deals with a dispute not contemplated by or not falling within**

**the terms of the reference to arbitration or contains decisions on matters beyond the scope of reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, *provided that* (emphasis mine) 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".**

### **Public Policy of Kenya in Arbitral awards.**

49. The claimant in its argument contended that the Arbitral Tribunal found that the variation of the work done constituted 42% of the initial contract value between the parties.

On page 51 of the Arbitral award, the Arbitral Tribunal found as follows:-

***“The joint appraisal carried out on 22<sup>nd</sup> April, 2013 did not represent the correct value of the work done and the materials on site then. There were some variations not taken into consideration.”***

50. The Arbitral Tribunal, on the request of the parties visited the project site on 16th May, 2014, to determine the value of the work done. The Arbitral Tribunal was accompanied by two Assistants. The three compiled valuation notes, took measurements and photographs of the said site. This information is contained in paragraph 6.1 of the arbitral award.

51. On the one hand, the claimant being a Public University was bound by the provisions of the PP&DA and regulations thereto issued from the time of advertising the Tender until completion of the project. On the other hand, the respondent by agreeing to undertake a project under the PP&DA was bound by the provisions of section 27 (4) of the said Act.

52. A close reading of the provisions of section 47 (a) and (b) of the PP&DA shows that **any variation for goods, works or services must be approved by the Tender Committee of the procuring entity.** It was therefore expected that the PM would bring the claimant's Tender Committee to speed with any variations that were to be undertaken in the project for approval.

53. Regulation 31 (b) of the regulations of 2006 provides that for the purpose of section 47 (b) of the Act, any variation of contract shall be effective only if:-

**(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.**

The claimant was duty bound to ensure that it did not exceed the variation threshold set by law. That was however only possible if the Tender Committee was kept posted of the contract variations. The claimant did not deny that there were variations made to the contract. Some of the documents filed in court show that variations were made at different stages of the project implementation.

54. It is evident that there was a lapse on the part of the claimant. It is unfathomable that the respondent would go on a spending spree so as to incur expenditure on matters that were not agreed upon with the claimant. The variation of works at 42% of the initial contract sum falls squarely at the feet of the claimant.

55. As Ringera J, as he then was, aptly put it in the case of **Christ for all Nations vs. Apollo Insurance Co. Ltd [2002] 2 EA 366, in equating an argument on public policy under section 35 (2) (b) (ii) of the Act, to an unruly horse, he held at page 70:-**

**“In my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy in Kenya. On the contrary, the Public Policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept an award, warts and all, subject only to the right to challenge it within the narrow confines of section 35 of the Arbitration Act.”**

56. This court takes cognizance of the fact that legally, suppliers of goods works and services do not sit in the Tender Committees of public entities. The composition of Tender Committees of Public Universities is well spelt out in paragraph 4 of the second schedule of the PP&D regulations of 2006.

57. My finding on the foregoing issue is that the claimant failed to act within the controls set by PP&DA on price variation thus incurring the additional cost of 42% of the original contract sum. The claimant by so doing failed to observe the tenets of efficient, effective and economic use of resources espoused in article 232 (1) (b) of the Constitution and contravened the provisions of article 227(1) of the Constitution on cost effectiveness. The claimants also contravened the provisions of section 47 (a) and (b) of the PP&DA and regulation 31 (c) thereof.

58. On page 5 of the arbitral award, the Arbitral Tribunal indicated the following in regard to the contract between the parties. **“The building contract agreement was the Government of Kenya Standard Conditions of contract in accordance with the Public Procurement and disposal Act, [2006] (sic).**

It therefore follows that the Arbitral Tribunal was not ignorant of the fact that the contract was governed by the said law that binds public entities when undertaking procurement. The onus was on the claimant to rein in the unruly horse.

59. The Arbitral Tribunal is a professional Quantity Surveyor. This court does not doubt its finding that the variation of work done stood at 42% of the original contract price. The respondent was in a legally binding contractual relationship with the claimant. It is clear that the claimant flouted the law on procurement, it cannot now cry foul and expect this court to sanitize the illegality it occasioned. This court cannot promote unjust enrichment to the claimant. Doing so would encourage superfluity of unjust claims by parties seeking to reap from where they have not sown. The buck stops squarely with the claimant which has the necessary channels to address the issue of the 42% price variation.

60. For the foregoing reasons, I decline to set aside the arbitral award on the ground of public policy as advanced by the claimant. It is my finding that the claimant is duty bound to pay for work done.

**Does the Arbitral award contain decisions on matters beyond the scope of reference to arbitration?**

61. The supporting affidavit of Jacqueline Wanjala at paragraph 11 revisits the issues that the parties agreed to at the commencement of the Arbitration as captured in paragraphs 3.6.6 to 3.6.10 of the Arbitral award. Paragraphs 3.6.7 provides that:-

**“The parties agreed that for the purposes of computation of the liquated and ascertained damages the effective start date was 5<sup>th</sup> May, 2013 and stopped on 14<sup>th</sup> September, 2013 when the respondent was ready to hand over the site to the claimant.”**

At paragraph 3.6.8., the parties agreed that;

**“On liquidated and ascertained damages, the respondent shall pay the claimant based on the agreed period of 132 days which was Ksh. 2,400,000.00.”**

A perusal of paragraph 7.1 of the arbitral award shows that the Arbitral Tribunal stated thus:-

**“The delay by the PM to issue drawings, specification or instructions required for execution of the works was a compensation event under clause 24.1 (c) of the conditions of contract. Consequently, the respondent was absolved from liquidated and ascertained damages on account of failure to furnish information.”**

62. It is my finding that the above issue was carried over from the mediation proceedings which formed part of the arbitral proceedings. I therefore agree with the submission by the claimant that by making the above finding, the Arbitral Tribunal made a decision that was beyond the scope of the reference. The Arbitral Tribunal could not purport to change the issues that the parties had agreed on. It is worth noting that the respondent also occasioned delays in project implementation.

I therefore set aside the above arbitral finding.

#### **Preliminaries and extended preliminaries**

63. The parties agreed as encapsulated in paragraph 3.6.9 of the arbitral award that:-

**“the respondent’s claim on extended preliminaries shall be based on thirty (sic) (36) weeks and that the computation for the sum claimed thereof would be Ksh. 1,234,908.00.’**

64. The Arbitral Tribunal made the following finding in clause 6.1.12 of the arbitral award:-

**“In accordance with clause 37.6 and 37.7 (of the standard conditions of contract), in exercise of the generality of my powers and in order to determine the rights of the parties, I do hereby assess and determine that the respondent is entitled to extension of time for the fifteen weeks as applied. The last application for extension of time dated 6<sup>th</sup> February, 2013, was never responded by (sic) the PM. The 21 day period allowed for the PM to respond expired without some of the matters contained in the application having been attended. The status remained until 3<sup>rd</sup> October, 2013, when the respondent handed over the site. It was inconceivable that the respondent would have completed the works in the absence of the information from the PM. Accordingly in accordance with clause 37.6 and 37.7, I hereby grant an extension for eight weeks. The total period for extension of time shall be fifty nine weeks. The value of extended preliminaries shall be as follows:-**

**(i) 36 weeks agreed by the parties @ Ksh. 34,303.00 – Kshs.1,234,908.00.**

**(ii) 23 weeks granted by Tribunal @ 34,303.00 – Kshs.788,969.00**

**Accordingly, the value of preliminaries and extended preliminaries shall be as above. No liquidated and ascertained damages shall apply.”**

65. The annexure marked **KM1** in the replying affidavit of Kenneth Mwaura in the remarks column on the issue of preliminaries reads **“as agreed on Tuesday 29th April, 2014”**.

The foregoing therefore shows that it was acknowledged by the respondent that the valuation of preliminaries was agreed on by the parties. I am therefore in agreement with the claimant that, the

Arbitral Tribunal exceeded its scope of reference as parties had agreed from the outset that the respondent's claim on extended preliminaries was an amount of Ksh.1,235,908.00. The Arbitral Tribunal could therefore not make an award that was over and above the amount that the parties had agreed on.

I therefore set aside the additional arbitral award of Kshs.788,969.00 that was awarded above the amount of Kshs. Ksh.1,235,908.00 that the parties had agreed on.

### **Compensation for tools, equipment and hoarding**

66. On the above, the matter that was referred to the Arbitral Tribunal for determination is in paragraph 3.6.11.13 of the Arbitral award. The issue was **“whether the tools and equipment were held by the claimant unjustifiably.”**

It was contended by the claimant that the Arbitral Tribunal proceeded to award compensation for tools, equipment and hoarding in the sum of Ksh. 4,894,071.43 when the issue presented before the Arbitral Tribunal was whether the tools and equipment were held unjustifiably.

67. The Arbitral Tribunal at paragraph 7.2.13 found as follows:-

**“The contract was terminated for the claimant's convenience because of fundamental breaches of contract. Where the contract is terminated for the employer's convenience, the contractor is allowed removal of equipment, temporary buildings, tools, goods and materials that belong to him. The hoarding and fencing of the site are part of the temporary buildings which the respondent was entitled to remove upon termination (sic). Accordingly, the respondent was entitled to compensation for the tools, equipment and hoarding that were held by the claimant in the sum of Ksh. 4,894,071.43. The period of compensation ran from 3<sup>rd</sup> October, 2013 to 28<sup>th</sup> April, 2014 which was two hundred and seven (207) days.”**

68. A plain reading of the issue referred to the Arbitral Tribunal shows as if the issue of compensation was not to be determined. I have looked at the documents that were submitted to the Arbitral Tribunal by the respondent and more particularly the annexure marked **KM1** where the respondent attached a value of Ksh.3,019,500.00 to the unjustifiable holding of its tools by the claimant. It was thus clear from the conduct of the respondent that it expected compensation if the Arbitral Tribunal made a finding that its tools were held unjustifiably by the claimant.

69. It is my finding that the Arbitral Tribunal was correct in attaching a monetary value to this issue and after calculating the number of days that the tools were unjustifiably held by the claimant the Arbitral Tribunal awarded the sum of Kshs.4,894,071.43. The award made was however above that claimed by the respondent.

I therefore set aside the additional arbitral award that was made over and above the sum of Kshs.3,019,500.00 that was claimed by the respondent.

### **The rate of interest applied to delayed payments**

70. Clause 23.3 of the Standard Conditions of contract read as follows:-

**“... the employer shall pay the contractor the amounts certified by the project manager within 30 days of the date of issue of each certificate. If the employer makes a late payment, the contractor shall be paid simple interest on the late payment in the next payment. Interest shall be calculated on the basis of the number of days delayed at a rate of three percentage points above the Central Bank of Kenya's average rate for base lending prevailing as of the first day the payment becomes over due.”**

71. On page 29 of the arbitral award, the Arbitral Tribunal made the finding below:-

**“The claimant and respondent were in agreement as to the applicable rate of interest with regards to payment of certificate Nos. 1 & 2, the point of difference coming in later certificates. The claimant used a lower rate of interest but did not submit any evidence in change of the interest rate. I have applied the rate of 21% per annum as the applicable rate across the board. I found that the respondent was entitled to Ksh.3,000,337.96 on account of delays. According to clause 23.3, the contractor shall be paid simple interest on late payment in the next payment. Where the PM has not included the interest due in the ensuing payment certificate, the amount continues to attract interest until it is paid. Accordingly, I found that the respondent was entitled to Ksh. 375,403.98 on account (sic) non-payment of interest.”**

72. Section 32(c) of the Act provides that an Arbitral Tribunal has power to award simple and compound interest. See the case of the Board of Ng'iya Girls High School (**supra**).

In this matter, the issue of interest was provided for under clause 23 of the standard conditions of contract. The Arbitral Tribunal was therefore duty bound to apply simple interest to all delayed payments in accordance with that clause.

I therefore set aside the above arbitral award on interest for the said reason.

**Did the Arbitral Tribunal admit documents in the arbitral proceedings from the respondent without the knowledge of the claimant?**

73. I have perused copies of the correspondence from the Arbitral Tribunal to both the parties herein and it is my finding that the Arbitral Tribunal through its order for directions No.2 copied to both the claimant and the respondent disclosed the documents that each of the parties had submitted to it. The claimant contends that it did not receive the order for direction No.2. The letter from the Arbitral Tribunal dated 27th June, 2014 addressed to the claimant's vice chancellor and the respondent's Managing Director showed that orders for direction Nos.2 and 3 were sent to both parties. As deposed by the respondent in paragraph 8 of the further affidavit of Kenneth Mwaura, the claimant cannot be heard to say that it received the order for direction No.3 and not order for direction No. 2 that were sent in the same mail.

74. Emails of electrical works were sent by the respondent to both the Arbitral Tribunal and the claimant's PM. These are marked as **KM2** in the affidavit of the above deponent.

75. On the issue of standards of measurements, these are documents that the respondent would be required to refer to in the exercise of its work, just like how Advocates are expected to refer to and cite the Civil Procedure Act and rules in a civil case.

76. In any event, the Tender document issued by the claimant under the **General conditions of contract** provided as follows-

**"For the full description and materials and workmanship, method of execution of the work and notes for pricing, the Contractor is referred to *Ministry of Roads and Public Works General specification dated 1976, or any subsequent revision thereof*, which is issued as a separate document, and which shall be allowed in all respects unless it conflict with the General Preliminaries, Trade preambles or other items in these Bills of Quantities".**

77. I therefore fail to see any non- disclosure of material information. If anything, the contractor and the PM were bound to use the standard methods of measurements of 1976 or a revised version thereof, in execution of the project. The Arbitral Tribunal would also be required to rely on the above guidelines to measure the work undertaken so as to establish its value.

The above ground therefore holds no merit and is dismissed.

78.It is apparent that the claimant herein did not exhaust all the avenues that were available to it under the Act before it filed its Notice of Motion of application. Since the intention of the parties was to have the dispute settled amicably through arbitration, the claimant hereto shall refer the issues calling for correction of the award that are highlighted in this ruling, to the Arbitral Tribunal by making the requisite application under the provisions of section 34(6) of the Act. The respondent shall be at liberty to do likewise should there be any issues that call for correction that it needs to bring to the attention of the Arbitral Tribunal.

79.Each party will bear its own costs as each of them has succeeded and lost in different ways.

**DELIVERED, DATED and SIGNED** in open court on this **30<sup>th</sup> day of NOVEMBER, 2015**

**NJOKI MWANGI.**

**JUDGE.**

**In the presence of**

**.....Mr. Wakoli for Mr. Malebe .....for the claimant**

**.....Mr. Burugu .....for the respondent**

**.....Mr. Anunda .....Court Assistant**