REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 570 OF 2012

IN THE MATTER OF THE ARBITRATION ACT, 1995

IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD

BETWEEN

SUPERIOR HOMES (K) LIMITED. ………………………… APPLICANT

VERSUS

JOYCE CHEROTICH SANG …………………………… RESPONDENT

R U L I N G

1. On 10th September, 2013 the parties agreed to have the instant application consolidated and heard together with the application dated 5th July, 2013 in **H.C Misc. App No. 201 of 2013** for the enforcement of the arbitral award delivered on 22nd June, 2012. The court further directed that the application dated 21st September, 2013 would be heard and determined first. That application is brought under the provisions of **Section 35(1), (2)(b)(ii)** of the *Arbitration Act* and **Rule 7** of the *Arbitration Rules, 1997*. The main Order that the applicant seeks is the setting aside of the arbitral award of Sankale Ole Kantai (hereinafter "the arbitrator") delivered on 22nd June, 2013.
2. The application is premised on the grounds that the arbitrator failed to determine the substance of the dispute in accordance with the principles of justice and fairness, which, according to the applicant, is contrary to public policy and contravenes substantive law. It is contended that the arbitrator made an award for higher damages in general terms than the claimant was entitled to, instead of the specific damages that had been prayed for in the claim. Further, the applicant claims that the arbitrator awarded general damages of Kshs. 6,480,000/- even after the applicant had already been restituted in terms of the special damages.
3. In the Affidavit is support of the application sworn by **Angelica W. Otieno** on even date, she reiterated the grounds of the application, and further contended that the arbitrator failed to take into consideration the terms of the agreement between the parties in finding in favour of the Respondent and failed to determine the substantive issues in dispute. It was contended that the applicant issued a 30 day completion notice to the Respondent, who after failing to complete her obligations under the agreement, resulted in the Applicant having to exercise the right to rescind as provided in the agreement. The deponent further avers that the decision arrived at by the arbitrator was contrary to public policy and that it is on this ground that the award should be set aside.
4. The Respondent filed its Grounds of Opposition dated 25th September, 2013. Therein, the

Respondent contended that the application is contrary to the provisions of *Article 159* of the *Constitution* and **Sections 10 and 35(2)(b)(ii)** of the Arbitration Act and an affront to the discretionary jurisdiction of the Court. The Respondent further avers that the application constitutes allegations of errors of law on the part of the arbitrator which cannot be grounds under **Section 35(2)(b)(ii)** for setting aside the award as being contrary to public policy. Further, she reiterated that the arbitral award was within the ambit of public policy in terms of finality of arbitral awards and as such the application is an appeal disguised as an application to set aside the arbitral award. In support of its arguments, the Respondent relied on the cases of **Kenya Shell Ltd v Kobil Petroleum Ltd (2006) eKLR**, **Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 E.A 366**, **Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd [2012] eKLR**, **Tame Ltd v Zagoritis Estates (1960) E.A 370** and **Thabiti Finance Co. Ltd (In Liquidation) v Abiero (2004) eKLR**.

5. The application is predicated upon **Section 35(2)(b)(ii)** of the *Arbitration Act* which empowers the Court to set aside an arbitral award on the grounds that it was contrary to public policy. On this aspect, Ringera, J (as he was then) in **Christ for All Nations v Apollo Insurance Co. Ltd** (supra) reiterated *inter alia*;

"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 a 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 to 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."

In my view, the above ruling clearly sets out the grounds within which an application for setting aside an award under **Section 35(2)(b)(ii)** of the *Arbitration Act* will be considered by the court as being contrary to public policy.

6. The applicant in its submissions dated 25th October, 2013 submitted that the award as delivered was unjustified, given that the arbitrator allowed an excessive amount for damages which, in essence, was beyond the scope of the Claimant's claim. It was further submitted that the award of Kshs. 6,480,000/- for general damages was not applicable under the law of contract. It relied on the case of **Securicor Courier (K) Ltd v Benson David Onyango & Another (2008) eKLR** where the Court reiterated that:

"…this Court has repeatedly held that general damages are not awardable for breach of contract…".

This was similarly reiterated in **Nones Company Ltd v Unilever Co. Ltd [2005] eKLR** where the Court determined:

"In any case, in the case of Kedera v Kavai [1997] LLR 624 CAK the Court of Appeal has held "there can be no award of general damages for breach of contract" and in any case, there is no evidence in the instant case to support such head of damages."

The applicant also submitted the authority of **Wally Trading Co. Ltd v Isiolo County Council [2005]** eKLR where my learned brother **Onyancha J** held inter alia:

"The Plaintiff also claimed general damages for breach of contract. It failed to demonstrate any extra loss or damage incurred as a result of the breach. Mere breach of contract in my understanding does not result into an award for general damages. Such damages have to be proved in this case. The claim for general damages is therefore dismissed."

7. It was the Respondent's contention that the guidelines as set out in **Christ for All Nations v**

Apollo Insurance Co. Ltd (supra) and reiterated in **Kenya Shell Ltd v Kobil Petroleum Ltd** (supra) set a threshold that the applicant has not achieved in its application. The Respondent also relied upon **Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd** (supra) in which Mabeya, J held *inter alia*:

"From the foregoing, it is quite clear that the term "conflict with public policy" used in Section 35(2)(b)(ii) of the Arbitration Act, is akin to "contrary to public policy", "against public policy", "opposed to public policy". These terms do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."

The Respondent submitted that counsel for the Applicant was present and fully participated in the proceedings, and had the opportunity to present its case before the Arbitrator. It could not therefore be regarded that either of the parties was disadvantaged or denied any opportunities to put forward their cases during the arbitral proceedings. There was no suggestion that the Arbitrator conducted the proceedings with impartiality, neutrality and equality, as a result, the question of contravening any law is unfounded.

8. The Respondent further submitted that the application was predicated, not on issues relating to contravening public policy, but on matters of law. That shifted the burden of proof contrary to **Section 107** of the *Evidence Act*. The arbitrator had awarded general damages where case law prohibits such an award and therefore, the award contravenes the laws of Kenya by failing to be fair and just. It was further submitted that the parties reserved their rights under **Section 39** the *Arbitration Act* and that the Court under *Article 159* of the *Constitution* is empowered to adopt alternative forms of dispute resolution. The Respondent relied on **Kenya Shell Ltd v Kobil Petroleum Ltd** (supra) in which the Court of Appeal determined as follows:

"At all events the tribunal was bound to make a decision that did not necessarily sit well with either of the parties. It would nevertheless be a final decision under Section 10 of the Act unless either party can satisfy (the) Court that it ought to be lawfully set aside. In this case the decision was final. We do not feel compelled therefore to extend the agony of this litigation on account of issues raised by the applicant."

9. In consideration of the foregoing and the submissions made by the parties, the question arising for the determination of the Court is whether the award of Kshs. 6,480,000/- awarded by the arbitrator by way of general damages in his award delivered on 22nd July, 2013 is contrary to public policy or otherwise? Was the decision by the Arbitrator to shift the burden of proof as against **Section 107** of the *Evidence Act* or that he failed to be fair and just in his adjudication between the parties, be construed as being against public policy as per the provisions of **Section 35(2)(b)(ii)** of the *Arbitration Act*? In **Christ for All Nations Church v Apollo Insurance Co. Ltd** (supra) the Court held *inter alia*:

"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 the an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards the finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act." (emphasis added).

10. **Section 39(1) and (2)(a)** of the *Arbitration Act* and *Article 159(2)(c) and (3)* of the *Constitution* empower this Court to determine issues of law that arise out of an arbitral award. **Section 35(2)(b)(ii)** the Court empowers it to consider the question of public policy that may arise out of the arbitral award so that it should be set aside. This is the section under which the application is brought before Court. As detailed in **Christ for All Nations Church v Apollo Insurance Co. Ltd**

(supra) the principles of setting aside are set out for the Court when considering an application predicated on such grounds. In **Kenya Shell Ltd v Kobil Petroleum Co. Ltd** (supra), it was reiterated that the decision of the arbitrator was final under **Section 10** of the *Arbitration Act*, and could only be set aside pursuant to the provisions of **Section 39** of the aforementioned Act on appeal on a point of law. The contentions by the Applicant are brought before this Court pursuant to allegations that are amount to a breach of the law, as contemplated under **Section 39** of the Act. The proper course for the applicant to have adopted would be by way of an appeal against the decision of the arbitrator on grounds that he had erred in law (**see Kenya Shell Ltd v Kobil Petroleum Co. Ltd**) and not under the setting aside provisions of **Section 35(2)(b)(ii)** of the *Arbitration Act*. In consideration of the technicalities that the Applicant's application portends, the Court stands guided by the decision rendered by the Court of Appeal in **Hunker Trading Co. Ltd v Elf Oil Kenya Ltd Civil App. No. 6 of 2010** in which it was held inter alia:

"…The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation of its application must be properly laid and the benefits of its application judicially ascertained."

11. In my view, the applicant has not failed to establish the test in relation to breach of public policy as per the ruling of Ringera, J in **Christ for All Nations v Apollo Insurance Co. Ltd** (supra). It has not shown that the arbitrator's award is against the provisions of the Constitution or the law, or against morality and justice, or inimical to the interest of the Republic of Kenya. The applicant, must accept the decision of the arbitrator, "warts and all" (see **Christ for All Nations v Apollo Insurance Co. Ltd**) and that for the Court to set aside an arbitral award as a final award as provided under Section 10 of the Arbitration Act, the applicant has to satisfy the Court that the award ought to be lawfully set aside.
12. At this juncture, it would be pertinent to consider the finding of Ringera, J as with regards to the issue of injustice as alleged by the applicant. In this regard, the learned Judge reiterated again in **Christ for All Nations v Apollo Insurance Co. Ltd** (supra) that:

"I do not accept that the award is contrary to justice. To accept the Applicants contention is to accept a most dangerous notion that whenever a tribunal adopts an interpretation of a contract contrary to the understanding of one of the parties thereto, an injustice is perpetuated."

Ogola, J in **Nairobi High Court Miscellaneous Civil Application No. 130 of 2011 Kay Construction Co. Ltd v A.G & Another**, in determining the limited role that this Court has in matters which parties have submitted to arbitration, the learned Judge held inter alia:

"It was held by the Court of Appeal in the case of East African Power Management Ltd v Westmount (K) Ltd [Nairobi Civil Appeal No. 55 of 2006] that the Court under Section 10 of the Arbitration Act had a limited role in intervening in matters where parties had agreed to refer a matter to arbitration except where the Act specifically provided for such intervention. The Court consequently held that the said provision was mandatory and that the Court's role in arbitration matters was merely a facilitative one."

13. The upshot, in consideration of the foregoing circumstances, is that I find that the applicant's application dated 29th September, 2013 is unmeritorious and is hereby dismissed with costs to the Respondent. Conversely, the application by the Respondent dated 5th July, 2013 in **H.C Misc App. No. 201 of 2013** for the enforcement of the arbitral award is allowed and the arbitral award dated 22nd June, 2012 is hereby recognized and adopted as the final decision of the Court. Costs of that application are also awarded to the Respondent.

DATED and delivered at Nairobi this 24th day of April, 2014

J. B. HAVELOCK

JUDGE