REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 79 OF 2012

IN THE MATTER OF AN ARBITRATION BETWEEN

PRUDENTIAL PRINTERS LIMITED...PLAINTIFF

VERSUS

CARTON MANUFACTURERS LIMITED...DEFENDANT

R U L I N G

The applicant has applied for an order that the Award delivered by Hon. Justice David Shikomera Majanja dated 13th September, 2011 as read together with the findings on the Respondent's request for an additional Award dated 5th February, 2012 be set aside. The application was brought under Section 35 (2) (b) (ii) of the Arbitration Act and Rule 7 of the Arbitration Rules.

The dispute in this matter arises from an Agreement dated 1st March, 2008 between the Applicant and Respondent whereby the Respondent agreed to sell to the Applicant printing machinery and other specified items set out in Schedule 1 in the Agreement. The entire purchase price was agreed at Kshs.108 million together with VAT thereon. The terms and conditions of the said Agreement were also set out in that Agreement. It would seem that the items the subject matter of the Agreement were sold and the Applicant paid the purchase price less Kshs.8,134,354/15. The matter was referred to Arbitration and after a full trial, an award for the said amount was made in favour of the Respondent. The present application seeks to set aside the said Award.

The Applicant's contention is that the said award is in conflict with the Public Policy of Kenya. The applicant contended that Section 16 of the Sale of Goods Act Chapter 31 of the Laws of Kenya creates an obligation on a seller to ensure that goods are reasonably fit for the purpose to which the buyer has disclosed expressly or by implication, that the purpose of the said Section is to protect the public from unscrupulous traders selling expired, defective and unusable goods. That the Respondent had sold to the Applicant goods that were expired, damaged, defective or unusable, that both the parties had confirmed in writing that the said goods were damaged and therefore the Applicant was to be compensated accordingly. The Applicant therefore contended that the Award purported to uphold the Respondent's right to sell expired, damaged, defective and unusable goods without compensating the Applicant and that therefore the Award condemns the Applicant with double jeopardy of paying for stocks and goods that it shall not use. In the Applicant's view, the Award amounted to unjust enrichment of the Respondent which

was immoral and contrary to Public Policy of Kenya.

It was submitted on behalf of the Applicant that the Applicant depended on the Respondent's advise in the selection of the stocks to be purchased and that was evidenced by the hiring of one of the Respondent's directors a Mr. Ajit Patel as the Applicant's consultant for six (6) months. That three (3) weeks after taking possession of the stocks, a large quantity thereof was found to be damaged, defective and unusable.

The Applicant relied on the case of **Berkefold –vs- Potts, 173 Minn.87** for the proposition that there was an implied warranty on the part of the Respondent as to the merchantability of the goods sold. It was further contended that the stock had been found to be hazardous and cannot be sold to the public. The Applicant further relied on the case of **Glencore Grain Ltd –vs- TSS Grain Millers Ltd (2002) 1 KLR 606** for the proposition that a court cannot uphold an award that is against public policy. Finally, the Applicant submitted that the Arbitrator ignored and/or overlooked the fact of the expired goods and relied on the clause in the agreement stipulating that the goods were sold on an **"as is where is basis".** The applicant urged that the Award be set aside.

The Respondent filed a Replying Affidavit and written submissions in opposition to the application. The Respondent denied that the Award had contravened Public Policy. The Respondent contended that Section 16 of the Sale of Goods was not applicable, that the award had not required the Applicant to pay for expired, defective and unusable goods, that the arbitrator had found that there were no expired defective and/or damaged goods. That the Award had given effect to the agreement between the parties as envisaged under Section 29 of the Arbitration Act.

It was submitted for the Respondent that in an application such as the one before me, the court is to confine itself to the Award only to establish if the same is against public policy, that the Applicant cannot adduce fresh evidence which was not before the Arbitral Tribunal. That the award did not make any finding that the Respondent had sold damaged goods, that the Arbitrator had made a finding that Section 16 of the Sale of Goods Act did not apply to the agreement between the parties, that the Applicant was inviting the court to retry and/or re-evaluate the evidence presented before the arbitral tribunal contrary to Section 10 of the Arbitration Act.

I have considered the Affidavits on record and the submissions of Counsel

The main issue before court is whether the award of the Arbitrator is in conflict with Public Policy of Kenya. Public Policy has been variously considered by the courts.

In **Renusagar Power Company Ltd –vs- General Electric Company (1994) AIR 860**, the Supreme Court of India observed thus:-

"While observing that "from the very nature of things <u>the expressions 'public policy', 'opposed to public policy' or 'contrary to puplic policy' are incapable of precise definition",</u> this court has laid down: . . . .

Public Policy is some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time." (Emphasis added)

In the case of **National Oil Company (1987) 2 All ER 769 at page 779** Sir Johnson Donaldson M.R observed:-

"Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J remarked in <u>Richardson –vs- Mellish</u> 'it is never argued at all but when other points fail, it has to be shown that there <u>is an element of illegality</u> or that the enforcement of the award <u>would be clearly injurious to the public good or possibly that enforcement would be wholly offensive</u> to the ordinary reasonable and fully informed member of the public on whose behalf

the powers of the state are exercised . "(Emphasis supplied.)

In **Glencore Grain Ltd –vs- TSS Grain Millers Ltd (2002) I KLR 606** Hon. Onyancha J held at page 626 that:-

"A contract or <u>arbitral award will be against the Public Policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society.</u> It has been held that the word illegal here would hold a wider meaning than just "against the law". It would include contracts or acts that are void. "Against Public Policy" would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive. (Emphasis supplied)

From the foregoing, it is quite clear that that term "conflict with the Public Policy" used in Section 35 (2) (b) 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.

How does these 'definitions' apply to the case before court?

The Applicant's complaint is that the award was in conflict with Public Policy of Kenya in that it upholds the right of the Respondent to sell the Applicant expired, damaged, defective and unusable goods, for endorsing the sale of expired and hazardous stocks harmful to the public and will be to unjustly enrich the Respondent by receiving payment for expired, damaged and unusable goods.

The Respondent's claim before the Arbitrator was, inter alia, for Kshs.8,134,359/15 being the balance of the purchase price under a contract of sale of business and other assets dated 1st March, 2008. The Applicant's defence before the arbitral tribunal was, inter alia, that it was not required to pay the full or any purchase price for defective and/or missing stocks and that it could not pay for the stock that were unfit for their intended purpose under the Sale Agreement. When framing the issues, in paragraph 39 the tribunal set out one of the issues for determination as being:-

"a.) Whether PPL made certain representations ineg ard to the stock particularly as regards merchantability and fitness for purpose and whether and to what extent Section 16 of the Sale of Goods Act is applicable to the Sale Agreement."

The tribunal dealt with this issue in paragraphs 68 to 79 of the Award. The evidence of the parties was duly evaluated and the arbitrator made findings that the Sale Agreement of 1st March, 2008 was reached after long negotiations that had commenced in November, 2007 under the aid of the parties' respective lawyers, that the Sale Agreement expressly dealt with warranties and conditions as to merchantability of the stocks being sold, that clause 15 of the Agreement provided that the stocks were sold on an **"as is where is"** basis thereby excluding any warranties as to their merchantability. The tribunal also made a finding that there were no representations made to the Applicant by the Respondent which the Applicant could be said to have acted or relied on in entering into the Sale Agreement as to the merchantability or otherwise of the stock. The Arbitrator came to a conclusion that Section 16 of the Sale of Goods Act had been excluded by the Sale Agreement.

Section 16 of the Sale of Goods Act Chapter 31 of the Laws of Kenya provides:-

"16. Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:-

a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be

the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:

provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacture or not), there is an implied condition that the goods shall be of merchantable quality;

Provided that if the buyer has examined the goods, there shall be no implied condition as regard defects which that examination ought to have revealed;

Clearly, from the reading of this section there is no warranty or condition as to the merchantability of goods. The only time such a warranty will be implied is when the buyer relied on the skill and judgment of the seller or where the goods are bought by description from a seller dealing with such goods. I have examined the evidence and the evaluation by the arbitrator and I find no fault in his conclusion that there was no evidence that Section 16 of the Sale of Goods Act was applicable. In my judgment clauses 12 and 15 of the Sale Agreement excluded any application of that section.

Further, I find no fault in the arbitrator's analysis of the evidence and conclusion that the Applicant did not establish the fact of any representation on the part of the Respondent that would have imported the application of Section 16 (a) of the Act. As if that was not enough, the arbitrator found as a fact that Clause 39 of the Sale Agreement expressly excluded the importation of any other matters outside that agreement. The Public Policy of Kenya is that parties are bound by the terms of the contracts they enter into. Interpreting the Sale Agreement between the Applicant and Respondent otherwise than interpreted by the arbitrator, would be re-writing the contract for the parties and that would in itself be contrary to Public Policy of Kenya.

I have carefully considered the Agreement between the parties and on my part, I find nothing immoral or illegal or offensive that violates the values of the Kenya Society in that agreement. Therefore, it will be unlikely that enforcing that Agreement would in any way be in conflict with the public policy of Kenya. I make that holding on the ground that, that Agreement is for sale of a business and certain assets. Nowhere in that agreement is there stipulation that what was to be sold was damaged, unusable or expired stocks. To that end therefore that Agreement was legal and in my view, there would be nothing that contrary to public policy of Kenya to enforce the same.

Is the award by the Arbitrator in the circumstances contrary and/or in conflict with Public Policy of Kenya?

In paragraph 105 of the Award, the arbitrator found as a fact that the items that were found to have been damaged and as admitted by the Respondent were, the MG Paper and Simcaster and the damaged floors. For these, the Arbitrator properly found for the Applicant and awarded a total of Kshs.193,820/25.

At page 33 of the Award which is exhibited in the Application is the Award itself. I have carefully examined the same. I have noted what the arbitral tribunal awarded. It is Kshs.8,134,354/15 plus 12% p.a. to the Respondent, a total of 193,820/25 to the Applicant together with interest thereon at the rate of 12% per annum from 21st March,2008 plus costs to the Respondent. That Award was in my view to enforce the remedies flowing from the breach of the Sale Agreement between the parties and nothing more.

Having carefully considered the Award, and having come to the conclusion that there was nothing illegal, offensive or immoral in the Sale Agreement between the parties, and having found that the Arbitral Award was only enforcing that Sale Agreement, I am unable to find anything that is in conflict with Public Policy of Kenya in the Award being impugned. That Award did not uphold the right of the Respondent to sell the Applicant expired, damaged, defective and/or unusable goods. Further, it did not order for the release to the public of any defective damaged or unusable goods as is contended by the

Applicant. It only confirmed and re-enforced the obligations and remedies of the respective parties to the Sale Agreement. The Applicant was not required to pay for any defective, damaged or expired goods. The Applicant was only being told in no uncertain terms, that it was being held to its bargain of the contract. I would here echo the words that fell from the lips of Hon. Ringera J, as he then was, in the case of **Christ for All Nations –vs- Apollo Insurance Co. Ltd (2002) EA 366** at page 370 that:-

" ***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 the 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 Public Policy of 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 to the right of challenge within the narrow confines of Section 35 of the Arbitration Act." (Emphasis added)***

There is nothing, in my view that is in conflict with the Public Policy of Kenya in telling the Applicant as the Arbitral tribunal did, that "***once you enter into a contractual bargain with your eyes and ears open and in particular, once you have been guided through the contractual process by your Counsel, whether you are left holding the short end of the stick or not you shall be held onto your bargain to the end."***

Accordingly, I find no merit in the Applicant's application and I dismiss the same with costs.

DATED and delivered at Nairobi this 29th day of June, 2012.

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A. MABEYA

JUDGE