



**Koto Housing Kenya Limited v Board of Governors Nairobi
Technical Training Institute (Arbitration Cause E020 of 2024)
[2025] KEHC 3389 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E020 OF 2024
BK NJOROGE, J
MARCH 13, 2025**

BETWEEN

KOTO HOUSING KENYA LIMITED APPLICANT

AND

**BOARD OF GOVERNORS NAIROBI TECHNICAL TRAINING
INSTITUTE RESPONDENT**

RULING

1. Before the Court are two Applications to be canvassed together. The 1st Application is a Chamber Summons dated 29th February 2024 seeking the following orders;
 - a. The Arbitral Award dated 31st January 2024 and filed in this Court be adopted and recognized by the Court.
 - b. Leave be granted to the Applicant to enforce the Arbitral Award dated 31st January 2024 as a decree of the Court together with interest at the rate of 11.75% p.a from the date of the award until payment in full.
 - c. The costs of this application be borne by the Respondent.
2. This Application was supported by the grounds on the face of it and by the sworn Affidavit of Beth Kimani. She deponed that the Arbitral Tribunal's released the Award dated 31st January 2024 on 15th February 2024. That it directed the Respondent to inter alia pay the Applicant a sum of Kshs.3,932,217.91.



3. Further, that the Respondent has not made any effort to comply with the Award by the Arbitral Tribunal. In addition, the Respondent has not filed any application to set aside the Award and as such, it ought to be recognized, adopted and enforced as a decree of the Court.
4. The Respondent responded to the Application vide the Replying Affidavit sworn on 5th November, 2024.
5. The 2nd Application is filed in (Nairobi) HC Misc Application No E023 of 2024 Board of Governors Nairobi Technical Training Institute -Vs- Koto Housing Kenya Limited. It is by way of a Notice of Motion dated 4th April 2024 by the Respondent seeking orders that;
 - a. The court sets aside the Arbitral Award of Mr. Christopher K. Kihara published on 31st January 2024 but delivered to the parties on 15th February 2024.
 - b. Spent
 - c. The costs of the Application be borne by the Respondent.
6. The said Application was supported by the sworn Affidavit of Dr. Glory Mutungi. She averred that the Respondent's Project Manager had given instructions too vary the works. These variations consequently increased the contract price from Kshs.60, 342,483 to Kshs.63, 779,378.00. The difference being Kshs.3,436,895.00.
7. The Applicant conversely cited the provisions of Article 227 of *the Constitution* of the Republic of Kenya and the *Public Procurement and Asset Disposal Act* 2015. That they were applicable to guide the parties with regards to variations of the contract between them. Failure to strictly comply to or adhere to the law meant that the contract went against public policy. That the Award published ought to be set aside.
8. That the Arbitrator in the Award erroneously indicated inter alia that the contract governing the parties had no express clause, indicating that the parties were bound by the provisions of the *Public Procurement and Asset Disposal Act*.
9. In Response to the 2nd Application, the Claimant filed a Replying Affidavit sworn by Beth Kimani on 11th September 2024. She stated that the Respondent's reliance on the *Public Procurement and Asset Disposal Act* as a ground to set aside the Arbitral Award lacks merit. That paragraph 16 of the Conditions of Contract required the contractor to carry out all instructions of the Project Manager with no requirement to refer to the Act.
10. Counsel for the parties were in agreement that a joint Ruling would resolve the two disputes. This is because in granting one application, the Court would have as of necessity dismiss the other application. The Court will consider the application for setting aside first, since if it fails, the application for enforcement would have to succeed.
11. Having considered the two Applications, the responses therein as well as the written submissions by the parties; the Court frames the following issues for determination?
 - a. Whether the arbitral award contravenes public policy
 - b. Whether the Court should either set aside or adopt the arbitral award.

Analysis

The main issue arising for determination is whether the award was contrary to public policy, as to warrant it being set aside.



- a) Whether the arbitral award contravenes public policy

The threshold for setting aside an Arbitral award is set out under Section 35 of the Arbitration Act as follows: -

- “ 35. An arbitral award may be set aside by the High Court only if—
- (a) the party making the application furnishes proof—
- (i) that a party to the arbitration agreement was under some incapacity; or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on 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; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
 - (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
- (b) the High Court finds that—
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
 - (ii) the award is in conflict with the public policy of Kenya.”

12. It was the Respondent’s case that the Award dated 31st January 2024 is in flagrant contravention of public policy and ought to be set aside. That the Arbitrator erroneously indicated that the contract governing the parties had no express clause indicating the parties were bound by the provisions of the Public Procurement and Asset Disposal Act. Further, that the award went against the dictates of the Constitution of Kenya particularly Article 227.



13. What amounts to public policy was well considered by Ringera, J. (as he then was) in *Christ for all Nations Vs Apollo Insurance Co. Ltd.* [2002] EA 366, and his expressions were as hereunder:

“An award could be set aside under Section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* or the other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.”
14. The Respondent submitted that it led evidence before the Arbitrator demonstrating that it was an express term of conditions of contract that the laws of Kenya shall guide the contract the subject matter of the proceedings. The relevant Act of Parliament is the *Public Procurement and Asset Disposal Act* Cap. 412C of the Laws of Kenya.
15. In *Kenya Shell Limited vs Kobil Petroleum Limited* [2006] eKLR, the Court of Appeal, addressed the effect of Section 35 of the *Arbitration Act*, as follows: -

“An award could be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.”
16. It was the Applicant’s submissions that the Respondent has not shown that the Award is tainted by fraud, breach of rules of natural justice. That the Respondent has not demonstrated that the Award is inconsistent with *the Constitution* of the Republic of Kenya or other laws of Kenya. That the issue of contravention of the *Public Procurement and Asset Disposal Act* is a mere afterthought aimed at avoiding liability to fulfill its contractual obligations.
17. For an arbitral award to be against the public policy of Kenya, it must be shown that it is immoral or illegal. That it would violate in clearly unacceptable manner, basic legal and/or moral principles or values in the Kenyan society. This was the holding in the case of *Glencore Grain Limited –vs- TSS Grain Millers* [2002] I KLR 606.
18. The Applicant explained that it was bound to take orders issued by the Project Manager (as equivalent order of the Respondent) as sufficient authority to execute the works. This is pursuant to paragraph 16 of the Conditions of the Contract. Thus, there was no requirement to refer to the *Public Procurement and Asset Disposal Act*. On the other hand, the Respondent pointed out that under paragraph 3 of the Conditions of the Contract, the contract was governed by the laws of Kenya unless otherwise stated. This brings us to the question was there breach of the *Public Procurement and Asset Disposal Act*?
19. The Arbitrator in his decision stated that the issue on the contravention of the *Public Procurement and Asset Disposal Act* is an afterthought, aimed at avoiding liability to fulfil contractual obligations. He explained that paragraph 16 of the Conditions of Contract required the Claimant to carry out all instructions of the Project Manager. This was a mandatory requirement with no requirement to refer to the *Public Procurement and Asset Disposal Act*. That had the Respondent intended to apply the provisions of the Act, it would have stated so in the Conditions of Contract which it did not.



20. It is trite law that parties to a contract are bound by the terms and conditions thereof, and that it is not the business of Courts to rewrite such contracts as was held in *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR, where Court stated:

“ A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.”

21. Guided by the above authority, the parties were indeed bound by the terms of their contract. Firstly, paragraph 3 of the Conditions the Contract stated that the contract was governed by the laws of Kenya unless otherwise stated. What then does “unless otherwise stated” mean in this context?

22. To this Court the question is whether the parties could expressly contract outside the Statute or impliedly exclude the application of a statute and its provision?

23. It is not in dispute that the Respondent is a public entity. The funds used to finance the project are public funds.

24. Clause 3 of the Conditions of Contract the subject of these proceedings states as follows:

Language of the Law

3.1 Language of the Contract and the law governing the Contract shall be English and the Laws of Kenya respectively unless otherwise stated.

25. To this Court, this clause leaves no doubt that the parties knew that the laws of Kenya were applicable to the Contract. They intended that the Laws of Kenya do apply unless there were expressly excluded.

26. It is doubtful as to whether the parties could have excluded the application of the law that relates to procurement involving public entities and public funds. This being the *Public Procurement and Asset Disposal Act* 412C of the Laws of Kenya.

27. The Constitutional foundation for public procurement is to be found in Article 227 of *the Constitution* of the Republic of Kenya which states as follows;

Procurement of public goods and services.

227. (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

- (a) categories of preference in the allocation of contracts;
- (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
- (c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
- (d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.



28. The Act contemplated under Article 227 (2) of *the Constitution* is the *Public Procurement and Asset Disposal Act*. At the preamble, the Act states as follows:

An Act of Parliament to give effect to Article 227 of *the Constitution*; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes

29. The Act at Section 2 defines a public entity as follows:

“Public entity” includes—

- (a) the national government or any organ or department of the national government;
- (b) a county government or any organ or department of a county government;
- (c) the Judiciary and the courts;
- (d) the Commissions established under *the Constitution*;
- (e) the Independent Offices established under *the Constitution*;
- (f) a state corporation within the meaning of the *State Corporations Act* (Cap. 446);
- (g) the Central Bank of Kenya established under *the Constitution*;
- (h) a public school within the meaning of the *Basic Education Act* (Cap. 211);
 - (i) a public university within the meaning of the *Universities Act* (Cap. 210);
- (j) a city or urban area established under the *Urban Areas and Cities Act* (Cap. 275);
- (k) a company owned by a public entity;
- (l) a county service delivery coordination unit under the *National Government Co-ordination Act* (Cap. 127);
- (m) a constituency established under *the Constitution*;
- (n) a Kenyan diplomatic mission under the state department responsible for foreign affairs;
- (o) a pension fund for a public entity;
- (p) a body that uses public assets in any form of contractual undertaking including public private partnership;
- (q) a body in which the national or county government has controlling interest;
- (r) a college or other educational institution maintained or assisted out of public funds;
- (s) an entity prescribed as a public entity for the purpose of this paragraph; or



- (t) any other entity or a prescribed class of public entities or particular public entities that uses public money for purposes of procurement or any other entity as declared under sections 4 and 5 of the *Public Finance Management Act* (Cap. 412A);

30. Public procurement is defined as;

“Public procurement” means procurement by procuring entities using public funds;

31. The Guiding principles in in the Act are as follows;

3. Guiding principles

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation—

- (a) the national values and principles provided for under Article 10;
- (b) the equality and freedom from discrimination provided for under Article 27;
- (c) affirmative action programmes provided for under Articles 55 and 56;
- (d) principles of integrity under the *Leadership and Integrity Act* (Cap. 185C);
- (e) the principles of public finance under Article 201;
- (f) the values and principles of public service as provided for under Article 232;
- (g) principles governing the procurement profession, international norms;
- (h) maximisation of value for money;
- (i) promotion of local industry, sustainable development and protection of the environment; and
- (j) promotion of citizen contractors.

32. The application of the Act to all public procurement is provided for by Section 4 of the Act as follows;

4. Application of the Act

(1) This Act applies to all State organs and public entities with respect to—

- (a) procurement planning;
- (b) procurement processing;
- (c) inventory and asset management;
- (d) disposal of assets; and
- (e) contract management.

(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—

- (a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an



employee, but this shall not apply to persons who are under a contract of service;

- (b) the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration;
- (c) acquiring of services provided by government or government department;
- (d) acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;
- (e) procurement and disposal of assets under *Public Private Partnerships Act* (Cap. 430); and
- (f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

(3) For greater certainty, all public procurement are procurements with respect to the application of this Act.

33. The Court’s reading of Section 5 and 6 of the Act shows that even where there is a conflict of laws or Government policies or International agreements, the provisions of the Act prevail.

34. From the above, the Court is not in doubt that the contract in issue involved procurement by a public entity using public funds. The use of the word “shall” right from *the Constitution* and the Act itself means that the application of the Act was not subject to discretion. It cannot be waived away. The reason behind this being that Kenyans desired that when entities contract the following Five (5) Constitutional imperatives had to be adhered to. That the system had to be;

- i. Fair,
- ii. Equitable,
- iii. Transparent,
- iv. Competitive and
- v. Cost-effective.

35. The Conditions of contract did not expressly state that this public procurement was exempt from the operations of the Act. The law remains the law unless it was expressly excluded and, in this case, it was not excluded.

36. The Respondent submits that the variations to the original contract price did not follow the statutory provisions, hence making the entire process contra statute and against public policy. The original contract sum was Kshs.60,342,783.00. The variations amounted to Kshs.3,436,595.00 making the total sum Kshs.63,779,378.00. As the initial amount of Kshs.60,342,783.00 was paid, the dispute is regarding variations of Kshs.3,436,595.00.

37. Section 139 of the Act applicable then being *Act No 33 of 2015*, relating to variations states as follows;

139. Amendments or variations to contracts

- (1) An amendment or a variation to a contract resulting from a procurement proceeding is effective only if—



- (a) the variation or amendment has been approved in writing by the respective tender awarding authority within a procuring entity; and
 - (b) any contract variations or amendments for goods, works and services shall be as prescribed.
- (2) An accounting officer of a procuring entity, on the recommendation of an evaluation committee, may approve the request for the following, which request shall be accompanied by a certificate from the tenderer making a justifications for such cost—
- (a) extension of contract period;
 - (b) use of prime costs;
 - (c) use of contingencies;
 - (d) reimbursable costs; and
 - (e) use of provisional sums.
- (3) No contract price shall be varied upwards within twelve months from the date of the signing of the contract.
- (4) For the purposes of this section, any variation of a contract shall only be considered after twelve months from the date of signing the contract and shall only be considered if the following are satisfied—
- (a) the price variation is based on the prevailing consumer price index obtained from Kenya National Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya;
 - (b) the quantity variation for goods and services does not exceed fifteen per cent of the original contract quantity;
 - (c) the quantity variation of works does not exceed twenty per cent of the original contract quantity;
 - (d) the price or quantity variation is to be executed within the period of the contract; and
 - (e) the cumulative value of all contract variations do not result in an increment of the total contract price by more than twenty five per cent of the original contract price.
- (5) An accounting officer of a procuring entity shall submit a quarterly report of their varied or amended procurement contracts to the Authority.
- (6) Where variations result in an increment of the contract price by more than twenty-five percent, such variations shall be tendered for separately.

38. Regulation 132 of the Public Procurement and Asset Disposal Regulations states the following regarding variations;

132. Amendments or variations to contracts



- (1) Contract variations or amendments envisaged under section 139(1)(b) of the Act for goods, works and services may either emanate from procuring entity on its own volition or from the contractor because of circumstances that were not foreseen during project design.
- (2) Any variation request shall be reviewed by—
 - (a) the contract implementation team as set out under section 151 of the Act for complex and specialized contracts; or
 - (b) an evaluation committee envisaged under section 139(2) of the Act for other contracts, before they are submitted through the head of a procurement function to accounting officer for approval.
- (3) The extension of contract period under section 139(2)(a) of the Act where delivery is delayed shall not have a financial implication.
- (4) Any additional funding required shall be secured and committed prior to a variation of contract under section 139(1)(a) of the Act.
- (5) For the purposes of section 139 of the Act and this regulation—
 - (a) "contract amendment" means a change to the terms and conditions of an awarded contract; and
 - (b) "contract variation" means a change to the price, completion date or statement of requirements of a contract to facilitate adaptations to anticipated events or changes in requirements.

39. The grievances laid down by the Respondent can be summarized into three (3) pronged issues;
- i. The variations were not approved by the procuring entity in writing;
 - ii. The variation request was not reviewed by the procuring entity's contract implementation team or the evaluation committee and approved by the accounting officer, and;
 - iii. Additional funding had not been secured or committed prior to the variation.
40. The Applicant's response is to fall back to Clause 16 of the Conditions of Contract in which the parties stipulated as follows;
16. 1 The Contractor shall carry out all instructions of the Project manager which are in accordance with the Contract.
41. The Applicant also submits that the power and authority to make and approve variations on behalf of the procuring entity was ceded to the Project Manager. This is as per Clause 22 of the Conditions of Contract. That having obtained the approval of the Project manager, the Applicant did not have to strictly follow the provisions of Section 139 of the *Public Procurement and Asset Disposal Act*. At least that is what this Court hears the Applicant to submit.



42. The Applicant cites and the Arbitrator followed the decision in *Centurion Engineers & Builders Limited Vs Kenya Bureau of Standards* [2023] KECA 1289 (KLR), where the Court of Appeal stated as follows;

“Consequently, we hold that the issue as raised by the respondent on the contravention of the PPDA is a mere afterthought aimed at avoiding liability to fulfil its contractual obligations. It is not disputed that the appellant indeed carried out and completed the additional works as instructed, and handed over the project to the respondent, who has since taken possession of the premises for its day-to-day business without paying the appellant the contractual sums due. We agree with the appellant that it is indeed entitled to the value for work done under the contract as mutually agreed upon by the parties.”

43. The Court notes that in the decision aforesaid, the Court of Appeal was applying the provisions of Section 47 of the *Public Procurement and Asset Disposal Act* of 2005 which stated as follows;

47. An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if —

- (a) the amendment has been approved in writing by the tender committee of the procuring entity; and
- (b) any contract variations are based on the prescribed price or quantity variations for goods, works and services.

44. The Act of 2005 was repealed and replaced by the *Public Procurement and Asset Disposal Act* No. 33 Of 2015. In the new Act, variations were now dealt with under Section 139. It is clear to the Court that in the *Centurion* case cited above, the Court of Appeal applied its mind to an Act which has since then been repealed. The Courts are now called upon to apply the prevailing provisions of Section 139 of the Act as well as Regulations 132 thereof.

45. The Court’s attention is drawn to the provisions of Section 5 of the Act which states as follows;

5. Conflicts with other Acts

- (1) This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.
- (2) A provision of an Act that provides for a person or body to approve any work or expenditure shall not be construed as giving that person or body any power with respect to the entire procurement proceedings.

46. The intention of the Act was that procurement could not be left in the hands of a single person. Not even the Project Manager could replace the Accounting Officer or the evaluation Committee who have to review and approve the variations. Regulation 132 introduces an extra check, that the funds to be expended as a result of the variations have to be secured first and committed. To this Court, this is to avoid wastage of public funds. This would also prevent contracts ballooning and eating into the public coffers. This also curbs corruption either apparent or the perception of it in public procurement.

47. *The Constitution* demands for transparent and cost-effective public procurement. If the Act states that you cannot vary a contract until the funds are secured and committed, to do otherwise is to act in breach of *the Constitution* and the procurement laws.



48. Failure to adhere with the Act means that the contract went against public policy as it flouted *the Constitution* and the existing laws.
49. The Applicant cannot argue that it was not aware of these provisions of the law. Ignorance of the law is not a defence. The Applicant cannot argue that this is an afterthought. The law remains the law and citing the law cannot be said to be an afterthought.
50. As the funds were not secured and committed in advance prior to the variations, the Respondent is justified in complaining that its unable to pay. There has to be strict justification of use of public funds. This Court has a duty to protect the use of public funds and resources.
51. The sad implication of this decision is that it leaves the Applicant without any redress against the Respondent. Yet the work was done and expenses incurred. But it does not in any way exonerate the officers of the Respondent who took part in the procurement and induced or led the Applicant to incur the expenses outside the statutory provisions. However, that is a by the way and does not fall for determination in this case.

Whether the Court should either set aside or adopt the arbitral award.

52. The Court has said enough to show that it is persuaded that the Award ought to be set aside for going contrary to the existing public policy. The Court is persuaded by the decision in *Jilk Construction v County Government of Kericho (Miscellaneous Application E001 of 2023)* [2023] KEHC 18916 (KLR) (15 June 2023) (Ruling).
53. As to costs, they ordinarily follow the event. However, the Respondent signed a contract that was contrary to public policy. It would be unfair to have it benefit from an award of cost. The Court directs that there will be no orders as to costs for either party.

Determination

54. The Court proceeds to make the following orders. The application by way of a Notice of Motion dated 4th April 2024 by the Respondent is allowed in the following terms;
 - a. The Court sets aside the Arbitral Award of Mr. Christopher K. Kihara published on 31st January 2024 but delivered to the parties on 15th February 2024.
 - b. There be no orders as to costs.
55. The application by way of a Chamber Summons dated 29th February 2024 by the Applicant is hereby dismissed in its entirety.
56. There be no orders as to costs.
57. This decision to apply to (Nairobi) HC Misc Application No E023 of 2024 Board of Governors Nairobi Technical Training Institute -Vs- Koto Housing Kenya Limited.
58. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH, 2025

NJOROGE BENJAMIN K.

JUDGE

In the presence of: -

Mr. Njuguna for the Applicant



Mrs. Maina for the Respondent

Court Assistant Mr. Luyai.

