Gelian Investment Limited v NK Brothers Limited (Miscellaneous Application E035 of 2024) [2025] KEHC 8378 (KLR) (Commercial and Tax) (13 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8378 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E035 OF 2024

RC RUTTO, J

JUNE 13, 2025

BETWEEN

GELIAN INVESTMENT LIMITED ..... APPLICANT

AND

NK BROTHERS LIMITED ..... RESPONDENT

RULING

1. By a Chamber Summons application dated 10th June, 2024, the Applicant, Gelian Investment Limited, challenges the Final Award issued by the Sole Arbitrator, QS. Joseph Kungu published on 21st March 2024, in the matter of arbitration between N.K. Brothers, the Respondent herein and the Applicant. Broadly, the Applicant seeks to: stay the enforcement of the award, set it aside in entirety, remit the Final Award to the arbitration tribunal for re-consideration, and for costs.

2. The application is premised on Articles 50(1) and 159(1) and (2) of *the Constitution*, section 35 (2) (a)(iii),(iv), (b)(ii) and (3) of the *Arbitration Act* 1995 (hereinafter referred to as "the Act") as well as Rules 3(2) and (7) of the Arbitration Rules, 1997. The Applicant pleads that the Arbitrator failed to determine the dispute in accordance with the terms of contract and that the Arbitrator re-wrote the contract between the parties. Further, that the Arbitrator did not give the Applicant fair and reasonable opportunity to present its case, and that the Arbitrator went beyond the scope of the arbitration. Finally, the Applicant contends that the award is in conflict with the public policy of Kenya.

3. The application is supported by the affidavit of Alfonse Kioko, the Applicant's director, sworn on 10th June 2024. It is further supported by the supplementary affidavit by the same director sworn on 17th October, 2024.

4. It is common ground that the parties entered into a contract for the development of a hotel in Machakos town. That a dispute arose out of the said contract and that the dispute was referred to

Arbitration before the Sole Arbitrator, QS. Joseph Kungu who heard the matter to its conclusion and published a Final Award on 21st March 2024. The Arbitration process was governed by the *Arbitration Act* and the Chartered Institute of Arbitrators (Kenya Branch) Rules, 2020. The Final Award published found in favour of the Respondent against the Applicant for Kshs.164,634,141.12 together with simple interest at the rate of 14% per annum from the date of the Award up to the date of payment.

5. According to the Applicant, the Arbitrator ignored Rule 59 of the applicable Arbitration Rules in adopting strict interpretation of clause 36 of the contract on the respondent's applications for extension of time rendering it unfair. In the same breadth, that the Arbitrator ignored the Provisions of section 29 (5) of the Act which required him to determine the dispute in accordance with the terms of contract. What is more, that the Arbitrator re-wrote the contract contrary to the law when he applied a suitable "commercial lending rate" as published by other First Tier Commercial Banks in awarding the Respondent interest as opposed to applying the commercial lending rate of Barclays Bank of Kenya or its successor in title as agreed by the parties under Clause 34.6 of the contract.

6. Further, that the Arbitrator, in awarding interest, ignored the principle of law that special damages must be pleaded and strictly proved, a claim for interest being a special damage. In addition, that the applicant did not produce documentary evidence or at all, to show the lending rates for Barclays Bank of Kenya at the material time, a fact acknowledged by the Arbitrator at page 91 of the Final Award. The Applicant argues that the Arbitrator improperly exercised discretion in attaching fresh evidence in the award, to wit weighted average commercial bank lending rates, without affording parties an opportunity to comment on the same. That this fresh evidence exhibited bias and effectively favoured the Respondent, contrary to Rule 51 of the Arbitration Rules, resulting in the Arbitrator failing to treat the parties with equality.

7. The Applicant avers that the Arbitrator failed to determine the dispute between the parties in accordance with the contract in finding that the Final Account prepared by the Quantity Surveyor and signed on 8th November 2016, considered the unresolved queries, and adjusted the initial account to Kshs.215,198,617.04 thereby including figures on electrical and mechanical works for Kshs.24,620,260.15 and Kshs.24,311,918.00 which were subsequently corrected. This was after the contentious areas in the impugned final account were addressed to Kshs.20,297,878.72 and Kshs.19,800,000.00 respectively. That the Arbitrator thus ignored the Respondent's pleading at paragraph 34 of the Amended Statement of Claim with respect to the final account on the electrical works as expected under clause 45:9 of the contract. That this culminated in an erroneous finding that the next outstanding principal amount due to the Respondent was Ksh.41,075,284.20.

8. The Applicant takes issue with the Arbitrator's award of the 2nd moiety of Kshs.11,217,463.00 together with interest, even though the Respondent had not pleaded the same. That this resulted in the Arbitrator going beyond the scope of the arbitration in dealing with a dispute not contemplated by or not falling within the terms of reference to arbitration. The Arbitrator is also faulted for acting in conflict with the public policy of Kenya to the extent that the assessment of damages ignored the established principles of law.

9. Annexed to the supporting affidavit was: the contract as developed by the Joint Building Council, Kenya; the final award; requests by the respondent for extension of time; final accounts; areas of contention in the final accounts; mechanical works final account; Electrical Installation works final account; the Amended Statement of claim; and calculations filed in the Arbitration Proceedings.

10. In the Supplementary Affidavit sworn on behalf of the Applicant, the deponent mainly adds that the law barred the Arbitrator from approbating and reprobating at the same time and that the assessment of damages for certain amounts awarded to the Respondent amounted to unjust enrichment contrary

to equity and justice. The deponent annexes the Press Release by the Central Bank of Kenya on the transformation of the corporate brand of Barclays Bank of Kenya to ABSA Bank PLC; the Report for Proposed Gelian Hotel in Machakos town; Interim Certificate No.15-Release of first moiety dated 24th March 2015 and the Interim Certificate issued on 23rd March 2015.

11. The application is opposed by way of a Replying Affidavit sworn on 1st August 2024 by Rajesh Radhod, the Respondent's Manager, Finance and Administration. He concurred with the facts set out in the application insofar as leading to the arbitration proceedings save to state that the decision of the arbitrator was premised upon the contractual clauses. He maintains that the determination of the dispute was first and foremost on the basis of the contract between the parties. He states that Rule 59 of the Arbitration Rules relates to the prohibition of the application of strict rules of evidence in arbitration proceedings as envisaged under section 2 of the *Evidence Act* and does not relate to the interpretation of the contract between the parties as alluded to by the Applicant.

12. He therefore agrees with the Arbitrator's interpretation of clause 36 of the contract. He adds that contrary to the assertion on behalf of the Applicant, section 29(5) of the Act requires the Arbitrator to at all times decide the dispute in terms of the particular contract as the one between the parties that applies to the present dispute. To this end, he states that the Applicant has not demonstrated the Arbitrator's deviation from the terms of the contract. He construes the Applicant to have on one hand accused the Arbitrator of strictly interpreting the contract between the parties and on the other hand alleging that the Arbitrator did not determine the dispute in accordance with the contract.

13. He posits that although the parties had agreed to use the Barclays Bank lending rates in the computation of interest on delayed payments as per clause 34.6 of the contract, the bank ceased to exist and the parties neither agreed on another alternative bank nor the successor for purpose of interest rates. He continues that parties had agreed on interest as being due for delayed payment which payment had delayed beyond the agreed payment timelines under clause 34:5 of the contract. That with the ceasing of Barclays Bank to exist, the Arbitrator had discretion to specify a rate of interest and make an award as provided under section 32C of the Act as result of which the Arbitrator settled on and applied the Central Bank of Kenya interest rate.

14. Notably, the Respondent at paragraph 14 of the Replying affidavit avers that its claim before the Arbitrator was for interest on delayed payment. The deponent concedes that the Arbitrator erred by calculating interest on interest on the principal amount and interest on interest on delayed payment of Interim Payment Certificates. Accordingly, that the issue of award of interest on interest may be remitted to the Arbitrator for re-consideration.

15. On the final account of Ksh.285, 974,306.90, it is the Respondent's position that the Applicant has no role in the preparation and signing of the final account under clause 34 of the contract once prepared by the project's Quantity Surveyor. That the Applicant retrieved this information from its own independent Quantity Surveyor instead of using the Quantity Surveyor of the project. It attacked the hired Quantity Surveyor's report for failing to deduce its methodology and how he arrived at his conclusions. In the premises, the final account of 8th November 2016 remained in force. Further, that the final account for the project was an issue for determination and was duly considered alongside the evidence adduced before the Arbitrator.

16. The Respondent agrees with the Arbitrator's non-consideration of the electrical and mechanical sub-contractor's final accounts by stating that neither party pleaded for such. It adds that the Respondent did not make a prayer for review of the amounts included as profit and attendance in the final accounts of 8th November 2016 and the Arbitrator would be stepping outside the scope of the reference had he ventured to address such uncontested issues.

17. Further, the Respondent confirms that it made a claim for release of retention (2nd moiety) which was certified in Certificate No.15 in the sum of Kshs.11,217,463.55 and this is a prayer reflected at paragraph 46 (e) and (f) of the Amended Statement of Claim. The Respondent therefore disputes that the Arbitrator went beyond the ambit of the arbitration in awarding it.

18. Further, the Respondent urges the Court to deny the application to set aside the entire award. This is on account of the Applicant's failure to satisfy the threshold of setting aside of an award for being contrary to public policy and in line with the Respondent's accession to remitting of the calculation of interests to the Arbitrator. It opposes the prayer for an order to stay enforcement of the award and argues that it contradicts the prayer for remitting the matter to the Arbitrator which the Respondent has partially acceded to, but only for recalculation of interest by removing interest on interest. The Respondent concedes that the Final Award should be partially set aside on the issue of calculation of interest on interest. As for costs, the Respondent urges that they abide by the outcome of the application.

19. In his further affidavit, in response to the supplementary affidavit filed on behalf of the Applicant, Rajesh Radhod contends, on behalf of the Respondent, that the Supplementary Affidavit raises new issues in presenting evidence of the press release from Central Bank of Kenya relating to the change of Barclays Bank to ABSA Kenya. This, he avers, was not presented to the Arbitrator and is therefore not permissible as the Arbitrator never had opportunity to consider it as to afford the Court an opportunity to consider it in support of the application to set aside the Arbitrator's award. The Respondent calls for the expungement of this new evidence. The affidavit annexes the Amended Statement of Claim dated 15th August 2019 in pointing out that the Applicant misinformed the Court on the pleading of the release of the 2nd moiety of retention by annexing an incomplete version of the Respondent's Statement of Claim.

20. The parties articulated their positions through their filed submissions. The Applicant's submissions filed on its behalf by M/s TripleOklaw LLP are dated 17th October 2024. The Applicant frames three issues for determination. These are: whether the Arbitral Tribunal failed to give the Applicant fair and reasonable opportunity to present its case; whether the Final Award dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration, or contained decisions on matters beyond the scope of reference to arbitration and whether the Final Award is in conflict with the public policy of Kenya. Having read and considered them including the authorities cited, I proceed to summarise them hereunder.

21. On the first issue, the Applicant relies on Article 50(1) of *the Constitution*, and sections 29(5) and 35(2)(a)(iii) of the Act. It argues that whilst section 32C of the Act empowers an arbitrator to award interest, such an award is subject to the agreement of the parties. It submits that the arbitrator misconducted himself when he obtained fresh evidence in the absence of the parties, way after the oral hearing and applied the same without affording the parties an opportunity to test it. He contended that the arbitrator acted outside the parameters of section 32C of the *Arbitration Act*, rule 52 of the Rules thereunder and clauses 34.5 and 34.6 when he awarded interest based on the commercial lending rates without any justification or basis. That the arbitrator downloaded the weighted average commercial banking lending rates from the Central Bank of Kenya website and attached the same to the award, yet the Respondent did not plead inoperativeness of clause 34.6 of the contract. Several decisions and literally texts were cited in support of these arguments. It further relied on the annexure attached to its supplementary affidavit to submit that Barclays Bank of Kenya changed its name to ABSA Bank Kenya PLC and was therefore still operational.

22. On the second issue, the Applicant founds its argument on section 35 (2)(a)(iv) of the Act which is hinged on section 29(5) of the Act. It is submitted that it is not in dispute that Certificate No.15

was in respect of one half of the amount retained (release of first moiety) and that the Respondent pleaded this fact at paragraph 18 and 46 (e) and (f) of the Amended Statement of Claim. The Applicant insists that the Respondent did not plead to be awarded the 2nd moiety and interest thereon. That accordingly, in allowing an unpleaded claim together with interest, the arbitrator went beyond the ambit of arbitration.

23. On the final issue, it is the Applicant's case that failure to effect adjustment with the correct figure of the determined final account amounts to unjust enrichment to the Respondent. This arose in the Arbitrator failing to fully discharge his duties under clause 45.9 of the contract and thus unjustly enriched the Respondent. Accordingly, miscarriage of justice was occasioned against the Applicant. It explained that after practical completion, parties herein agreed to conduct a forensic audit. The audit team revealed that the profit and attendance for mechanical and electrical works after remeasurement worked out the final figures as Kshs.18,494,606.53 and Kshs.18,559,985.00 respectively. That the Respondent was entitled to 10% of the figures as opposed to the figures captured in the final account of 10th November 2016. Secondly, the claim for Kshs.4,875,000.00 was untenable as the structural works were revised.

24. That it was further noted that there was a cost implication of Kshs.20,248,142.74 between the final account and the audited account. The Applicant explicated that it adduced evidence to demonstrate that mechanical works and electrical installation works in the sum of Kshs.19,800,000.00 and Kshs.20,297,878.72 respectively were paid to the relevant parties. That the arbitrator failed to adjust these sums thereby unjustly enriching the Respondent.

25. It continued that the arbitrator determined that the Project Quantity Surveyor by the final account of 10th November 2016 included amount of Kshs.6,078,437.87 as interest on delayed payments. That the arbitrator deducted the said amount from the outstanding principal amount. However, as per the said final account the interest on delayed payment was Kshs.7,050,987.93. The figure applied by the arbitrator was based on the findings of the project Quantity Surveyor after parties conducted a forensic audit on the project. The arbitrator rejected the figures emanating from the audit on other items. However, he applied the figure on interest for delayed payments. In this regard, the Applicant posited that the arbitrator could not approbate and reprobate at the same time.

26. As a consequence of the above, the Applicant submits that the award is in conflict with the public policy of Kenya. It thus urged that it has established cogent reasons to justify the setting aside of the Award under section 35 of the Act.

27. In response, the Respondent's filed submissions, filed by M/s Nyagah B. Kithinji Advocates, dated 7th November 2024. The submissions respond to the three issues as framed in the Applicant's submissions.

28. On the first issue, the Respondent, in addition to summing up its case, adds that the Applicant did not make an application before this Honourable Court for admission of the new evidence relating to ABSA Bank. As such, that the Applicant is not permitted to introduce such evidence. It adds that this new evidence was available to the Applicant during the arbitration proceedings and having not adduced it, its production is an attempt by the Applicant to make a fresh case before this Court or fill up omissions or patch up its case, and should be expunged from the Court's records. The Respondent asserts the powers bestowed to the Arbitrator under section 32C of the Act, to award interest, the Arbitrator having found that the Respondent was entitled to payment of interest on delayed payment. Thus, what is in contention is the rate used by the Arbitrator to compute interest payable to the Respondent by the Applicant and not whether the Respondent was entitled to interest in the first place. On this issue, the Respondent prays that if the Court was to agree with the Applicant's contentions, it should consider

remission as opposed to setting aside the award in entirety to avoid what he termed as throwing out the baby with the bath water.

29. On the second issue, the Respondent builds from its partial concession on the issue of interest on interest. It submits that to allege that the payment of the 2nd moiety of retention was not pleaded amounts to a challenge based on the language of the Arbitrator used to refer to the 2nd half of the retention rather than a challenge of the release of the amount involved. That it also amounts to an invitation to the Court to admit and consider a challenge against the merit and/or value considerations of the award, in effect making it an appeal guised as an application to set aside.

30. That clause 34.12 of the contract envisaged retention of money two-fold; the 1st moiety retention and the 2nd moiety retention. That the appendix to the conditions of contract provided for retention at 10% of the contractual sum. It argued that it was not disputed that the contractual sum was Kshs.257,909,101.00; the total amount retained being Kshs.22,434,926.00 accounting for two equal halves of Kshs.11,217,463.00 each. It continued that the release of those sums was provided under clause 34.16 of the contract.

31. It submitted that although a certificate of practical completion was issued to warrant the release of the 1st moiety of retention, the same was not released, and so was the 2nd moiety of retention which would then form part of the final payment. In the circumstances, the trial court properly awarded both retentions as pleaded. It argued that this was an impermissible appeal argued herein since the same was premised purely on semantics.

32. On the third issue, the Respondent points out that the parties were bound by their contract and none of the provisions required a forensic audit to be conducted to ascertain the amounts payable to the Respondent. Specifically, that clause 34.21 laid down the procedures for the formation, agreement and payment of a final account. That that provision did not envision the application of a forensic audit to ascertain the amount payable after the project Quantity Surveyor's final account that was executed on 8th November 2016. It was accepted on 11th November 2016 and returned to the Quantity Surveyor.

33. Further, that this issue was interrogated and extensively tried through examination of witnesses prior to the Arbitrator making his decision as to the proper final account for the project and that this finding is not open to the Court to re-open and interrogate. Moreover, that this is a factual issue for the Arbitrator's determination and the Court should not be called upon to review the merits and act as an appellate court.

34. The Respondent adds that to relook into issues of the final accounts and amounts awarded therein is stretching the ground of public policy. At any rate, for the Applicant to prove that the award is contrary to the public policy, it was imperative that the Applicant demonstrates that the award threatens national interest. The Respondent posits that the Applicant is dissatisfied with the findings of the Arbitrator in his determination of the final account. That this dissatisfaction does not warrant setting aside of the award.

Analysis and Determination.

35. Having perused the application, the affidavits filed on behalf of the parties and the submissions, the Court notes at the onset that the Applicant sought essentially three main prayers: – stay of enforcement and/or further proceedings upon the Final Award pending the hearing and determination of this application; setting aside in entirety the final award of the Sole Arbitrator; and the remittance of the Final Award to the Arbitrator for re-consideration or consideration.

36. From the grounds in support of the application and the submissions in court, the Applicant did not address the interlocutory prayer for stay of enforcement and/or further proceedings pending the determination of the application. The Court therefore sees no reason to progress this issue any further as it is evident the prayer is spent. This leaves before court for determination the question of whether the award should be set aside and if so to what extent. Thereafter, it will be for the Court to determine whether to remit the award for re-consideration or consideration by the Arbitrator and the extent of such remittance, if at all.

37. The Court also notes that a preliminary issue was raised by the Respondent regarding the competency of annexure SAK-1 – Press Release corporate brand and name transformation of Barclays Bank of Kenya to ABSA Bank Kenya PLC. It is not contested that the document was not adduced before the arbitral tribunal for its analysis and determination. It is also not in dispute that no application was made for its production in evidence.

38. In considering the above issues, it is not lost to this Court that the Respondent made some concessions. This is both in the replying affidavit and the submission filed on its behalf. Specifically, the Respondent, in concluding its written submissions made the following concessions to the application:

> "...
>
> c. That in the unlikely event that this Honourable Court is to find that the Arbitrator misconducted himself by computing interest using Central Bank of Kenya rates rather than Barclays Bank rates, the Respondent prays that the Court remits the award to the Arbitrator for reconsideration on the issue of interest, and for recalculation of interest using Barclays Bank Rates.
>
> d. That the Respondent admits that the Arbitrator's calculation of interest on interest was erroneous, and prays that this Honourable Court only sets aside the part of the Award that awards interest on interest, and remits the award for interest recalculation on the basis of simple interest.
>
> ...
>
> i. The Respondent prays that this Honourable Court remits the award to the Arbitrator for consideration/re-consideration of the following issues:
>
> i. Computation of interest on delayed payment using Barclays Bank rates.
>
> j. The Respondent prays that this Honourable Court partially sets aside the award on the following issue:
>
> i. Award of interest on interest to the Respondent, and
>
> ii. Remits the interest for recalculation on the basis of simple interest."

It is on the above context that I now examine the delineated issues.

a.Whether to set aside the final Award.

39. Arbitration proceedings are in their nature sui generis. They are a form of dispute resolution mechanism embraced by our Constitution under Article 159(2)(c) of *the Constitution*. The provisions of the *Arbitration Act* apply to domestic arbitrations such as the present one. So sacrosanct are these

arbitration proceedings that courts are dissuaded from interfering with such disputes. This is the import of section 10 of the *Arbitration Act* which categorically provides that except as provided in this Act, no court shall intervene in matters governed by this Act. It is in fact this provision that limits the interference of courts when an application is brought under section 35 of the *Arbitration Act*.

40. The apex Court in the binding authority of Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch [2019] KESC 11 (KLR) held as follows, and this Court fully associates itself with that holding:

> " Section 35 of the *Arbitration Act* should be interpreted in a way that promoted its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. It allowed an aggrieved party to apply for the setting aside of an arbitral award on certain grounds. The court had the opportunity to correct specific errors of law that could taint the process of arbitration. There was need to shield arbitral proceedings from unnecessary court intervention but there was also need to acknowledge that there could be legitimate reasons for seeking to appeal against High Court decisions."

41. It is against this firm legal background that I shall now proceed to determine the present dispute. The parameters for setting aside an award are stipulated by section 35 of the Act. In particular, the Applicant has invoked sections 35(2)(a)(iii) and (3) of the Act. They provide as follows:

> " 35 (2) An arbitral award may be set aside by the High Court only if.
>
> (a) the party making the application furnishes proof-
>
> i. The party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> ii. 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 part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
>
> b. The High Court finds that-
>
> i. The award is in conflict with the public Policy of Kenya."

This, in my view, portends a disjunctive test under section 35 (2) where an applicant needs to prove any of the grounds raised.

42. In adjudicating this application, the Court is mindful not to delve into the merits of the correctness of the decision of the arbitrator. This was succinctly captured by the Supreme Court in Geo-chem Middle East –vs—Kenya Bureau of Standards [2020] eKLR, in holding that:

> " It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the Court is called upon to determine whether or not to set aside an award .... if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue..."

It is evident that the Supreme Court underscored the finality of arbitral awards, as a facet of public policy.

43. With deference to party autonomy in arbitration process, and as already noted above, Section 10 of the Act is prescriptive on the extent of court intervention. In the present case, the parties entered into a contract. As a term of their contract, the parties elaborately set out the applicable arbitration process including the mandate and scope of the arbitrator. This is captured under Clause 45 of the contract comprising the arbitration clause which the Court has had the opportunity peruse.

44. On whether the criteria under section 35(2)(a)(iii) of the Act as to the Applicant having been given a fair and reasonable opportunity to present its case has been met, it comes down to the Arbitrator's award of interest calculation based on Central Bank of Kenya lending rates instead of Barclays Bank of Kenya rates. In determining this issue, the Court notes that the Arbitrator used the weighted Average Commercial Bank lending rates and printed an extract of the same from the Central Bank of Kenya attaching it to the Final Award. The applicable Clauses 34.5 and 34.6 of the parties' contract provided as follows:

> " 34. 5 The contractor shall, on presenting any interim payment certificate to the employer, be entitled to payment thereof within fourteen days from presentation.
>
> 34. 6 If a certificate remains unpaid beyond the period for honoring certificates stated herein, the employer shall pay or allow to the contractor simple interest on the unpaid amount for the period it remains unpaid at the commercial lending rate in force during the period of default. The Quantity Surveyor shall assess the amounts to be included in an interim certificate as the interest due for the delay and if an interim certificate is issued after the date of any such assessment, the amount shall be added to the amount which would otherwise be stated as due in such a certificate."

45. The appendix to the condition of contract named Barclays Bank of Kenya as the bank for purposes of interest calculation. It is instructive to note that in my analysis of this issue, the Applicant was not disputing that the Respondent was entitled to interest. The Applicant was disputing the rate applied.

46. Two things arise. First, it is evident that none of the parties was given an opportunity to address itself on this rate chosen by the Arbitrator before applying it. It is no wonder that the Arbitrator saw it fit to attach a copy of the rates he had applied to the Award for the parties to understand the Arbitrator's basis. Second, while it is common ground that the parties had contracted to use Barclays Bank's rate, it was not agreed what rate would apply if the Bank ceased to exist at the time of default, for closure of the bank was not anticipated and/or foreseen. On one hand, the Respondent agrees with the choice made by the Arbitrator while on the other hand, the Applicant understood that ABSA Bank's interest rate was applicable as a successor to Barclays Bank.

47. The Court appreciates that section 32C of the Act empowers the Arbitrator to award interest. However, this is not a peremptory provision as it allows the parties the latitude to first agree on the applicable interest rate. Section 32C of the *Arbitration Act* provides:

> " Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment

of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award." (Emphasis mine)

48. From the contract, it emerges that the parties had neither contemplated the non-existence of Barclays Bank at the time of default nor the application of the interest rate of Barclays Bank's successor, being ABSA Bank. It is also evident that firstly, the Barclays Bank of Kenya lending rates were not furnished before the tribunal. The Respondent on its part proposed the use of Kenya Commercial Bank commercial lending rates which were vehemently refuted by the Applicant.

49. As it turned out, the arbitrator introduced the weighted average as published by the Central Bank of Kenya in the absence of agreement by the parties on the applicable rate. The court's understanding of the applicability of section 32C of the Act is in situations where no applicable rate was prescribed by the parties. In the obtaining circumstances, it fell upon the Arbitrator to at least allow the parties to argue out the applicable basis of the interest and hopefully come to a consensus before making a finding and thereby applying the rate he decided.

50. The Court is therefore satisfied that neither the Respondent nor the Applicant had an opportunity to present its case on the applicability of the weighted average interest that the Arbitrator chose to apply. For the Arbitrator to make a final award and thereafter attach the evidence of his basis of the finding with the published award, the parties were left with no recourse before the Arbitrator, the Arbitrator having been rendered functus officio over the dispute.

51. In the same breadth, it is certain that the Applicant's supplementary affidavit has introduced evidence pertaining to the change of brand by Barclays Bank to ABSA Bank.

52. Without belabouring the issue; it is undoubted that this document was never raised before the Arbitrator for consideration. The Court of Appeal in Telkom Kenya Limited vs. John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR) held as follows regarding introduction of evidence not examined at a trial:

> "The judge in our view was trying to convert the judgment in rem into a judgment in personam using a procedure alien to law in that he was trying to improperly admit evidence after a suit had been heard and concluded. The documents that were ordered to be filed had not been introduced at the trial of the suits and could not be brought in after the judgment had been proclaimed. This has obvious evidentiary implications in terms of authenticity, veracity and admissibility and leads to the question whether the makers of the documents and the deponents to the affidavits could be amenable to cross-examination on the same at that post-judgment stage."

53. This Court takes the same approach. If I consider that piece of evidence, I am in essence pitting out that the document is unopposed and has passed the test for examination. This Court is not sitting as a trial court. The Respondent has opposed its application before these proceedings. I find that the document was improperly introduced before me in the supplementary affidavit. Furthermore, the Applicant failed to seek leave of this Court for its production. In the interest of justice, that document will accordingly not be considered and is hereby disregarded from the proceedings.

54. Having said that, and in the spirit of section 29 (5) of the *Arbitration Act*, I am of the considered view that the arbitrator ought to have invited parties to make a commentary on the applicable lending rates given the scenarios that had arisen. This is a permissible practice under arbitration. Rule 52 of the

Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules 2020, applicable to the parties, provides that:

> "At any time during the proceedings, the Arbitral Tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate either at the request of a party or for its own understanding of the matters in issue, within such period of time as Arbitral Tribunal shall determine."

55. In view of the above finding that the parties ought to have been allowed to ventilate on the basis of the rate and the fact that the parties did not have a consensus ad idem on the issue, it is only just that the parties be allowed to present their case in this regard. At any rate, this is not an appeal and the court cannot delve into a re-appraisal of the facts and analyse the correctness or otherwise of the Arbitrator's findings. It is only the Arbitrator who should be allowed to interrogate the place of such evidence, new or otherwise.

56. On the Arbitrator exceeding the scope of the reference to arbitration, the Applicant points to the error on the part of the arbitrator on computation of interest. The Applicant submitted that a reading of clause 34.6 of the contract provided that if a certificate remained unpaid beyond the period for honoring certificates, the employer was obligated to pay or allow the contractor to charge simple interest on the unpaid principal sum at commercial bank lending rates in force at that time. This fact was conceded by the Respondent who urged that instead of setting aside the award on this ground, the same ought to be remitted to the arbitrator for reconsideration.

57. Indeed, clause 34.6 of the contract makes provision of simple interest on the unpaid amount for the period it remains unpaid at the commercial lending rate in force during the period of default. In its decision, the arbitrator applied interest at the rate of 14% per annum on accrued interest on delayed payments on interim certificates and principal amounts on retention and final account rather than applying simple interest on the principal unpaid sum on the interim certificates, retention and final account contrary to clause 34.6 of the contract. That was not the agreement of the parties.

58. As this issue on interest has been conceded to by the Respondent through the replying affidavit of its director and in the written submissions, the Court finds no reason to apply its mind or make findings on otherwise uncontested matters.

59. Apart from interest, the Applicant also pleaded that the Arbitrator awarded the Respondent the 2nd moiety of Kshs.11,217,462.55 together with interest from 18th September 2015 until 15th August 2019 totaling Kshs.6,230,609.21 even though the Respondent had not pleaded the same. The Applicant reproduced paragraphs 46 (e) and (f) of the amended statement of claim to argue that certificate No. 15 was in respect to the one half of the amount retained that was the release of the 1st moiety. On its part the Respondent submits that it raised the issue in the pleadings as a claim for the sum of shs.11,217,463.55 being certificate No. 15 dated 23rd March 2015 which was outstanding from the due date of 6th April 2015. The Respondent urges that the arbitrator was free to build up in his award by separating the 1st moiety of retention from the 2nd moiety of retention given their different due dates.

60. I understand the Applicant's lament to be that the issue was not raised by the Respondent in its pleadings. The question that arises is what then was pleaded in relation to the 2nd moiety and/or the outstanding being Certificate No. 15? The other question becomes what then did the Arbitrator determine out of this?

61. It is common ground that the Arbitrator's duty is to interpret the contract and in effect assert the rights of the parties by giving a proper interpretation. To establish whether the arbitrator went beyond the

scope of the reference to Arbitration, one has to first appreciate the applicable scope. This is set out first, in the Arbitration clause and thereafter from the pleadings.

62. A perusal of the Arbitration Clause set out in the contract between the parties herein reveals ten (10) provisions spanning from appointment of the arbitrator, the scope of the arbitration matters, powers of the arbitrator to the final and binding nature of the award upon parties. With such far reaching effect and as earlier stated, the place of party autonomy cannot be under stated. It is the parties that ultimately yield to the arbitrator granting him jurisdiction over the dispute together with the extent of the exercise of such jurisdiction.

63. From the award, the Arbitrator not only listed the common ground of the parties but also the contentious issues. Among the contentious issues raised and relevant to this issue as agreed by the parties are captured by the Arbitrator at page 27 of the award. These are:

> " ...
>
> d) Whether the Respondent's right to claim liquidated damages under clause 43.1 of the contract accrued.
>
> e. Whether the Respondent is entitled to claim liquidated and ascertained damages.
>
> i. Whether the parties are entitled to their respective claims."

In his findings, the Arbitrator found an outstanding principal amount of Kshs.69,545, 913.79 comprising two principal amounts, 10% retention withheld of Kshs.22,434,926 inclusive of VAT and unpaid Principal (based on final account) of Kshs. 47,110, 987.79 inclusive of VAT.

64. It is indeed trite law and practice that parties are bound by their pleadings. A court cannot thus fashion or grant prayers outside the scope of a party's pleadings. The relevant paragraphs of the Respondent's amended statement of claim, as cited by the Applicant, are reproduced as follows:

> "
>
> " 46. And the Claimant claims in respect of the main works in terms of clause 34.6, clause 34.21.3 and rule 18 (3) (k) of the Arbitration Rules (December 2012) of the Chartered Institute of Arbitrators (Kenya Branch):
> The total claim for interest on delayed payment of already paid certificates in respect of the main works amounts to Kshs. 16,430,839.57 as at 30th November 2018 [Calculation sheet Nos. 1 & 2]
>
> e. Kshs. 11,217,463.55 being certificate no. 15 dated 23rd March still outstanding and owing from the due date of 6th April 2015
>
> f. Simple interest on the delayed payment of Kshs. 11,217,463.55 for 209 days up to 1st November 2015 when the Final Payment became due in terms of the Contract, amounting to Kshs. 804,584.10"

65. From the foregoing, it is an arduous task for the court to discern the extent of the pleadings as against the scope of the reference to arbitration without conducting a merit review of the Arbitration reasoning on the above issues. This is exacerbated by the fact that the Arbitrator was empowered to interpret the contract. In the premises, mere disagreement with the manner of interpretation and the context of the dispute does not, of itself amount to going beyond the scope of reference to arbitration.

In the same manner, it is not inimical to the contract as to amount to re-writing the contract. However, as the Respondent already made a concession albeit limited, I am inclined to find that the Applicant also satisfies the ground set in section 35(2) (9) (iv) of the Act.

66. As for public policy, the Applicant grievance is that the Arbitrator erred by accepting the final account prepared by the Project Quantity Surveyor dated 10th November 2016 and signed by the Respondent on 11th November 2016 in the sum of Kshs.285,974,306.90 inclusive of VAT, as the agreed final account. The Applicant elucidated that after practical completion, parties herein agreed to conduct a forensic audit. The audit team revealed that the profit and attendance for mechanical and electrical works after remeasurement worked out the final figures as Kshs.18,494,606.53 and Kshs.18,559,985.00 respectively. That the Respondent was entitled to 10% of the figures as opposed to the figures captured in the final account of 10th November 2016. Secondly, that the claim for Kshs.4,875,000.00 was untenable as the structural works were revised. That it was further noted that there was a cost implication of Kshs.20,248,142.74 between the final account and the audited account.

67. As per the Applicant, this acceptance was without taking into account the findings of the forensic audit conducted in relation to the Final Account. The Applicant further contends that the payment of the amounts awarded bases on the final account to the Respondent constitutes unjust enrichment. Thus, a miscarriage of justice was occasioned against the Applicant.

68. In opposing this position, the Respondent postulates that the Applicant is dissatisfied with the findings of the arbitrator in his determination of the final account. To the Respondent, this dissatisfaction does not warrant setting aside on grounds of public policy. The Respondent weighed in by stating that parties were bound by their contractual agreement. That Clause 34.21 laid down the procedures for the formation, agreement and payment of a final account. That the provision did not envision the application of a forensic audit to ascertain the amount payable after the project Quantity Surveyor's final account that was executed on 8th November 2016. It was accepted on 11th November 2016 and returned to the Quantity Surveyor. It further observed that the arbitrator considered the evidence of both parties on this issue and arrived at a just decision. For that reason, the Respondent urges that the Court ought not to be invited to re-open and interrogate the same as to admit the forensic report would have invited the arbitrator to consider extrinsic evidence which would amount to parol evidence. Hence, that to consider such a ground would warrant this Court to consider the merits of the award, which is not permissible under the law.

69. As already expounded, the conduct of the parties including the carrying out of their respective obligations was to be governed by the terms of contract. Similarly, the reference to arbitration was by voluntary volition. There appears to be a dispute as to the final accounts with the parties pursuing divergent positions. Without descending into the merits of the dispute and cautious of the limited jurisdiction of the Court in the obtaining circumstances, the Court refers to the award in so far as it needs to infer the grounds in issue. Accordingly, the Court notes that among the framed issues in contention as agreed, the arbitrator was called upon to determine whether there was an agreed final account under the contract. With that in mind, the Court notes that the Arbitrator made its decision on the issue the way he did. At this juncture, this Court cannot delve any further in view of the disputed position as it would inevitably warrant a merit review of the decision including the applicability, if at all, of the parol evidence.

70. On public policy, this court in Christ for All Nations vs. Apollo Insurance Co. Ltd [2002] 2 E.A 366 held:

> " Public policy is a broad concept incapable of precise definition. An award can 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 any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality".

71. In my view, a finding on violation of public policy requires more drastic aspect of the award to be demonstrated such as violation of law, national interest, breach of morals and outright dereliction on the part of the Arbitrator. While there is an allegation of unjust enrichment, this can only be a finding dependent on the final award adopted and the consequential interest applied not to mention the allowed liquidated claim. The Court therefore declines the argument that the award violates public policy in Kenya and the attendant ground for setting aside the award.

72. The upshot is that the Court finds that the Applicant has not demonstrated to the Court's satisfaction that the award went against public policy.

73. As the grounds set out for setting side an award under section 35 (2) (a) and (b) of the Act are disjunctive, the Applicant only needed to demonstrate either of the grounds. While the Respondent called for partial setting aside of the award, the court finds that such approach can only pertain to decisions on matters referred to arbitration that can be separated from those not referred. This is the import of section 35(2) (a) (iv) of the Act under which provision the Respondent made partial concessions. However, there is no similar latitude under the edicts of section 35(2) (a) (iii) of the Act.

74. With the Court's finding, it is beyond peradventure that the final award should be set aside as prayed. The final award is therefore set aside in entirety. This leads me into determining whether the award should be remitted to the Arbitral Tribunal.

b.Whether the final award should be remitted to the Arbitral Tribunal for re-consideration or consideration

75. The Court having found that the award be set aside in entirety, the next consideration is whether the award should be remitted to the Arbitrator. The Respondent put a case for decline of the prayer on the ground that it is conflicting with the prayer for setting aside. The Court disagrees with this assertion by the Respondent and declines the invitation by the Respondent to isolate certain issues for remittance to the Arbitrator. To the contrary, unless the award is set aside there is nothing available to be remitted to the Arbitrator.

76. With the issues raised, bifurcation of the award for purposes of reconsideration will not only amount to miscarriage of justice in the wake of finality of arbitration process but also prevent the determination of the dispute of its proper context. In Synergy Industrial Credit Limited –vs-Cape Holdings Limited [2019] eKLR ,the Supreme Court held as follows:-

> "... And hence the purpose of section 35 is to ensure that courts are able to correct specific areas of law, which if left alone would lead to a miscarriage of justice. Therefore, even in promoting the core tenet of arbitration which is quicker and efficient way of setting commercial dispute that should not be at the expense of real and substantive justice."

77. In view of the above, the just cause calling for adoption is for the parties to submit before the Arbitration Tribunal to articulate the dispute in a forum where the merit of the arguments and evidence can be resorted to. This is in line with the parties' contract that provided recourse to arbitration.

78. The upshot of the decision is that the application succeeds. The court is satisfied that the applicant has fulfilled and discharged the burden to entitle it to the prayer sought for setting aside the award. It

has ably shown that the Arbitrator went beyond the scope of the arbitration mandate in the manner already stated. However, the applicant has not succeeded to the court's satisfaction that the award went against public policy.

79. The Final Award of QS Joseph Kungu published on 21st March 2024 is set aside in entirety and the same is remitted to the Arbitral Tribunal for re-consideration or consideration. As the dispute remains alive between the parties, the Court does not see the need to award costs to any of the parties.

80. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 13TH DAY OF JUNE, 2025.

RHODA RUTTO

JUDGE

In the presence of;

Applicant

Respondent

Sam Court Assistant