



Ere Build Systems Limited v Sikawa (Arbitration Cause E017 & E019 of 2023 (Consolidated)) [2024] KEHC 5567 (KLR) (Commercial and Tax) (8 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION CAUSE E017 & E019 OF 2023 (CONSOLIDATED)**

DAS MAJANJA, J

MAY 8, 2024

BETWEEN

ERE BUILD SYSTEMS LIMITED APPLICANT

AND

KENETH SIKAWA RESPONDENT

RULING

1. On 30.11.2022, Charles J. Mwaura, QS (“the Arbitrator”) published an award in which the Respondent’s (“Keneth”) claim was allowed to the extent that he was awarded Kshs. 3,656,518.45 as full and final settlement against the Applicant (“EBS”). Further, that any amount remaining unpaid after 30 days had elapsed from the date of delivery of the Award would attract simple interest of 13% per annum and that in case the Arbitrator’s fee balance of Kshs. 496,870.00 was to be paid by Keneth, then the same would be considered as a debt payable by EBS to Keneth (“the Award”).
2. Both parties have now filed applications in respect of the Award. EBS seeks to set it aside and Kenneth seeks to enforce it as a judgment and decree of the court. EBS’s application is by way of the Notice of Motion dated 22.02.2022 made under section 35 of the Arbitration Act and is supported by the affidavits of Peter Ole Saikah, EBS’s director, sworn on 22.02.2023 and 23.02.2023 respectively. It is opposed by Keneth through his replying affidavit sworn on 10.03.2023. Keneth’s application is through the Chamber Summons dated 10.03.2023 made under section 36 of the *Arbitration Act* and supported by Keneth’s affidavit sworn on 10.03.2023. It is opposed by EBS through the replying affidavit of Peter Ole Saikah sworn on 23.03.2023.
3. Before getting into the substance of the applications, I think it will be appropriate to contextualize them by setting out the background of facts leading up to the Award. The parties entered into an agreement on 15.01.2020 where Keneth contracted EBS to construct a residential house for him on the property Cismara/Oloisusu/253 for a contract sum of Kshs. 10,732,762.80 (“the Contract”). As



per the Contract, the date of practical completion was 12 months and Keneth was to make an advance payment of Kshs. 3,000,000.00.

4. In the course of the construction, a dispute of arose over the performance of the Contract where Keneth claimed that EBS had carried out works which were not in conformity with the agreed specification and in particular reduced the dimensions of the walls and beams of the residence, a change that resulted in a complete change to the character of the building as envisioned under the Contract. Keneth also lamented that there was very slow progress of the works. The parties exchanged correspondence and held meetings on the same but it appears that Keneth was not satisfied because on 30.01.2021, he wrote to EBS declaring a dispute, which ultimately led to the arbitration proceedings before the Arbitrator who heard the dispute and the rendered the Award.
5. In his claim before the Arbitrator, Keneth sought for inter alia a Refund of overpayment for incomplete works at Kshs. 2,975,211.36, Cost of rectifying defective works at Kshs. 585,301.67, Valuation costs at Kshs. 170,000.00 making a total award of Kshs. 3,730,513.03, Interest at 14% p.a. simple interest commencing 30.01.2021 until the award is fully paid and Costs of the arbitration.
6. EBS filed its defence and counterclaim where it averred that any structural works fully complied with the duly approved architectural and structural drawings with such deviations as were expressly authorised by Keneth including increase in size of the lounge into the side veranda, the provision of a 150mm high step-up from the lounge into the dining area which came up on the realization of the increased length of lounge (7.0metres), making it awkward to have a continuous floor level between the increased lounge and the dining area at a total length of 10.6metres, increased numbers, sizes and location of the windows to provide additional lighting, construction of a masonry septic tank instead of a plastic septic tank, increased size of the main entrance door from single to double leaves, suspended concrete slab over the dining room to create an open terrace, swapping of the first bedroom with the family room on the first floor and creating a door to open into the open terrace, the provision of a store under the staircase; and the provision of toughened glass guardrails in the master balcony and open terrace on the first floor, whose details and photos were to be provided by Keneth, which EBS stated were to be obtained from a neighbouring completed building owned by Keneth's friend, but which were never been obtained.
7. EBS stated that Keneth participated fully from inception of the project through to implementation during the period between December 2019 and January 2021 and that the issue was never about funds, therefore there was no need to engage a Quantity Surveyor for measurement and subsequent demand for a refund, as the project was proceeding even as EBS proposed the remedial works requested for and that in fact the periodic payment received from Keneth's wife based in America were on the recommendation of Keneth after satisfying himself of the progress, and workmanship. That the last few remittances from Keneth's wife on the recommendation of Keneth between 03.11.2020 and 16.12.2020 in 9 instalments of between Kshs. 100,000 and Kshs. 300,000 were to facilitate fabrication of doors and windows; and finishes to walls, floors and ceiling.
8. EBS stated that Keneth involved another contractor on the project and that Keneth totally rejected EBS's suggestions to carry out the minor remedial works and went ahead to purport to terminate the Contract and that the involvement of a competitor contractor, Mr. John Makari, escalated the dispute through suggestions to redesign the building to the extent of disregarding the earlier expressly agreed actions during the parties' site meeting. Thus, EBS stated that Keneth's conduct amounted to wrongful and illegal termination of the Contract as EBS had not declined to conduct the agreed remedial works before Keneth's purported termination of the Contract.



9. EBS denied that Keneth was entitled to the reliefs sought and insisted that it was Keneth that was in breach of the Contract and that he contributed to and failed to mitigate any loss, which loss was in any event denied, which he allegedly suffered. Therefore, EBS contended that Keneth's breach of contract had exposed, and continued to expose EBS to loss and damage in the amount of Kshs. 4,060,082.20 made up of Loss of Profit of Kshs. 2,683,192.20, Idle plant/Equipment totalling Kshs. 1,266,700.00 and Loss due to idle labour at Kshs. 110,220.00. EBS thus sought this amount together with interest and costs for defending the claim and prosecuting the counterclaim.
10. Having read the documentary evidence and having considered the submissions made by the parties' counsels together with witness statements, the Arbitrator held that there were four issues that required to be determined:
 1. Did EBS make any alterations and/or modifications to the design specification and quantity of work?
 2. Was Keneth justified in terminating the Contract?
 3. Was Keneth entitled to an award of Kshs. 3,730,513.03 as sought under his statement of claim?
 4. Was EBS entitled to an award of Kshs. 4,060,082.20 as sought under the counterclaim?
11. The Arbitrator found that EBS made several variations both in design modification and quantity of work and that some of the variations were authorised by Keneth whereas others were neither authorised nor sanctioned as required under the terms of the Contract. The Arbitrator further found that there was lack of trust on the part of EBS as it had refused to take Keneth's calls, the Quantity Surveyor's calls and their other representatives and that EBS had breached Clause 6 of the Contract for carrying out variations without authority of Keneth. As such, the Arbitrator held that Keneth was justified to terminate the Contract.
12. Since the Arbitrator had answered the first two issues in the affirmative, he stated that Keneth was substantially entitled to some of the reliefs sought under the Statement of Claim and that the calculation of the claim was based on the Arbitrator's assessment of work done as at 22.12.2021 when the Tribunal visited the site. He thus concluded that a summary of valuation of the works was Kshs. 3,524,828.40 comprised of Builders work at Kshs. 2,649,313.10, Eternal works at Kshs. 625,800.00, Sub-contracts at Kshs. 206,675.00, Materials on site at Kshs. 300,020.00. On EBS's counterclaim, the Arbitrator found that it had received several advance payments totalling Kshs. 7,000,000.00 and that only part of the resources at EBS's exposure was utilised. Thus, the Arbitrator rejected the claim for loss of profit on the total contract sum and for which almost 70% was paid. However, the Arbitrator accepted that some of the plant and equipment and labour were to be utilised on site and thus the Arbitrator concluded that EBS was entitled to a sum of Kshs. 186,900.00 comprised of idle poker vibrator at Kshs. 4,500.00, U-jack scaffolding at Kshs. 102,400.00 and idle labour at Kshs. 80,000.00.
13. The Arbitrator thus determined that the gross valuation was Kshs. 3,847,298.80 which was equivalent to 36% of the Contract sum comprised of the net valuation at Kshs. 3,524,828.40, preliminaries at Kshs. 135,570.40 and allowable claims under the counterclaim at Kshs. 186,900.00. The Arbitrator then subtracted this amount from the total amount paid as advance payment and held that the refund due to Keneth was Kshs. 3,152,701.20. The Arbitrator further accepted that the Quantity Surveyor's fees of Kshs. 170,000.00 was to be shared equally between the parties at Kshs. 85,000.00 each bringing the refund due to Keneth at Kshs. 3,237,701.20. Interest was then calculated at a rate of 13.5% p.a from 06.07.2021 and ending 06.04.2022 and was calculated to Kshs. 327,817.25 bringing the total amount due to Keneth at Kshs. 3,565,518.45 and now making up the Award as I have highlighted earlier on.



Analysis and Determination

14. As stated, the court is being called to determine whether to set aside or enforce the Award. I propose to first deal with the application to set aside before determining the one on enforcement, if at all.
15. EBS contends that the Award was made without affording it full, fair and reasonable opportunity to present its case, that the Award does not deal with all the issues raised by the parties, that it goes beyond the Arbitrator's jurisdiction, that it is uncertain and does not comply with the substantive requirements of completeness, coherence, certainty, finality, consistency, cogency and enforceability, that it is inconsistent with public policy since it was inconsistent with the Constitution and other laws of Kenya, inimical to the national interests of Kenya and contrary to justice and morality and that it was made following some irregularities in the proceedings.
16. Section 35(2) of the Arbitration Act provides the grounds upon which a court can set aside an award as follows:
 35. Application for setting aside arbitral award
 - (1)
 - (2) 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.

17. On the ground that the Arbitrator did not accord the parties an opportunity to present their case, EBS avers that the Arbitrator decided the case on points not put to the parties, specifically, the Arbitrator unilaterally sat as an expert in the Arbitration proceedings without allowing the parties an opportunity to address him on his findings in that self-appointed capacity, particularly with regard to his observations in Paragraph D 18.00 and his own valuations in Paragraphs F and G of the Award the basis of which the Arbitrator did not provide. That the Arbitrator relied on uncited sources other than those put to him by the parties in respect of which he did not ask the parties to submit their respective positions with regard to the new references.
18. I have gone through the Award and depositions of the parties which had annexures of correspondences between the parties themselves and the Arbitrator. It is not in dispute that the Arbitrator and the parties held a number of meetings on site including one that was held on 22.12.2021. It is this meeting that the Arbitrator makes reference to in arriving at the observations he makes in Paragraph D 18.00 and assessments at Paragraph 19.00. In a prior meeting held on 30th November 2021 announcing the site visit meeting of 22.12.2021, the parties were directed to file submissions. In the subsequent meeting held on site on 18.02.2022, the minutes of that meeting indicate that the meeting was, “to assess the works under dispute in order to help the Arbitrator to determine the accuracy of some of the written submissions.” The minutes further indicate that the Arbitrator was taken through the works by the parties’ representatives which items included Floor to ceiling heights, depth of beams, variations, extent of the 200mm thick walls v 150mm walls and materials on site. The Arbitrator then directed the parties to file their final written submissions.
19. From the above, it is clear that the parties were given opportunities to present their cases on all the items that required clarification both orally on site and through written submissions. I therefore reject EBS’s contention that the Arbitrator made observations and came to conclusions that were completely foreign to the parties when they made presentations and submissions on the very same issues. It is therefore incorrect for EBS to state that it was never accorded an opportunity to present and submit on its position on the issues before the Arbitrator as the record indicates otherwise. The Arbitrator’s observation and conclusions were borne out of his appreciation of the positions taken by the parties on the various items, which is within his jurisdiction as an arbitral tribunal. This ground by EBS fails.
20. EBS also stated that the Arbitrator completely failed to consider its Further Submissions dated 10th May 2022 in respect of which he had already acknowledged receipt. That the Arbitrator stated in the Award that the last submissions filed were Keneth’s submissions dated 06.04.2022 thereby denying EBS a full opportunity to ventilate its issues and consequently the proceedings can only be considered to be irregular and that Paras. C 11.00 and G (c) of the Award confirm that the Arbitrator made the Award without considering EBS’s Further Submissions dated 10.05.2022 which had been admitted to the record and which he had promised to consider.
21. Going through the Award, it is true that the Arbitrator stated that it had only received Keneth’s final written submission dated 25.02.2022, EBS’s submissions dated 15.03.2022 and Keneth’s reply to the Respondent’s written submissions dated 04.04.2022 and that the last submissions were received by him on 06.04.2022. However, this is against the position as per his correspondence of 09.05.2022 where he accepted EBS’s request of filing further submissions and EBS’s counsel’s email of 10.05.2022 indicates that the submissions were forwarded to the Arbitrator. It is therefore obvious that the Arbitrator did not consider these submissions in preparing the Award in as much as he received them. There is no mention of the same in the Award which asserts this position and it is not that the



Arbitrator considered these submissions but then exercised his discretion by not taking them into account in the Award. He simply did not make any reference or consideration to them at all.

22. In *Brian Martin Francis & 5 others v Samuel Thenya Maina & Martin Munyu (Arbitrator)* [2021] eKLR Mativo J., (as he was then) stated that a court/tribunal cannot afford to be seen to be selective in determining what submissions to consider and that it was imperative for the trial court/tribunal to evaluate all the evidence and the submissions presented by the parties. He went on to state as follows:

This courts duty is to determine whether the trial court/tribunal applied the law or applicable legal principles correctly to the facts in coming to its decision. In other words, in order to determine the merit of the applicants' contention, this court must consider their submissions before the tribunal, and, juxtapose it against the judgment/ruling, and finally determine whether there is any basis for interfering with the judgment/ruling. If this court finds that a particular fact or submission is so material that it should have been dealt with in the judgment/ruling, but such fact or submission is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court/tribunal. This court must then consider whether either the said misdirection, viewed on its own or cumulatively together with any other misdirection, is so material as to affect the judgment/ruling, in the sense that it justifies interference by this court.

23. I find the omission by the Arbitrator to consider EBS's further submissions amounts to a violation of the right to be heard in a fair manner because in making the request to file the further submissions, EBS informed the Arbitrator that Keneth had introduced new material and authorities which it needed to respond to. This averment ought to have been given some weight and the Arbitrator ought to have at least gone through the same to determine whether there was such new material, and whether it was capable of altering the direction of the Award to the disadvantage of EBS.
24. Having failed to consider EBS's submissions, it follows that their right to a fair hearing was violated and that this violation is contrary to public policy and the rules of natural justice. This alone is sufficient to set aside the Award and there is no reason to consider the other grounds as section 35(2) of the *Arbitration Act* is couched in disjunctive terms meaning that an applicant is only required to satisfy one of the said grounds to enable the court set aside an award.

Disposition

25. I therefore find merit in the Notice of Motion dated 22.02.2023 on terms that the Award published on 30.11.2022 by Charles J. Mwaura, QS ("the Arbitrator") is set aside. Consequently, Chamber Summons dated 10th March 2023 seeking to enforce the Award is dismissed. Each party shall bear its own costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2024.

A. MABEYA

JUDGE

