REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 50 OF 2020

GODFREY MWAMPEMBWA.....APPLICANT

VERSUS

NATION MEDIA GROUP LIMITED.....RESPONDENT

JUDGMENT

1. Serving before Court is a Chamber Summons application brought under Sections 35(1) and (2) (b) (ii) and Section 37 of the Arbitration Act, 1995 and Rule 7 of the Arbitration Rules, 1997 praying for an order in the following terms: -

(a) That the Honourable Court be pleased to set aside the Arbitral Award in its entirety made and published by Professor Wambua Musili on 10th January, 2020 in the matter of an Arbitration between **GODFREY MWAMPEMBWA *and* NATION MEDIA GROUP LIMITED.**

(b) That the costs of this application be provided for: -

2. The application is premised on grounds 1 to 7 set out on the face of the Chamber summons and buttressed in the supporting Affidavit of the applicant attached thereto.

3. The gravamen of the application is that the applicant filed a claim in the Employment and Labour Relations Court under the reference Employment and Labour Relations Cause No. 461 of 2017 alleging unlawful and unfair dismissal from employment by the Respondent Nation Media Group Limited.

4. The Claimant sought the following reliefs in the claim: -

(a) **THAT** the Claimant's termination of service be and is hereby declared wrongful, unlawful and/or unfair.

(b) **THAT** the Claimant be paid one month's salary in lieu of notice as per his terms of employment **(Kshs.437,850).**

(c) **THAT** the Claimant be paid an equivalent of one year's pay in accordance with Section 49(1) (c) of the Employment Act, 2007 under remedies for unfair termination and wrongful dismissal **(Kshs.437,850 x 12=Kshs.5,254,200) ÷**

(d) **THAT** the Claimant be paid one month's salary for each completed year of service (24 years) **(Kshs.437,850 x 24 = Kshs.10,508,400).**

(e) **THAT** the Claimant be paid for 28 days leave earned but not taken up to 4th February, 2016 and counting (Ksh. 5,254,200 ÷ 360) x 28 = Ksh. 408,660).

(f) Accrued Employer pension contribution in accordance with the law and within the period prescribed by the rules and regulations on retirement benefits.

(g) Consequential loss to be quantified.

(h) That the Respondent do issue the Claimant with a Certificate of Service, so far.

(i) Interest at commercial rates on prayers b, c, d, e, and g above from the date of filing the suit till payment in full.

(j) Costs of the suit and interest thereon.

5. That pursuant to the Arbitration Clause contained at clause 8.6 of the Agreement between the parties dated 1st July, 2014, and upon consent of the parties dated 21st December, 2017 and filed in Court on 17th January, 2018, the dispute in Nairobi Employment and Labour Relation Court Cause NO. 461 of 2017 was referred to Arbitration.

6. That the Chairman of the Chartered Institute of Arbitrations appointed the Hon. Arbitrator, Professor Wambua Musili as the sole Arbitrator and upon the subsequent concurrence of the parties, the Honourable Arbitrator accepted his appointment to arbitrate over the Dispute by way of a letter dated 22nd January, 2019.

7. That pursuant to directions issued to the parties during the second preliminary meeting held on 20th February, 2019, the applicant through his advocates filed the Statement of Claim, witness statement and list and Bundle of documents on 6th March 2019.

8. The respondent thereafter filed its statement of response on 28th March, 2019 and thereafter the witness statement of its former Head of Legal and Training, Mr. Sekou Owino on 27th May, 2019.

9. That pleadings closed with the filling of the parties' Agreed issues for Determination which was filed before the Arbitration on 3rd January, 2019.

10. That the parties attended the arbitral proceedings on 4th July, 2019 when the parties testified and closed their respective cases subsequently, the Honourable Tribunal directed the parties to file their submissions which were duly filed on 2nd August, 2019, respectively.

11. The Arbitrator retreated to consider and determine the dispute and delivered his Award to the parties on 10th January, 2020 in which its determination is as follows: -

i. That the claimant failed to establish that the agreements for the years 2002 to 2014 have any relevance to the present dispute between the parties as dispute is wholly governed by the agreement dated 1st July, 2014.

ii. That the claimant failed to establish that he was an employee of the Respondent as he was engaged by the Respondent as an independent contractor.

iii. That the claimant failed to establish that there was any wrongful termination of the Agreement made on 1st July, 2014.

iv. That the claimant failed to establish that he is entitled to any of the benefits or compensation which would accrue to an employee as sought in the statement of claim.

v. That the claimant has established that he is entitled to leave from duty earned but not taken but has failed to establish that he is entitled to any other relief or damages claimed for the consequential loss of employment and for interest thereof at commercial rates.

12. The applicant avers that the Arbitrator in holding that the parole evidence rule does not allow the introduction of extrinsic evidence to alter or vary the terms of a written contract agreed by the parties to be a complete record of the entire contract failed to consider the extrinsic representations between the parties and that the resultant award does not take into account the exceptions to the Parole Evidence Rule which does not exclude representations and conduct after a contract is formed, especially when such representations are offered to establish an illegality or fraud.

13. The Applicant avers that the agreement of 1st July, 2014, interpreted in the absence of all preceding agreements, is a sham contract as the same was expressly camouflaged to disguise the employment relationship between the parties with intention of nullifying or attenuating the protections afforded under the Employment Act, 2007.

14. That the award in clothing the Agreement of 1st July, 2014 with legitimacy, notwithstanding its patent attempt to conceal and distort the employment relationship between the parties by cloaking it as a contract for service in which the applicant enjoys less labour protection, has an overarching Constitutional implication touching on fair labour practices as enshrined under Article 41 of the Constitution.

15. The respondent on its part states that an arbitral award on the grounds set out under section 35 of the Arbitration Act can only go to the High Court and that the Honourable Court lacks jurisdiction to hear and determine the application as contemplated by Article 162(2) of the Constitution as read with section 12 of the Employment Act. The respondent maintains that issues enumerated by the applicant in the application goes to the merit of the decision/award and so falls outside the purview of grounds envisaged by Section 35 of the Arbitration Act 1995.

16. The Respondent cites the Supreme Court's decision in Application No.2 of 2012; **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where it is said the Supreme Court of Kenya held that a *Court's jurisdiction flows from either the Constitution or legislation or both: '(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.'*

17. The Respondent also submits that section 12(1)(a) of the Employment and Labour Relations Court Act only grants this Honourable Court the jurisdiction to determine disputes relating to or arising out of employment between an employer and an employee and cites the **Cause No. 1107 of 2017; In Touch Sports Limited v Kenya Rugby Union [2020] eKLR,** where at Page 4 of 11 the Employment and Labour Relations Court declined to determine a dispute in which an employment relationship was not established as follows: "*The Claimant and the Respondent did not have an employer/employee relationship. The relationship did not also qualify as one between a trade union and an employer. 24. Consequently, the Court finds that the jurisdiction of the Court in respect of the Claimant's cause of action cannot be founded upon the Employment and Labour Relations Court Act. The Claimant and the Respondent did not have an employer/employee relationship. The relationship between the Claimant and the Respondent was not founded upon a contract of service nor was it anchored on a dispute arising under a contract of service. In line with the decision of the* **Court of Appeal in National Bank of Kenya Ltd v Leonard Gethoi Kamweti (2019)** *eKLR, the Court finds that it has no jurisdiction over the dispute herein."*

18. The Respondent submits that following the Arbitrator's finding that there was no employment relationship between the Applicant and the Respondent, then it follows that this Honourable Court similarly lacks the jurisdiction to entertain the Application under section 12(1)(a) of the Employment and Labour Relations Court Act.

19. The Court frames the flowing issues as falling for determination: -

(i) Whether the Employment & Labour Relations Court Lacks jurisdiction to entertain the instant Application.

(Ii) If answer to (1) above is in the negative, whether the award violated the exception to Parole rule and Constitutional imperatives under Article 41 of the Constitution and therefore falls to be set aside under Section 35(2) (b)(ii) of the Arbitration Act, 1995 for violating Kenya Policy.

(iii) What remedies if at all are available to the applicant?

20. The Court proceeds to answer the questions posed above seriatim.

In **OWNERS of MOTOR VESSEL 'LILLIAN S' Vs CALTEX OIL (KENYA) LIMITED [1989] KLR 1;** It was held that:-

> **"By jurisdiction it is meant the authority which a court has to decide the matters litigated before or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both characteristics**

21. In **Miscellaneous Application No 559 of 2016, CMC Aviation Limited, Trident Enterprises Limited –vs- Anastacio D Thomas** *Fred Ochieng J. observed that: -*

> **'There is no doubt that the Employment and Labour Relations Court was established by Parliament, pursuant to the Constitutional imperative that a court, with the status of the High Court be established to hear and determine disputes relating to employment and labour relations…..I am also alive to the fact that the Arbitration Act in Kenya was enacted in 1995. At that time, the Courts with the status of the High Court did not exist. Therefore, it cannot be argued that by specifying the High Court as the court to which parties could have recourse against arbitral awards, the Arbitration Act intended to, inter alia, exclude the courts with the status of the High Court.' In my considered view, the fact that the dispute was first registered at the Industrial Court, as a claim by an employee who believed that his employers had dismissed him unfairly or had unfairly terminated his services, is significant. I so find because the logical step, after the Arbitrator had delivered his final award, was to revert to the forum before which the dispute was first lodged. And that is what the respondent did, when he filed the application for the enforcement of the award'.**

22. In **United States International University –vs- Attorney General Nairobi Petition No. 170 of 2012(eKLR),** Majanja J in the High Court stated that: -

> **"The Industrial Court contemplated under Article 162(2) was intended to be independent of the High Court. It is for this reason that it was bestowed the status of the High Court. Indeed, the Final Report of the COE affirms that giving Parliament power to establish the Industrial Court with the status of the High Court was aimed at addressing the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court. It was the intention of the drafters of the Constitution to give the Industrial Court, though a specialized court in nature, full independence from the High Court…. The Constitution does not define what "status" means but in my view it implies that the court so created must have the same juridical incidents as the High Court. The jurisdiction bestowed upon the High Court under Article 165(3) is not absolute but 'subject to clause (5)' whose provisions forbid the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the specialized court established under Article 162(2). This status is to be determined from a textual consideration of the provisions governing the judicature. First, under Article 162, the courts of status of the High Court are considered superior courts save that their functions are to be defined by Parliament rather than the Constitution itself. Second, Part 2 of Chapter Ten titled "Superior Courts" sets out the jurisdiction of the Superior courts, that is, the Supreme Court, the Court of Appeal and the High Court. Though the Courts of status of the High Court are not defined their jurisdiction is dealt with in negative terms under Article 165. The High Court shall not exercise jurisdiction in matters reserved for status courts contemplated under Article 162(2). This implies that the High Court cannot deal with matters set out in section 12 of the Industrial Court Act, 2011. Third, the High Court does not have supervisory jurisdiction of superior courts, which includes courts with the status of the High Court."**

23. The Court in answer to issue (a) agrees with the Applicant that the issue of jurisdiction of the ELRC Court in relation to the setting aside of an award under section 35 of the Act is well settled, and returns that the Court in light of Article 162(2) of the Constitution, Section 12 of the Employment & Labour Relations Act, 2012 as well as the authorities foreshadowed, the Court has the jurisdiction to handle applications from an arbitral award. The Application for the most part concerns an employment contract, and this is the Court whose intervention was first sought in relation to the settlement of the current dispute.

24. The applicant has submitted that Section 35 of the Arbitration Act 1995 gives this Court the leeway to intervene in this matter in that it provides:-

> **"(2) An Arbitral award may be set aside by the High Court only if: -**
>
> **(a) .....**
>
> **(b) the High Court finds that-**
>
> **(i)…….**
>
> **(ii) the award is in conflict with the public policy of Kenya"**

25. The applicant submits that there is no all- encompassing definition to what amounts to a contravention of Public Policy. The applicant however, submits that similarities may be deduced from the determination by the Courts for instance, in that it relates to illegality or patent illegality and more generally, when the upholding of the award would ***"shock the conscience" or is "clearly injurious to the public good."***

26. The applicant cites the case of **Christ of All Nations –vs- Apollo Insurance Company Limited [2002] 2 E.A. 366** in which it was held *inter alia*: -

> **"Public Policy is a broad concept incapable of precise definition."**

27. In **Glencore Grain Limited –vs- TSS Grain Millers [2002] I KLR 606,** the Court held that, ***"[a] against Public Policy would also include: -***

> **Contracts or contractual acts or awards which would offend the conceptions of justice in such a manner that enforcement would therefore stand to be offensive."**

28. ***Black's Law Dictionary Tenth Edition*** *defines Public Policy as follows:-*

> **"The collective rules, Principles or approaches to problems that affect the commonwealth or *(esp.)* promote the general good; ..... principles and standards regarded by the legislature or by the Courts as being of fundamental concern to the state and the whole of society."**

29. *The dictionary further provides:-*

> ***"Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy."***

30. The applicant submits that the arbitral award creates an explicit conflict with other laws and legal precedents thus violating the public policy of Kenya. The applicant accordingly contends that the Arbitral award does not augur with the national policy for the protection of workers as it not only interferes with but further disguises the true relationship between the parties.

31. The Applicant further submits that complicated working relationships can only be adequately discerned by 'sifting substance from form' The Applicant cites the South African authority of **South African Broadcasting Corporation versus Mackenzi (1998),** where the South African Labour Appeal Court was of the opinion that the legal relationship between the parties must be deduced primarily from the construction of the contract which they concluded and from the realities of the relationship between them and not simply what they chose to describe it. So, the Court has to give effect to what the relationship really is rather than what it purports to be.

32. Reliance was also placed on the English Employment Tribunal authority in **MS M Dewhurst versus City sprint UK LTD ET/220251/2016** where it was held that '*It matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee….Even where the contractual relationship has been allowed to continue for many years without question on either side, once the courts have been asked to determine the question of status they have to do so., on the basis of the true legal position regardless of what the parties have been content to accept over the years. An employee cannot be stopped from contending that he is an employee merely because he has been content to accept self-employed status for some years.*

33. The Applicant also relied on, inter alia the authority of **Edward Ngarega Gacheru versus Nation Media Group Limited (2019) Eklr** for the proposition that 'that *the existence of a contract of employment is a matter of fact as it is a matter of law and once the salient features of the relationship are established, it is irrelevant that parties expressly or impliedly agreed to the contrary…. The parties cannot agree and contract beyond matters within their freedom to contract such as the meaning prescribed by the law. The Court will therefore look at all the*

circumstances of the contract, its implementation and the conduct of the parties to give full meaning to the intentions and the nature of the emerging relationship between the parties to the contract.

34. The Applicant relied on, among others, the authority of **Savings and Loan Kenya Limited versus Mayfair Holdings Limited (2012) e KLR** to contend that the exceptions to Parole Evidence Rule was not duly considered by the arbitrator. The applicant further submitted that the disguised contract which relegated the applicant to a mere contractor for service contrary to the reality of the relationship between the parties amounted to an unfair labour practice in violation of Article 41 of the Constitution which matter the Arbitrator failed to appreciate and consider.

35. The question to be answered therefore is whether the determination by the arbitrator offends Kenyan Public Policy, endorses a patent unfair practice in violation of Article 41 of the Constitution and is thus so outrageous as to offend the concepts of justice in a gross manner.

36. The applicant set out the contractual relationship between the parties herein as having commenced by a letter of employment dated 20th July, 1992 in which the applicant was offered employment as a Cartoonist on an open- ended contract and on a monthly salary and other benefits. The applicant was placed on 3 months' probation which he served and continued in employment.

37. On 8th May, 2002, the applicant entered into another arrangement with the respondent under an '***Agreement for Services'*** commencing from 1st April, 2002. In terms thereof, the applicant was still to remain on a monthly salary of Kshs 120,000 per month which salary was described '***as an annual fee'*** payable in equal, monthly instalments.

38. The terms of the assignment are contained in the written agreement.

39. The parties signed a further Agreement for Services dated 1st June, 2003 under which the terms of the Applicant changed. In the terms thereof, the applicant was engaged as Editorial Cartoonist by the respondent and the respondent was to pay the applicant Ksh 5,000 per cartoon less tax.

40. The payment was to be made at the end of every month against an invoice raised by the Editorial Cartoonist**.**

41. The terms and conditions of employment of the applicant changed under various fixed term contracts. In the first contract dated the 20th July, 1992 for instance, he is expressly referred to as an employee of the Respondent Company. The Agreements/contracts culminated into the Agreement dated 1st July, 2014, titled "***Agreement for a newspaper Editorial Cartoonist.''***

42. In terms thereof, the Applicant was engaged as '***Editorial Cartoonist***, with duties set out under Clause 1.2, 1.3 and 1.4 of the agreement.

43. In terms of Clause 2.1, the term of the contract was from 1st July, 2014, until 31st March, 2015, and was terminable in terms of Clause 6 by giving one month written notice.

44. In terms of Clause 7, the applicant was described as follows:-

> **"7.1 "*The Editorial Cartoonist shall at all times act as an Independent contractor and not as a partner to or an employee of the company."***

45. Clause 4 of the Agreement, however, provides that the Editorial Cartoonist warrants as follows;

> 4(c) **He shall not, during the term of this Agreement render similar or identical services to any other person or body whosoever which is in competition with the Company.**
>
> 4(d**) He shall report to the Company's Group Managing Editor and adhere to and comply with the directives and guidelines issued by the Group Managing Editor from time in performance of his tasks under this agreement.**
>
> 4(e) **He shall at all times during this agreement comply with such Rules, Regulations, Guidelines, and ethics as govern the task contemplated under this Agreement including and not limited to the Nation Media Group Editorial Policy.**

46. The applicant was paid Ksh 437,850 '***Standard Fee'*** for every calendar month that the applicant has performed his duties. The last contract expired on the 31st March, 2015. There was subsequently no formal agreement written and signed between the parties, but vide a letter dated the March 17, 2015, he was granted leave which was to end on February 2016 and was expected to adhere to the terms of service as contained in the contract. The letter reads as follows;

> "*Dear Godfrey,*
>
> **RE: SABBATICAL LEAVE**
>
> *I write to advise you that your application for a year's sabbatical leave has been approved and you can proceed effective March 19th 2015. You will be released on full pay and terms as contained in your contract. Your leave will thus end on February 28th 2016.*

During your leave you will be expected to adhere broadly to the terms of service as contained in the contract. Specifically, we expect that you will not work for any other newspaper in the same capacity and will at all times behave with the decorum expected from a staff of the Nation Media Group.

I take this opportunity to wish you well during the sabbatical and look forward to seeing you again in February when your contract will be reviewed.

Yours Sincerely,

Tom Mshindi."

47. The arbitrator in addition to other findings of fact held that the agreement dated 1st July, 2014, was extended for a further one -year up to 28th February, 2016 pursuant to the respondent's letter dated 17th March, 2015 mentioned above and applied the doctrine of estoppel against the respondent as opposed to the claimant in finding that indeed the contract for service dated 1st July, 2014 was impliedly extended by the said letter of 17th March, 2015 for a further term of one year which ended on 28th February, 2016.

48. The arbitrator further found that, the claimant was served with a termination notice on 4th February, 2016, one month prior to the expiry of his sabbatical leave in compliance with Clause 6 of the contract of service.

49. The applicant in short submits that the Arbitrator by failing to look at the totality of the whole working arrangements between him and the respondent Company materially misconstrued the true working relationship between him and the respondent leading to his mis-characterization as an independent contractor when in real sense he should have been employee.

50. The applicant concludes therefore that the Arbitrator was unable to avail the applicant the Statutory protections/remedies following what the applicant deemed to be unfair termination relating to the previous work he had done whilst working for the respondent. This is the claim captured in the demand letter and in the Statement of Claim which unfortunately the Arbitrator failed to address in his Award. This, the applicant submits is against Public policy within the meaning of section 35 (2) (b)(ii).

51. The Applicant submits that exceptions to the parole evidence ought to have been considered in making the decision as to whether or not he was an employee. The essence of the **Parole Evidence Rule** under section **97 as read with section 98 of the Evidence Act**. is that:-

"[1] ***when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions.***

52. **Section 98** provides the exceptions to the rule as follows:-

"(i) '*any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;*

(ii) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph of this proviso applies, the court shall have regard to the degree of formality of the document;

(iii) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved;

(iv) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents;

(v) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(vi) any fact may be proved which shows in what manner the language of a document is related to existing facts."

53. The respondent filed written submissions in which it addressed the demerits of the application at length.

54. The respondent relied on the decision in **Misc. Application No. 454 of 2019, IEBC –vs- John Omollo Nyakongo (t/a) H.R. Ganjee & Sons [2021) eKLR** in which the Court in determining whether the award in question was in conflict with the public policy in Kenya held as follows: -

"29..... **I chose to be persuaded by the decision of Onyancha J. in Glencore Grain Limited –vs- TSS Grain Millers [2002] I KLR 606, for the proposition that 'for an arbitral award to be against the public policy of Kenya, it must be shown that it is**

immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or value in the Kenyan society. The word illegal would hold a wider meaning than just against the law. It would include contracts or acts that are void. "Against Public Policy." Would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement therefore would stand to be offensive.

55. The respondent further relied on the High Court decision in **Misc. Application No. E1301 of 2020 – Dinesh Construction Limited & Another –vs- Aircon Electronic Services (Nairobi) Limited [2021] eKLR**, where it was held: -

"30. Although framed broadly, public policy as a ground for setting aside an arbitral award must be narrow in scope and assertion that an award is contrary to the public policy of Kenya cannot be vague and generalized. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and then must show which part of the award conflicts with that policy."

56. The respondent further cited the case of **Christ for all Nations (Supra**) where Ringera, J. held as follows:-

"[1] In my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction or a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the Public Policy of Kenya. On the contrary the Public Policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."

57. In **Civil Application No. 57 of 2006, Kenya Shell Limited –vs- Kobil Petroleum Limited [2006] eKLR**, the Court of Appeal held as follows:-

"The matter before us has of course nothing to do with Section 35(2) (b) (ii) *(Supra).* **.... We think as a matter of Public Policy, it is in the public interest that there should be an end to litigation and the Arbitration Act, under which the proceedings in this matter were conducted underscores that policy."**

58 The respondent further cited the decision in **Petition No. 2 of 2012; Synergy Industrial Credit Limited – Cape Holdings Limited [2019] eKLR** in which the supreme Court states as follows: -

"64. Section 10 of our Arbitration Act is meant to ensure that the judicial process will only be resorted to where the Act so provides and only within the parameters provided. For example, once an arbitrator has made an award, the Act provides that the only way of challenging the award is through an application for setting it aside and only on the grounds narrowly subscribed."

59. The respondent further submitted citing **Misc. Civil Application No. 216 of 2016 Mahan Limited –vs- Villa Cares Limited [2019] eKLR,** that the applicant only raises grounds of Appeal which are not permissible in an application to set aside under Section 35(2) (b) (ii) of the Arbitration Act, 1995.

60 *The High Court held thus: -*

"6.... I have understood the Applicant to be arguing that the Arbitrator misconstrued the evidence and law before her. That is an argument that would typically be an argument made on appeal.

8. ***One of the grounds that is most abused is that an award is against public policy....."***

61. In considering these submissions, this Court cites the provisions of the Arbitration Act, 1995 as follows: -

62. ***Section 10 of the Arbitration Act, 1995 provides: -***

"***Except as provided in this Act, no Court shall intervene in matters governed by this Act."***

Section 32A further provides: -

"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it and no recourse is available against the award otherwise than in the manner provided by this Act."

63. Section 35(1) provides recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

64. This application is brought under sub-section 35 (2) (b) (ii) of the Arbitration Act 1995 as earlier stated.

65. An Appeal however may be brought against an arbitral award under Section 39 on questions of law where the parties have agreed. The present matter is therefore an application under Section 35 of the Act and not an Appeal under Section 39 on questions of Law arising.

66. This is the context in which the Court proceeds to determine the second issue in this matter.

Determination

67. The agreement between the parties dated 1st July, 2014, had an arbitration clause which read: -

> "***This Agreement shall be governed and construed in accordance with the laws of Kenya and any disputes between the parties in relation to this Agreement shall be submitted to a single Arbitrator appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch"***

68. When the suit was filed before Employment and Labour Relations Court by the claimant, the parties entered into a consent which was recorded and adopted by the Court on 21st December, 2017, pursuant to which the matter was referred to arbitration.

69. The consent attached to the application at page 6 reads: -

> ***"We the undersigned would be grateful if the following orders could be recorded in the above matter***.
>
> ***"By consent: -***
>
> (1) The matter herein be referred to arbitration.
>
> (2) The Chamber Summons application dated 17th July, 2017 be and is hereby marked as withdrawn with no orders as to costs.
>
> (3) The Notice of Motion application dated 31st May, 2017 be and is hereby marked as withdrawn with no orders as to costs.
>
> We undertake to pay your requisite charges.
>
> ***Yours faithfully,***
>
> Kemboy Law Advocates for the claimant
>
> Iseme, Kamau and Maema Advocates for the Respondent."

70. This consent was pursuant to clause 8.6 of the Agreement between the parties dated 1st July 2014.

71. The parties did not contemplate in the Arbitration clause and in the consent, that issues of law arising under Section 39 would be subject of an appeal.

72. Whereas an application under Section 35 to set aside does not require an agreement, any challenge of the arbitral award on matters of law must be based on a prior agreement by the parties. The Court must therefore be wary of a party who then challenges the arbitral award on appealable issues of law disguised as an application to set aside under Section 35 (2) (b) (ii) of the Arbitration Act, 1995.

73. Upon a carefully analysis of the contents of this application, *vis a avis* the finding by the arbitrator, the inevitable conclusion is that the applicant is faulting the decision by the arbitrator on pure points of law, which would otherwise be raised on appeal under Section 39 of the Arbitration Act, 1995 and only upon prior written agreement by the parties.

74. The Arbitrator at page 50 of the award while analyzing the submissions by the parties on the admissibility of parole evidence stated: -

> "**the parole evidence rule has survived since it was first enunciated in the nineteenth century and still applies to modern day contracts. The principle has been reinstated by the courts in many ways one of which is to exclude the Courts and tribunals from rewriting contracts entered into by the parties. This fact of the Principle was well stated by** Marete J. in James Heather Haya –vs- African Medical Research Foundation (AMREF) (2014) eKLR when he stated that: -
>
> ***"it is not the duty of this Court to redraw agreements by parties. The Court can only come in to facilitate an interpretation and implementation of these contracts and no more"***

75. The Applicant contends that validating a contract which relegated the Applicant to the position of an independent contractor contrary to the realities of the relationship between the parties offends the conceptions of justice in such a manner that enforcement would therefore stand to be offensive.

76. The arbitrator concluded referring to the case of **Kangaro –vs- Kenya Commercial Bank Limited and Another**: -

> **"I am not persuaded by the claimant's contention that he was an employee of the Respondent. The totality of the evidence adduced supports the inevitable conclusion that the claimant was an independent contractor and not an employee of the Respondent. It is however, worth noting that the relationship between the parties was peculiar in many ways. Some of the benefits extended to the claimant by the Respondent** *(for example, fully paid sabbatical leave)* **were akin to benefits enjoyed by employees rather than by independent contractors."**

77. The Arbitrator cited further peculiar features of the arrangement between the parties to have included, the fact that the claimant had to issue an invoice for the Respondent to pay the agreed monthly standard fees; the fact that the Respondent made income tax deductions and yet the Agreement clearly provided that no such deductions were to be made; the fact that the claimant was entitled to 14 days relief from work after every six months of service and the fact that the claimant was restricted from working for other organizations while he continued to serve the Respondent.

78. It is on the above premises that the applicant urges this Court that by holding that the applicant was not an employee and therefore could not enjoy the statutory rights an ordinary employee is entitled to under part V of the Employment Act, 2007, and the Constitutional protection against unfair labour practice accorded the applicant under Article 41 of the Constitution the award was an outrage against public policy and a scar on the conscience of the people of Kenya and so this honourable Court should find so and set it aside.

79. We do find sympathy with some of the arguments made by the applicant regarding the peculiar continuous relationship the applicant had with the respondent over a period of many years from 2nd June, 1992 up to the date the relationship ended on 28th February, 2016 but are equally not persuaded that the decision by the arbitrator on the facts and law placed before him was in any way an outrage against Public Policy.

80. At best, the attack of the decision by the applicant is on the finding of mixed facts and law which would otherwise have been challenged on appeal properly filed in terms of Section 39 of the Arbitration Act, 1995. This application is in many ways clothed as such an appeal and this Court decline's the invitation to apply such pretensions in an application under Section 35 (2) (b) (ii) of the Arbitration Act. 1995.

81. If we were to entertain such invitation, that to the contrary would be an affront on the Kenyan and international policy that arbitral awards are an expeditious; economical, and final method of resolving disputes by the parties who willfully submit to the jurisdiction of an arbitrator, like the parties herein did.

82. Accordingly, we find that the application lacks merit and is dismissed. In consideration of the very long and fruitful relationship between the parties, the Court considers this an appropriate case for each party to meet their own costs of the case.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 21ST DAY OF OCTOBER, 2021.

MATHEWS N. NDUMA

JUDGE

APPEARANCES

MRS OKINA FOR CLAIMANT

M/S WERU FOR THE RESPONDENT

EKALE –COURT ASSISTANT