



**Pili Management Consultants Limited v China Fushun No 1 Building  
Engineering Company Ltd (Miscellaneous Civil Application E470 of 2022)  
[2023] KEHC 3758 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3758 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E470 OF 2022**

**EC MWITA, J  
APRIL 20, 2023**

**BETWEEN**

**PILI MANAGEMENT CONSULTANTS LIMITED ..... APPLICANT**

**AND**

**CHINA FUSHUN NO. 1 BUILDING ENGINEERING COMPANY  
LTD ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling disposes of two applications; one dated 24<sup>th</sup> June 2022, for setting aside the arbitral award published on 25<sup>th</sup> April 2022 and the other dated 15<sup>th</sup> August 2022, for recognition and enforcement of the said arbitral award by the arbitrator.
2. The background leading to the two applications is that on 15<sup>th</sup> November 2011, Pili Management Consultants Limited (Pili Management) entered into a construction agreement with China Fushun No. 1 Building Engineering Company Ltd (China Fushun). China Fushun was to construction go downs, offices and apartments for Pili Management on L. R. No. 15137, along Mombasa Road, Nairobi.
3. later, a dispute arose regarding payment of certified costs of Kshs. 127,684,474 in an interim account certificate of 4<sup>th</sup> March 2016 and final account certificate of 3<sup>rd</sup> March 2017 by the project consultant who was also the architect and quantity surveyor.
4. China Fushun initiated arbitration proceedings against Pili Management under clause 45.1 of the agreement for breach of clause 34 of the contract by declining to pay the certified amount. China



Fushun claimed the amount together with interest at 18% per annum, costs of the arbitration and interest on such costs.

5. Pili Management did not file a defence or witness statement. Pili Management's participation in the arbitral proceedings was limited to several procedural applications and cross-examination of China Fushun's witness and written submissions.
6. Pili Management argued through the written submissions that the agreement was a fixed price contract for Kshs. 440,971,611, but it had paid Kshs. 721,230,412 which was an overpayment. Pili Management took the view, that there claim had no basis. On its part, Pili Management claimed that it was China Fushun that was in breach because it failed to construct the apartments, complete the works within the stipulated period and had abandoned the works before a completion certificate was issued.
7. In the arbitral award dated and published on 25<sup>th</sup> April 2022, the arbitral tribunal found in favour of China Fushun. The arbitral tribunal held that Pili Management having not filed a response and a counterclaim, whether or not China Fushun breached the contract was not an issue for determination before it. The arbitral tribunal reasoned that under section 24 of the Act, the only matters available for determination are those canvassed in the pleadings or addressed by the parties during the trial or agreed by the parties. In the arbitral tribunal's view, the only issue for determination was whether Pili Management had breached its contractual obligations.
8. The arbitral tribunal held that clause 2.5 was clear that this was not a fixed price contract but contemplated payments of more than the sum specified. According to the arbitral tribunal, since Pili Management had already paid Kshs. 764,550,068.65 being Kshs. 323,578,457.63 over and above the sum specified without any reservation, Pili Management was estopped from claiming overpayment.
9. Regarding Pili Management's assertion that the final certificate was not addressed to it and was not in the proper form, the arbitral tribunal held that it preferred substance than form given that the certificate was issued by the project consultants who were also the architect and quantity surveyor mandated to value and certify the works under the contract. The arbitral tribunal concluded that Pili Management was in breach of the contract.
10. The arbitral tribunal also held that the amount owing from the certificates was Kshs. 98,823,785.30; allowed reasonable interest at 16% per annum from the date of the certificates, (4<sup>th</sup> March 2017 up to 15<sup>th</sup> August 2019 when the claim was filed of Kshs. 19,923,785.30.
11. The final orders were that China Fushun was entitled to damages of Kshs. 118,203,410.7 at simple interest of 16% from 15<sup>th</sup> August 2019 until payment in full. The arbitral award also awarded costs with simple interest from 25<sup>th</sup> April 2021, the date of publication of the award, until payment in full.

### **First application**

12. Pili Management filed an application dated 24<sup>th</sup> June 2022, under section 35 of the Act, seeking to set aside the arbitral award. The motion is premised on grounds that the arbitral tribunal acted outside its jurisdiction by deciding on issues that were not covered by the agreement and awarded an amount which was beyond the contractual sum.
13. Pili Management also argues that the arbitral award is in conflict with public policy of Kenya as it unjustly enriches China Fushun. Pili Management asserts that the arbitral award was influenced by extraneous matters that should not have been considered and the arbitral tribunal acted arbitrarily, irrationally and capriciously.



14. It is Pili Management's case that the contract was a fixed price contract and by the time the claim was filed, China Fushun had been overpaid even though the work was completed. According to Pili Management, China Fushun's witness admitted that the contractor left the site before completing the WORK and without notice.
15. Pili Management argues that the arbitrator awarded an additional sum of Kshs. 172,919,941 on the strength of the architect's final certificate dated 4<sup>th</sup> March 2017 that was not provided for in the agreement despite admission of non-completion of the work. Pili Management asserts that the final account certificate was not addressed to it but to the project consultants and faults the arbitral tribunal for relying on that certificate which was an internal communication between two of its employees.
16. Pili Management also faults the arbitral tribunal for finding that the contract was not a fixed price contract, thus misinterpreted clause 2.5 of the contract. According to Pili Management, the additional sums under clause 2.5 were the periodic payments provided for under clause 34 of the contract. Pili Management maintains that clause 35 on fluctuation was deleted since this was a fixed price contract.
17. Pili Management asserts that the arbitrator overlooked clause 30.3 which expressly barred the project architect from issuing instructions whose effect would be to vary the works by more than 15% without consent of both parties.
18. It is Pili Management's view, that the arbitral tribunal was also at fault in applying the estoppel principle to hold that it could not assert overpayment since it had paid Kshs. 764,550,068.65 without reservation. Pili Management took the position that the arbitral tribunal ignored the letter dated 1<sup>st</sup> August 2019 from its advocates to China Fushun's advocates stating that China Fushun had rushed to arbitration before completing the project, before accounts were agreed on or before a completion certificate had been issued.
19. The arbitrator is also faulted for failing to consider that China Fushun did not produce a practical completion certificate in accordance with clause 41 of the contract.
20. Pili Management again asserts that the certificate did not comply with clause 34.21. That clause required China Fushun to issue the Quantity Surveyor with all documents or calculations necessary for purposes of computations required under the payment conditions in terms of what a final account should state and a completion certificate was not issued.
21. Pili Management relies on National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited (Misc Civil Case No. 27 of 2014) [2014] eKLR, for the position that an arbitrator who acts in manifest disregard of the contract acts without jurisdiction and commits misconduct; Associated Engineering Co. v Government of Andhara Pradesh (1991) 4 SCC 93, that an arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract as his sole function is to arbitrate in terms of the contract; Roofs & Building Maintenance Ltd v David Kinuthia Kimani & Another (Civil Case No. 318 of 2014) [2020] eKLR, that a contractor has to deliver within the amount that it tendered works for unless there are variations agreed upon subsequently by the parties; and University of Nairobi v N. K. Brothers Ltd (CA Civil Appeal No. 309 of 2002) [2009] eKLR, that an architect's certification may be binding on the employer in a building contract only if it is not made in excess of the contractual amount.

## Response

22. China Fushun has opposed the application through a replying affidavit and written submissions. China Fushun contends that the application is a disguised appeal against the arbitral award. China



Fushun relies on sections 10, 32A and 17 of the Act to argue that this court's jurisdiction on arbitral matters is limited.

23. China Fushun posits that Pili Management challenged the arbitral tribunal's jurisdiction but the challenge was dismissed. China Fushun maintains that the issue of jurisdiction having been determined by the court, the arbitral tribunal's jurisdiction cannot be raised here again.
24. China Fushun relies on *Teejay Estates Limited v Vihar Construction Limited* (Misc Civil Appl E184 of 2021) [2022] eKLR that a court will not sit to hear claims of factual or legal error by an arbitral tribunal as if it were sitting on appeal; *Geo Chem Middle East v Kenya Bureau of Standards* (SC Petition No. 47 of 2019) [2020] eKLR, that to have the court sit on appeal over the decision of the arbitral tribunal would be against public policy and the intention of giving finality to arbitral awards and *Synergy Industrial Credit Limited v Cape Holdings Limited* (CA Civil Appeal No. 81 of 2016) [2020] eKLR, that where the terms of an arbitral agreement are clear and unambiguous, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement.
25. China Fushun asserts that the arbitral tribunal did not deal with issues beyond its scope but only considered matters that were canvassed in the pleadings. According to China Fushun, Pili Management has not shown that the arbitral award is contrary to public policy. Reliance is placed on *Castle Investments Company Limited v Board of Governors–Our Lady of Mercy Girls Secondary School* (Misc. Appl. No. 780 of 2017) [2019] eKLR and *Manara Limited v Britania Foods Limited* (Misc. Appl. No. E007 of 2021) [2021] eKLR on the circumstances under which an arbitral award will be set aside for being inconsistent with public policy.
26. China Fushun states that even though clause 2.5 states that the contract was a fixed price contract, it argues that Pili Management cannot rely on the amount in that clause (Kshs. 440,971,611) to argue that it is a fixed price contract. This is because no other conditions specified the contract amount. China Fushun also takes the view, that since Pili Management paid more than the amount specified in clause 2.5, it cannot not rely on the amount in that clause to argue that the contract is a fixed price one.
27. Regarding completion of works, China Fushun contends that the final account certificate of 4<sup>th</sup> March 2017 for Kshs. 58,634,211.82 was confirmation that the project was completed. As to the claim of mischief, China Fushun asserts that the architect was appointed by both parties and could not favour either party.

## **Second application**

28. The second application is brought under section 36 of the Act for adoption and enforcement of the arbitral award and the award on costs. China Fushun argues that parties submitted themselves to the arbitration process and an arbitral award was made. The application should be allowed as prayed.
29. Pili Management's response is that the application is incompetent in that it violates section 36 of the Act and should be struck out or dismissed with costs.

## **Determination**

30. As stated at the beginning of this ruling, there are two applications: for setting aside the arbitral award and for adoption and enforcement that award. I will deal with the application for setting aside first for the reason that the outcome of this application will determine the direction of the other application.



## Setting aside

31. Pili Management seeks to set aside the arbitral award for the reason that the tribunal determined matters that were outside its jurisdiction given this was a fixed price contract; the award is inconsistent with public policy; the arbitral award misconducted itself acted arbitrarily, irrationally and capriciously.
32. China Fushun takes the view, that the issue of the arbitral tribunal's jurisdiction was settled, the award is not inconsistent with public policy; the arbitral tribunal did not misconduct itself; and did not act arbitrarily, irrationally or capriciously
33. I have considered the arguments by parties and decisions relied on by parties on this application. I have also read the record and the impugned arbitral award. The gravamen in this application is that arbitral tribunal decided matters that were outside the contract thus the tribunal acted without jurisdiction. The reason attributed to this is that what parties entered into was a fixed price contract and China Fushun had been overpaid. for that reason, there could not have been a dispute.
34. Pili Management also argues that the award is inconsistent with public policy and arbitral tribunal misconducted itself and acted arbitrarily irrationally and capriciously.

## Jurisdiction

35. Pili Management's challenge to the arbitral tribunal's jurisdiction is that it acted outside jurisdiction by deciding issues that were not covered in the fixed contract and awarded an amount beyond the contract sum. China Fushun argues that the issue of jurisdiction was determined by the court in a ruling delivered on 22<sup>nd</sup> April 2021, thus the arbitral tribunal's jurisdiction is not in question here.
36. There is no inherent jurisdiction of an arbitral tribunal. The arbitral tribunal derives jurisdiction from a valid arbitration agreement between the parties, to decide a particular dispute through arbitration. In that regard, the arbitral tribunal must act in accordance with the terms of the agreement. Where the arbitral tribunal acts outside the terms of the arbitral agreement, the source of its jurisdiction, the award would be set aside because it is made without jurisdiction.
37. The arbitral tribunal has power to rule on its jurisdiction. If a party refers a dispute to arbitration in breach or violation of a valid jurisdictional clause, the other party may raise the jurisdictional challenge before arbitral tribunal. The issue of jurisdiction must be raised at the earliest opportunity to enable the arbitral tribunal decide whether or not it has jurisdiction over the dispute.
38. Section 17(1) of the Act empowers the arbitral tribunal to rule on its own jurisdiction in a matter referred to it. Section 17(2) further states that:

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.
39. It is a legal requirement that the issue of jurisdiction be raised as soon as the statement of defence is filed. The fact that a party has appointed or participated in the appointment of the arbitrator does not affect the party's right to raise the issue of jurisdiction.
40. Where the issue of jurisdiction is raised, the arbitral tribunal may decide the issue as a preliminary question or determine the issue on merit in the arbitration award. (ss. 5). Sub section (6) is material- where the arbitral tribunal rules on the issue as preliminary question, the aggrieved party has 30 days



after receiving notice of the ruling to apply to the High Court on the matter. The decision of the High Court on the issue is final and is not subject to appeal (ss7).

41. I have read the arbitral proceedings and the award. The arbitral award is clear (paragraph 13) that Pili Management filed a motion challenging the arbitral tribunal's jurisdiction but the challenge was dismissed on 15<sup>th</sup> April 2020. It not clear if Pili Management challenged the arbitral tribunal's decision on jurisdiction under section 17 (6), given that the issue of jurisdiction had been determined as a preliminary question. Whatever the case, the application to the High court was to have been made within 30 days of that decision.
42. The record also shows that an application for the arbitral tribunal's recusal was made but was also dismissed on 12<sup>th</sup> August 2020. An application to this court was also dismissed on 22<sup>nd</sup> April 2021.
43. It is true, as China Fushun argues, that the arbitral tribunal's jurisdiction had been determined. With that determination, this court has no latitude to revisit that issue here. Had the arbitral tribunal dealt with the question on merit in the arbitral award, this court would have been perfectly in order to deal with the issue here. However, the issue having been determined as a preliminary question, the law precludes this court from addressing the question at this stage. The argument that the arbitral tribunal acted without jurisdiction and made an award that was outside the contract was done and dusted.
44. There is also the fact that Pili Management did not file a statement of defence to the claim. This is clear from both the record and the arbitral award. The arbitral tribunal stated that the matter proceeded under section 26 of the Act so that China Fushun was to prove its claim. Pili Management's participated was limited to cross examining China Fushun's witness and filing of submissions. In that regard, the arbitral tribunal identified the issues for determination as those arising from pleadings filed by China Fushun.
45. The fact that Pili Management did not file a defence or call evidence, the issue of fixed price contract had not been pleaded as an issue. for that reason, that the arbitral tribunal there would be no basis for this court to hold that the arbitral tribunal made an award on matters that were excluded by the agreement since this court is not sitting on appeal over the arbitral tribunal's decision. I will say more on this later in this ruling.

### **Public policy**

46. Pili Management again argues that the arbitral award is inconsistent with public policy. Section 35(2) (b)(ii) provides that an arbitral award may be set aside only if the court finds that the award is in conflict with the public policy of Kenya. The phrase "public policy" is not defined in the Act. The issue has, however, received judicial consideration in various jurisdictions.
47. In *Renusagar Power Co. Ltd v General Electric Co.* 1994 AIR 860, 1994 SCC Supl. (1) 644, the Supreme Court of India held that an arbitral award will be against the public policy if it was in contravention of "Fundamental policy of Indian law, Interest of India and Justice and Morality."
48. In *Haryana Tourism Limited v Kandhari Beverages Limited* SC/0033/2022, (11 Jan 2022), the same court again held that an award can be set aside only if it is against the public policy, that is, if the award is found to be contrary to, (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal.
49. In *Christ of All Nations v Apollo Insurance Company Limited* [2002] 2 E.A 366 the court stated with regard to section 35(2) (b) (ii) of the Act, that an award will be set aside for being inconsistent with the public policy of Kenya only if it is shown that the arbitral award is either inconsistent with *the*



- constitution or other laws of Kenya, whether written or unwritten; or is inimical to the national interest of Kenya; or is contrary to justice and morality.
50. The jurisprudence emerging from these decisions is that a party seeking to set aside an arbitral award for being inconsistent with public policy, will only succeed if he shows that the award violates the tenets of the constitution or laws of Kenya; national interest or offends justice and morality of Kenya, is outright illegal or it unjustly enriches a person in a manner that is inconsistent with Kenya's socio-economic ethos. This must be shown to be factually the case through evidence.
  51. Pili Management's grievance, as I understand it, is that the arbitral award is inconsistent with public policy of Kenya because it leads to unjust enrichment, I have read the record of the arbitral proceedings and the award to satisfy myself whether the award violates the constitution or the law. Pili Management does not point out constitutional tenets or the law the arbitral award violates.
  52. Similarly, whether the arbitral award would lead to unjust enrichment was a question of fact to be demonstrated through evidence. Pili Management did not call evidence before the arbitral tribunal to prove the issue of unjust enrichment.
  53. Pili Management having not filed a defence and raised issues of fixed price contract, overpayment or unjust-enrichment, and lead evidence to that effect; this court would have no basis to hold that the arbitral award is inconsistent with the public policy.
  54. In *Profilati Italia SrL v PaineWebber Inc* (2001) 1 All ER (Comm) 1965, (2001) 1 Lloyds Rep 715, it was observed that where a party alleges that the way in which an award was procured was contrary to public policy, it will be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on the part of the successful party contributed in a substantial way to the award being made. That has not been shown to have been the case before the arbitral tribunal.
  55. It should be understood that the public policy clause in section 35(2)(b)(ii), allows for review of the arbitral award to a limited extent only and is not an appellate procedure. The purpose is to review the compliance of the arbitral award with the fundamental principles of the legal system of Kenya, so that its enforcement does not contradict the constitutional and legal principles of Kenya. The court, sitting on an application under section 35(2)(b)(ii), does not do a merit review of the arbitral award. A claim that the award is inconsistent with public policy of Kenya must be demonstrated that it is the case and not a conjecture. Pili Management has not shown that the arbitral award violates the constitution or the law to be outright illegal.
  56. As to whether it is against justice and morality, again this is a question of fact and, as already stated, the issue of whether or not the project was completed, overpayment, certificate of completion was not issued or final accounts certificate was not perfect in form or was between employees, were issues of fact to be pleaded and proved through evidence. In any case, the arbitral tribunal rendered itself on the issues and preferred substance of the final account certificate over form. This court cannot revisit the issue since it is not sitting on appeal over the arbitral award.
  57. The is yet the complaint that the arbitral tribunal acted arbitrarily, irrationally, capriciously and was influenced by extraneous matters which should not have been considered. A claim of arbitrariness, irrationality, caprice or influence by extraneous matters on the part of the arbitral tribunal, if proved, would amount to a misconduct which would lead to setting aside of the arbitral award. This is, however, a question of fact that must be shown to have been the case.
  58. I have again gone through the record of the arbitral proceedings and the award. I have not come across evidence of arbitrariness, irrationality, caprice, bias or misconduct on the part of the arbitrator. The arbitral tribunal heard the dispute and issued the arbitral award. If a party argues that the arbitral



tribunal acted arbitrarily, irrationally and capriciously, he must show that there exist grounds from which a reasonable person would conclude that there was a real likelihood that the arbitral tribunal could not have fairly determined the dispute on the basis of the evidence and arguments adduced before it.

59. It is the duty of the person alleging misconduct to point out instances that truly demonstrate that the arbitral tribunal acted in a manner that amounted to misconduct. Pili Management has not been laid this bare to persuade the court to arrive at that conclusion.
60. In the impugned award, the arbitral tribunal stated China Fushun's case as presented, the issues for determination and findings on each issue and the amount finally awarded. Of importance, the arbitral tribunal noted that Pili Management did not file a defence and counterclaim thus issues for determination were those arising from the pleadings filed by China Fushun. In the premise, this court finds it difficult to fault the arbitral tribunal in the manner the dispute was disposed of.
61. I hasten to add that it is not permissible for this court to undertake an appraisal of evidence before the arbitral tribunal as the court is not sitting on appeal over the arbitral award. This is the view that was aptly expressed in a persuasive decision of the Supreme Court of India in *Ispat Engineering And Foundry v Steel Authority Of India Ltd. B.S. City, Bokaro Steel Authority of India Ltd, Laws (SC) 2001-7-58 (Decided on 25 July, 2001)* as follow:

[R[e-appraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to re-appraise the evidence is unknown to a proceeding under section 30 of the *Arbitration Act*. In the event of there being no reason in the award, question of interference of the Court would not arise at all. In the event however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law...The award of an Arbitrator is ordinarily final and conclusive unless a contra intention is disclosed in the agreement itself.
62. The import of this proposition is that an application for setting aside an arbitral award does not serve the purpose of a substantive review of the arbitral tribunal's award by the court. The court will not, therefore, determine the merits of the dispute between the parties to the arbitral proceedings. Doing so would be contrary the nature of arbitration, render its existence pointless, and disregard the autonomy and the will of the parties who have submitted the resolution of their dispute to the jurisdiction of the arbitral tribunal, thereby foregoing the jurisdiction of the court.
63. in *Ralliaram Union of India v AL. Railiarum, [1964] 3 SCR 164*, the court emphasized that whether right or wrong, the decision of the arbitral tribunal is binding except in the case of error of law on the face of it or in the event the award itself or in a document incorporated in it, there is found some legal proposition which stands out to be the basis of the award and which is illegal, courts cannot exercise apparent power over the decision of the tribunal.
64. See also *Jivrajbhai Ujamshi Sheth and others v Chintamanrao Balaji & others 1965 AIR 214, 1964 SCR (5) 480*, that the law is well-settled on the scope of exercise of jurisdiction of the courts as regards interference with an arbitral award.
65. Applying the principles enunciated in the above decisions to the application before this court, and having considered the totality of the application and arguments presented by parties, the law and the contextual facts of this case, there is no evidence on record that the arbitral tribunal overstepped its jurisdiction or travelled beyond the agreement of the parties.



66. For those reason, this court ought not interfere with the tribunal award passed by the chosen forum of the parties, the law being well settled on this score. The court declines this application.

### **Enforcement**

67. The second application seeks recognition, adoption and enforcement of the arbitral award. It is argued that parties submitted themselves to the arbitral process culminating to the award of 25<sup>th</sup> April 2022 and a further award on costs of 8<sup>th</sup> August 2022. China Fushun urges that having complied with the law, the application should be allowed as prayed. Pili Management's answer is that the application offends section 36 of the Act.

68. I have perused the record and note that the original award and copy of the agreement are attached to the application. The award on costs is also attached. In view of the court's conclusion regarding the application for setting aside, this application for adoption and enforcement has to succeed.

### **Conclusion**

69. Having considered the two applications, responses and submissions, and upon perusing the record and decisions relied on, the conclusion I come to, is that the application for setting aside fails. The application adoption and enforcement succeeds.

### **Relief and Order**

70. The application dated 24<sup>th</sup> June 2022 for setting aside of the arbitral award is dismissed with no order as to costs.

71. The application dated 15<sup>th</sup> August 2022 for adoption, recognition and enforcement of the arbitral award dated 25<sup>th</sup> April 2022 together with the award on costs dated 8<sup>th</sup> August 2022 is allowed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL 2023**

**E C MWITA**

**JUDGE**

