Kishan Construction Company Limited v Patel & another (Miscellaneous Civil Application 264 of 2021) [2023] KEHC 24527 (KLR) (5 May 2023) (Ruling)

Neutral citation: [2023] KEHC 24527 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 264 OF 2021

MN MWANGI, J

MAY 5, 2023

IN THE MATTER OF THE ARBITRATION ACT, NO. 1995 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION TO RECOGNIZE AND ENFORCE AN ARBITRAL AWARD ARISING FROM THE DISPUTE BETWEEN KISHAN CONSTRUCTION COMPANY LIMITED & KANJI KUNVERJI PATEL & DEEPAK KANJI PATEL

BETWEEN

BETWEEN

KISHAN CONSTRUCTION COMPANY LIMITED ..... CLAIMANT

AND

KANJI KUNVERJI PATEL ..... 1ST RESPONDENT

DEEPAK KANJI PATEL ..... 2ND RESPONDENT

RULING

1. This ruling is in respect to two applications. The first application is the claimant's Chamber Summons dated 29th December, 2021 brought under the provisions of Section 36 of *Arbitration Act* and Rule 9 of *Arbitration Rules*, 1997 and all other enabling provisions of the law. The claimant seeks the following orders-

    i. Spent;

    ii. That the final award by the sole Arbitrator, Arch. Julius Muthui F. Mutunga dated and published on the 22nd November, 2021 be recognized and adopted as a Judgment of this Honourable Court;

iii. That the applicant herein be granted leave to enforce the Arbitral award published on the 22nd November, 2021 as a decree of this Honourable Court; and

iv. That costs of this application be provided for.

2. The application is brought on the grounds on the face of it and is supported by affidavits sworn on 29th December, 2021 and 15th March, 2022 by Pravin K. Patel, a director of the claimant company.

3. The second application is the respondents' Notice of Motion dated 24th January, 2022 brought under the provisions of Section 35 of the *Arbitration Act*, 1995, Rule 7 of the *Arbitration Rules*, 1997, Sections 1A, 1B, 3A & 59 of the *Civil Procedure Act*, Order 46 Rules 16 & 17 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, the inherent powers of the Court and all other enabling provisions of the law. The respondents seek the following orders-

i. Spent;

ii. That this Honourable Court be pleased to set aside the Arbitral award published on 22nd November, 2021; and

iii. That the costs of this application be provided for.

4. The application is brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 20th January, 2022 by Deepak Kanji Patel, the second respondent herein. On 8th February, 2022, this Court gave directions that the application dated 24th January, 2022 shall be deemed as a response to the application dated 29th December, 2021.

5. Directions were given for the filing of written submissions. The claimant's submissions were filed by the law firm of Oloo & Chatur Advocates on 18th March, 2022, whereas the respondents' submissions dated 12th October, 2022 were filed by the law firm of Dr. Mutubwa Law Advocates. The claimant's Counsel filed further written submissions on 9th November, 2022.

6. Mr. Oloo, learned Counsel for the claimant submitted that the parties herein entered into an agreement (contract for building works) on June 10, 2013 for the construction of a block of apartments (8) storeys including the basement at Kizingo area in Mombasa Island on Land Reference No. MSA/Block/xxvi/225, but a dispute arose due to failure by the respondents to make payments on variations made as was permitted under the agreement and conditions of contract for building works. He pointed out that clause 45 of the agreement directed parties to invoke arbitration in the event of a dispute. He stated that the respondents vide an application dated 14th April, 2019, sought to restrain the claimant from instituting arbitral proceedings but the Court vide an order dated 25th November, 2019 gave clause 45 a fresh breath of life. The claimant's Counsel stated that subsequently, the parties herein agreed on Arch. Julius Muthui F. Mutunga who was appointed by the Architectural Association of Kenya, who carried out the arbitral proceedings and thereafter published his final award on 22nd November, 2021.

7. Mr. Oloo cited Sections 32A, 36 & 37 of the *Arbitration Act* and submitted that in compliance with the said provisions, the claimant confirms that it has met the pre-conditions for enforcement of the Arbitral award. He submitted that in as much as the respondents allege misconduct on the part of the Arbitrator, no evidence has been put forth to demonstrate any element of the said misconduct. The claimant's Counsel relied on the case of *Kibutha v Kibutha* [1984] eKLR where the Court quoted *Prussel on Arbitration* 19th Edition at page 268 and submitted that the respondents' Counsel opted to close the respondents' case once the expert testified and the said fact cannot be blamed on the Arbitrator who conducted the proceedings in a fair manner. Mr. Oloo stated that no elements of misconduct can be discerned in the proceedings.

8. He cited the case of *Bremer v ETS Soules* [1905] I Lloyds L. R 160 where Mustil J., laid down the principles to be considered when removing an Arbitrator because of misconduct of and stated that none of the principles in the said case have been established by the respondents herein.

9. He submitted that Section 10 of the *Arbitration Act* contemplates that this Court can only intervene in arbitration matters where permitted to do so under the Act. He referred to the case of *Prof. Lawrence Gumbe & another v Honourable Mwai Kibaki & others* HC Miscellaneous No. 1025 of 2004, where Nyamu J., held that such intervention by the Court can only be supportive and not obstructive or usurpation oriented.

10. In submitting that the award published on 22nd November, 2021 is recognizable hence enforceable as a Judgment of this Court, he relied on the case of *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR. He contended that the respondents' application is tantamount to an abuse of due process as its effect is intended to deny an award finality and speedy enforcement, both of which are major objectives of arbitration.

11. Mr. Oloo cited the case of *Kibutha v Kibutha* (*supra*), where the holding of Duffins J., in the case of *Rashid Moledina v Hoima Ginners* [1967] EA 645 was quoted and submitted that the Arbitrator in awarding the claimant the owed certificate together with interest accruing therefrom, did not in any manner fall short of understanding the law. In submitting that the award herein being lawful is enforceable as a decree of this Court, Mr. Oloo relied on a number of authorities such as the case of *Meghji Patel & Company Limited v Nature Green Holdings Limited* [2017] eKLR and the case of *Boleyn Magic Wall Panel Limited v Nesco Services Limited* [2020] eKLR, where Odunga J., while dismissing an objection to an application for enforcing an arbitral award held that where parties have agreed to resolve a dispute arising out of a commercial agreement by arbitration, the Courts are required to give effect to the wishes of such parties by enabling the parties to conclude with the finality the determination of the dispute by arbitration.

12. Dr. Mutubwa, learned Counsel for the respondents submitted that the initial contract sum was Kshs. 217,528,048.00 including VAT and the contract term was 75 weeks with the completion date set for 31st December, 2014, and that upon reconsideration, the respondents changed the scope of works entailing the conversion of two penthouses to four apartments. He stated that the parties mutually agreed that the scope of the additional works would be Kshs. 8,028,940/= and the respondents would supply the materials for the additional work in the project. He stated that they supplied materials worth Kshs. 15,199,920.80 which was not factored in the initial contractual sum of Kshs. 217,528,048.00.

13. He submitted that the respondents paid the claimant the full contractual price being Kshs. 212,893,847.00, withholding tax of Kshs, 5,505,880.00 plus the costs of the additional scope of the works done, but upon completion of the project, the respondents noted defects in the finishes of the works, and brought it to the claimant's attention as it was within the defect liability period, but the claimant failed to make good the defects and/or formally hand over the project to the respondents.

14. Dr. Mutubwa stated that the arbitration proceeded before the Arbitrator Arch. Julius Muthui F. Mutunga as a sole Arbitrator and a final award was signed and published on 22nd November, 2021, where the Arbitrator awarded the claimant Kshs. 10,526,135.90 and 18% simple interest on any unpaid amount from the date of the award until payment in full.

15. He stated that the Arbitrator's fees and disbursements were to be borne by the respondents, who were also ordered to reimburse all Arbitrator's deposits of costs and/or disbursements paid by the claimant to the Tribunal within 14 days of demand, failure to which simple interest of 18% per annum would

be chargeable until payment in full. The respondents now challenge the said award on grounds that it offends the public policy of Kenya and/or the Arbitrator misconducted himself.

16. On the issue of the misconduct on the part of the Arbitrator, Dr, Mutubwa cited Section 35 of the *Arbitration Act*, 1995 and submitted that the award in issue was procured as a result of misconduct on the part of the Arbitrator by ignoring and/or disregarding the evidence adduced for the respondents. He contended that from the award made, it is evident that the only evidence taken for the respondents by the Arbitrator is that of the expert witness, despite the respondents having filed a witness statement by Virji Kanji Pindoria dated 9th March, 2020. The respondents' Counsel stated that the hearing had been scheduled for 1st and 2nd July, 2021 but was held on the first day only.

17. He submitted that the respondents were desirous to have their witness Mr. Virji Kanji Pindoria testify but the witness was unable to avail himself in person since he was in India at the time of the hearing and could not travel to Kenya as a result of the travel restrictions that existed due to the Covid-19 Pandemic. He indicated that the respondent's request to have the witness testify virtually was declined by the Arbitrator, which was prejudicial to the respondents' case. Dr. Mutubwa contended that the Arbitrator erred by failing to ensure fairness of process, that he was biased and lacked impartiality, thus vitiating the award in issue. He also contended that the Arbitrator at paragraph 56 (h) & (i) arbitrarily excluded the respondents' only evidence without any justifiable reason so that it would appear that the claimant's case was uncontroverted. Dr. Mutubwa relied on the case of the *Attorney General of Kenya v Prof. Anyang Nyong'o & 10 others* EACJ application No. 5 of 2007 quoted with approval by Judge Kemei in *Mukunya Mugo A & another v Elizabeth Mugure Mukunya* [2020] eKLR and submitted that in light of the foregoing submissions, there is evidence of bias.

18. On the issue of the arbitral award being against public policy, Dr. Mutubwa referred to Section 35(2) of the *Arbitration Act* and the case of *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR, which defines the parameters of public policy and submitted that the Arbitral award is in conflict with the public policy of Kenya on the grounds that it is inconsistent with the provisions of Article 50 of the *Constitution* of Kenya, the principles of natural justice, Section 19A of the *Arbitration Act* on equality of parties and Section 32(3) of the *Arbitration Act*, on issuance of reasoned awards.

19. Dr. Mutubwa relied on the case of *Msagha v Chief Justice & 7 others* Nairobi HCMCA No. 1062 of 2004 (HCK) [2006] 2 KLR 553 and submitted that the Arbitrator's act of denying the respondents' witness of fact an opportunity to testify and ultimately excluding the respondents' evidence that was properly on record is against the respondents' right to challenge and adduce evidence and the principles of natural justice.

20. He submitted that no one should be condemned unheard and relied on the case of *Kikenni Properties Ltd & another v Vipingo Ridge Limited* [2021] eKLR, where Judge Githinji quoted the decision of the Supreme Court of Uganda in *Management of Committee of Makondo Primary School & another v Uganda National Examination Board*, HC Civil Misc Application No. 18 of 2010.

21. Dr. Mutubwa contended that the Arbitrator awarded unreasonable interest rates, a pre-award interest at the rate of 12% and post-award interest at the rate of 18% without any justification or basis, which is contrary to the provisions of Section 32(3) of the *Arbitration Act*, 1995 and rendered the Arbitral award to be in conflict with the public policy of Kenya. He submitted that there is no other option but to set aside the Arbitral award in issue for being in contravention of express provisions of the law. He relied on the case of *Continental Homes Ltd v Sun Coast Investment Ltd* [2018] eKLR to augment his submissions.

22. In concluding his submissions on whether the application dated 29th December, 2021 is merited, the respondents' Counsel submitted that the provisions of Section 36(3) of the *Arbitration Act* are

couched in mandatory terms hence an applicant seeking to enforce an Arbitral award must furnish the Court with an original award and an original arbitration agreement or in the alternative certified copies of the same. He stated that in this case, the claimant did not comply with the said provisions. He cited the case of *Samura Engineering Limited v Don-Woods Company Limited* [2014] eKLR and urged this Court to find the application dated 29th December, 2021 incurably defective and dismiss it without any further consideration.

23. In a rejoinder, Mr. Oloo submitted that the respondents did not produce any evidence to support the allegations of bias or partiality. He stated that the respondents made no application to indicate that their witness was unable to travel because of the Covid-19 Pandemic, and/or apply for the said witness to appear virtually and/or at another date. He stated that the absence of Mr. Vinu Pindoria prompted the claimant to seek for the witness statement of the said witness to be expunged but the said statement was not expunged and the Arbitrator analyzed the evidence therein and relied on it in arriving at the award.

24. He stated that the respondents did not make an application seeking for the said witness to be cross-examined at any other time and he cannot allege that he was denied a chance to be heard. He relied on the case of *Benson W. Kaos & 72 Others v Attorney General & 85 Others* [2022] eKLR which reaffirmed the decision in *Erastus Wade Opande v Kenya Revenue Authority & another* Kisumu HCCA No. 46 of 2007 and submitted that in the absence of any proof adduced by way of affidavit, the respondents were attempting to provide evidence in submissions which this Court should not encourage.

25. Mr. Oloo cited the Supreme Court case of *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR and stated that the respondents are inviting this Court to delve into ascertaining the correctness of the Arbitrator's award yet the Covid-19 situation was not even an issue before the Arbitrator. He contended that the Court cannot arrogate on itself the jurisdiction to determine matters which have been expressly vested by the *Arbitration Act* in the jurisdiction of the Arbitral Tribunal. He further contended that this Court cannot set aside an Arbitral award on grounds that it was unfair, unreasonable or non-feasible as these grounds are not contemplated by Section 35 of the *Arbitration Act*.

26. He pointed out that the claimant filed a certified copy of the original award in compliance with the provisions of Section 36 of the *Arbitration Act*.

Analysis And Determination.

27. I have considered the applications filed herein and the grounds in their support, as well as the affidavits filed in support of the said applications. I have also considered the written submissions by Counsel for the parties. The issues that arise for determination are-

    i. Whether the Arbitral award published on 22nd November, 2021 should be set aside; and

    ii. Whether the Arbitral award published on 22nd November, 2021 should be recognized and adopted as Judgment of this Court.

28. In the affidavit filed by the claimant, it deposed that the parties herein entered into an agreement for the construction of a twin block of apartments at Kizingo area in Mombasa Island on Land Reference No. MSA/Block/xxvi/225 but a dispute arose due to payments on variations made as was permitted under the agreement and conditions of contract for building works and the claimant invoked clause 45 of the said agreement which directs parties to institute arbitral proceedings if a dispute arose.

29. The claimant averred that the respondents vide an Originating Summons dated 14th April, 2009 sought for an injunction, among other orders restraining the claimant from instituting arbitral proceedings

but Judge P.J. Otieno issued an order dated 25th November, 2019 for the Architectural Association of Kenya (AAK) to appoint an Arbitrator for the parties. It further averred that AAK first appointed QS Ali Mandhri but the respondents opposed his appointment faulting the process of his appointment, That AAK then appointed Engineer Oliver C.W Khabure but the said Arbitrator could not proceed with the arbitration citing conflict of interest as he had worked with the claimant sometime in the year 2008 and finally, AAK appointed Arch. Julius Muthui F. Mutunga who accepted the appointment on 22nd January, 2020 and both parties to the dispute acquiesced to his appointment as the sole Arbitrator.

30. It was stated by the claimant that the said Arbitrator carried out the arbitration proceedings herein and published the final award on 22nd November, 2021, and as such, for the ends of justice to be met, it is only fair and equitable for this Court to recognize and adopt the said Arbitral award as being legally binding and enforceable.

31. The respondents in the affidavit in support of the application dated 24th January, 2022 deposed that the award herein was procured and/or resulted from misconduct on the part of the Arbitrator. They averred that the Arbitrator ignored and/or disregarded evidence placed before him that was determinative of the dispute that he was required to resolve by disregarding the respondents' witness statement on record or to accord him an opportunity to testify virtually, despite evidence that their witness of facts, Virji Kanji Pindoria was affected by travel restrictions and lockdown in India during the Covid-19 Pandemic.

32. The respondents stated that the Arbitrator at paragraph 56 (h & i) excluded the respondents only evidence before the Arbitral Tribunal leaving them without any evidence, thus treating the claimant's case as uncontroverted. They further stated that there was no evidence that the Arbitrator gave the parties an opportunity to come up with the rules of procedure to guide them during the hearing and/or that the Arbitrator settled on some rules and procedures of presenting evidence that were communicated to the parties to the dispute, prior to the hearing, so as to guide them during the said hearing.

33. The respondents contended that the parties had not agreed to be guided by the provisions of the *Evidence Act* on admissibility of evidence, thus the Arbitrator was duty bound to admit every piece of evidence presented before him and weigh its probative value.

34. The respondents deposed that the Arbitrator acknowledged that the cost for additional works and variation of the contract was Kshs. 8,028,858.80 and that the claimant had consented to the supply of extra materials by the respondents at an additional cost of Kshs. 15,199,920.80 and as a result, there was a variation of Kshs. 7,171,062.00. They further deposed that the said Kshs. 7,171,062.00 was to be deducted from the contractual price of Kshs. 217,528,048.00 leaving a balance of Kshs. 210,356,986.00 that would be due and owing to the claimant. The respondents stated that since the claimant acknowledged payment of Kshs. 212,893,847.00 inclusive of withholding tax of Kshs, 5,505,880.00 and a statutory deduction submitted by the respondents on the claimant's behalf, the claimant was overpaid by Kshs. 2,536,861.00, which the respondents had counter-claimed for, but was dismissed by the Arbitrator.

35. It was stated by the respondents that by deliberately avoiding taking into consideration the agreement of the parties that the claimant would supply extra materials, the Arbitrator arrived at a decision that was manifestly unjust and amounts to unjust enrichment which constitutes illegal conferment of a benefit on a party, at the expense of another and misuse of the power conferred to him upon his appointment as an Arbitrator.

36. The respondents averred that clause 34.6 of the agreement dated 10th June, 2013 provides that if a certificate remains unpaid beyond the period for honouring the said certificates, the respondents were to pay or allow the contractor simple interest on the unpaid amount for the period it remained unpaid at the commercial bank lending rate. The respondents contended that it is necessary that the issue of the correct statute that governed the proceedings before the Arbitrator be resolved before the expiry of the thirty (30) days period set out in Section 35 of the *Arbitration Act* so as to preserve the respondents' right to move the Court under the *Arbitration Act*.

Whether the Arbitral award published on 22nd November, 2021 should be set aside.

37. The dispute between the parties herein was heard and determined by a sole Arbitrator Arch. Julius Muthui F. Mutunga who was appointed by the Architectural Association of Kenya pursuant to a Court order issued by Judge P. J. Otieno on 25th November, 2019. The Arbitrator signed and published his award on 22nd November, 2021. The said award was in favour of the claimant herein.

38. The respondents were dissatisfied with the Arbitral award, and they filed the application dated 24th January, 2022, seeking to set aside the said award on grounds that there was misconduct on the part of the Arbitrator, and that the Arbitral award is contrary to public policy. Section 35 of the *Arbitration Act* No. 4 of 1995 provides the instances in which the High Court may set aside an Arbitral award on application by a party. It states as follows-

> " 1. 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).
>
> 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
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> 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."

39. The application dated 24th January, 2022 has also been brought under the provisions of Order 46 Rule 16 of the *Civil Procedure Rules*, 2010 which provides that-

> " 1. The court may set aside an award on the following grounds only-
>
> a. corruption or misconduct of the arbitrator or umpire; or
>
> b. that either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.
>
> 2. An Application under this rule shall be served on the arbitrator or umpire.
>
> 3. Where an award is set aside under this rule the court shall supersede the arbitration and shall proceed with the suit."

40. This Court's jurisdiction on matters Arbitration is limited since the Arbitrator's finding of fact and the meaning of the contract between the parties herein is final therefore, this Court has no jurisdiction to hear the claims of factual or legal error by an Arbitrator and disturb the Arbitrator's findings on the same. This was the Supreme Court's position in *Geo Chem Middle East v. Kenya Bureau of Standards* [2020] eKLR, where it quoted Ochieng J's holding in the High Court that-

> " It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and 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. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal." (emphasis added)

41. The respondents contended that the Arbitral award was procured as a result of misconduct on the part of the Arbitrator who disregarded the respondents' evidence. They averred that the only evidence taken by the Arbitrator for the respondents is that of the expert witness despite the respondents having

filed a witness statement by Virji Kanji Pindoria dated 9th March, 2020. It was stated by the respondents that their witness of fact Mr. Virji Kanji Pindoria was unable to avail himself in person since he was in India at the time of the hearing and could not travel to Kenya as a result of the travel restrictions that existed due to the Covid 19 Pandemic. They further stated that their request to have the witness testify virtually was declined by the Arbitrator and that was prejudicial to the respondents' case. It was also contended that the Arbitrator at paragraph 56(h) & (i) arbitrarily excluded the respondents' only evidence without any justifiable reason and so it appears as if the claimant's case was uncontroverted.

42. A perusal of the pleadings before me and the annexures attached to the parties' affidavits reveals that none of the parties herein annexed copies of the proceedings before the Arbitrator to enable this Court to ascertain and/or confirm the allegations leveled against the Arbitrator by the respondent. In addition, Order 46 Rule 16 (2) of the *Civil Procedure Rules* provides that an application made under this rule shall be served upon the Arbitrator or Umpire. This Court holds that the said provision is couched in mandatory terms and its aim is to give an opportunity to an Arbitrator to respond to and/or defend himself against any allegations that may have been leveled against him.

43. There is no evidence of the application dated 24th January, 2022 having been served on the Arbitrator. The allegation that the Arbitrator disregarded the respondents' evidence can only be a valid argument and/or assertion if the Arbitrator himself was served with the said complaint, as this is what is required under Order 46 Rule 16(2) of the *Civil Procedure Rules*. It is my finding that the authorities cited by the respondents are not relevant to this case at all.

44. This Court is cognizant of the provisions of Articles 48 & 50 of the *Constitution* of Kenya, 2010 on the rights of access to justice and the right to a fair hearing. Determining an application under Order 46 Rule 16(2) of the *Civil Procedure Rules* in the absence of the Arbitrator who has no knowledge of the allegations leveled against him would amount to infringing on his rights guaranteed under Articles 48 & 50 of the *Constitution* of Kenya 2010. It is therefore my finding that the respondents' application fails on this ground.

45. The respondents submitted that the Arbitral award should also be set aside on grounds that it is against public policy for being inconsistent with the provisions of Article 50 of the *Constitution* of Kenya, the principles of natural justice, Section 19A of the *Arbitration Act* on equality of parties and Section 32(3) on issuance of reasoned awards. In *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, Ringera, J defined what constitutes an award that is inconsistent with the public policy of Kenya as follows-

> " 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* for 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." (emphasis added).

46. The respondents averred that the Arbitrator's act of denying the respondents' witness of fact an opportunity to testify and ultimately excluding the respondents' evidence that was properly on record was against the respondents' right to challenge and adduce evidence and the principles of natural justice. As explained herein above, the allegation that the Arbitrator disregarded the respondents' evidence can only be a valid argument and/or assertion if the Arbitrator himself was served, as provided for under Order 46 Rule 16(2) of the *Civil Procedure Rules* which is couched in mandatory terms. This Court can therefore not proceed to determine whether the award herein is against public policy on this ground as it would amount to denying the Arbitrator an opportunity to be heard which is against the principles of natural justice.

47. Dr. Mutubwa submitted that the Arbitrator in his awarded unreasonable interest rates, a pre-award interest at the rate of 12% and post-award interest at the rate of 18% without any justification or basis which is contrary to the provisions of Section 32(3) of the *Arbitration Act*, 1995 rendering the said award to be in conflict with the public policy of Kenya. Section 32C of the *Arbitration Act*, 1995 provides that-

> " 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."

48. Clause 34.6 of the agreement dated 10th June, 2013 provides that if a certificate remains unpaid beyond the period for honouring the said certificate, the respondents were to pay or allow the contractor simple interest on the unpaid amount for the period it remained unpaid at the commercial bank lending rate. On perusal of the Arbitrator's final award, it is evident that the parties herein both claimed interest at a rate equivalent to commercial lending rates. No evidence or submissions was presented by any of the parties on what in their view was the appropriate commercial lending rate.

49. This Court finds that the Arbitrator properly exercised his discretion at paragraph 62 of his award in line with Section 32C of the *Arbitration Act* in making a pre-award simple interest of 12% payable six (6) months from January, 2018 when the project was handed over, and computing the interest from 1st August, 2018 to 23rd December, 2019 when he was appointed. In addition, the Arbitrator at paragraph 66 of his award referred to Section 32C of the *Arbitration Act* and clause 34.6 of the agreement which provides for interest on delayed payments and stated that since the parties had not agreed on any rate of interest, by his discretion he would pre-award simple interest of 12% per annum and post-award simple interest of 18% per annum. The Arbitrator also gave his reasons for arriving at the said figures in paragraph 66 (g & h) of his Award.

50. As was held in the case of *Christ For All Nations vs Apollo Insurance Co Ltd* (*supra*), an applicant has to demonstrate that an Arbitral award was inconsistent with the *Constitution* or other laws of Kenya, or inimical to the national interest of Kenya or contrary to justice and morality. In view of the above, this Court finds that the respondents' contention that the rates of interest awarded is unreasonable thus being contrary to the provisions of Section 32(3) of the *Arbitration Act*, 1995 and being in conflict with the public policy of Kenya are unfounded. The respondents did not demonstrate that there was any violation of public policy. In any event, the Arbitrator gave justifiable reasons in making the said award.

51. It is apparent that the respondents herein are seeking to appeal against the Arbitrator's decision through the back door, and have disguised their appeal in the form of an application under Section 35 of the *Arbitration Act* and Order 46 Rule 16 of the *Civil Procedure Rules*, 2010 by seeking to set aside the Arbitrator's final award. In *Santack Enterprises Limited v Kenya Building Society Limited* [2015] eKLR the Court held that-

> " It is, however, important to note that under Section 39 of the *Arbitration Act*, the court can only consider questions of law that arose in the course of the arbitral proceedings if the parties had consented to the lodging of appeals or if the Court of Appeal was of the opinion that there was a point of law of general importance due to the final and binding nature of arbitrations.
>
> As the court stated hereinabove, the court has no jurisdiction to re-open findings of fact that have already been made by an arbitral tribunal. Once an arbitrator makes a finding of

fact, the court cannot review it even it is of the view that it would have arrived at a different conclusion..."

52. In view of the analysis made in the preceding paragraphs of this ruling, I find no merit in the respondent's application dated 24th January, 2022.

Whether the Arbitral award published on 22nd November, 2021 should be recognized and adopted as judgment of this Court.

53. The relevant law when it comes to adoption of an Arbitral award is Section 36, & 37 of the *Arbitration Act*, No. 4 of 1995. Section 36 of the said Act provides as hereunder -

> " 36. Recognition and enforcement of awards
>
> 1. A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.
>
> 2. ...
>
> 3. Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—
>
> a. the original arbitral award or a duly certified copy of it; and
>
> b. the original arbitration agreement or a duly certified copy of it.
>
> 4. ..."

54. Section 37 of the *Arbitration Act* No. 4 of 1995 on the other hand provides for grounds upon which the High Court may decline to recognize and/or enforce an arbitral award at the request of the party against it as hereunder-

> " Grounds for refusal of recognition or enforcement
>
> 1. The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—
>
> a. at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—
>
> i. 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, under the law of the state where the arbitral award was made;
>
> iii. the party against whom the arbitral award is invoked 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 it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

vi. the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

vii. the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

b. if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

2. If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."

55. The respondents submitted that the provisions of Section 36(3) of the *Arbitration Act* are couched in mandatory terms, thus an applicant seeking to enforce an Arbitral award must furnish the Court with an original award and an original arbitration agreement or in the alternative certified copies of the same but in this case, the claimant did not comply with the said provisions. The respondents' Counsel submitted that the application dated 29th December, 2021 is incurably defective and it should be dismissed.

56. I have gone through the affidavit in support of the application dated 29th December, 2021 and it is evident that annexure No. PKP-8 is a copy of the final award and the said award was certified as a true copy of the original by Mathew Oduor Okumu Advocate and Commissioner for Oaths. As such, the

claimant complied with the provisions of Section 36(3)(a) of the *Arbitration Act*, 1995. It is however evident that the claimant did not attach either the original and/or certified copy of the Arbitration agreement if any. This therefore begs the question of whether failure to do so is fatal to the application dated 29th December, 2021. In *Assa Abloy (E.A.) Limited v Top Security Systems Limited* [2021] KEHC 194 (KLR) when allowing an application to enforce a final Arbitral award, Judge Majanja stated as follows-

> "In this respect, therefore, the need for the original or certified copy of the award and arbitration agreement is necessary for the court to satisfy itself of the authenticity of the arbitral proceedings. By use of the phrase, "Unless the High Court otherwise orders", section 36(3) aforesaid imports discretion to allow the application despite failure to provide the original or certified copies of the arbitral award and arbitration agreement. Since the substance of the Award and the arbitration agreement are admitted, and the Respondent's application for enforcement is not opposed on substantive grounds, I do not see any reason why I should not allow the application."

57. I am of the same view as the learned Judge and I hold that failure to produce the original and/or certified copy of the Arbitration agreement. if any, is not fatal. It is also not one of the grounds provided for under Section 37 of the *Arbitration Act* reproduced hereinabove.

58. This Court has said enough to show that the respondents have not established any of the grounds provided for under Sections 35 & 37 of the *Arbitration Act*, to warrant the dismissal of the application dated 29th December, 2021. In the case of T*anzania National Roads Agency v Kundan Singh Construction Limited* [2013] eKLR, the Court held *interalia* that-

> "Recognition and enforcement of arbitral awards both domestic and foreign is automatic under the provisions of section 36 of the *Arbitration Act*. The conditions set under section 37 of the Act have not been met to warrant this court not to recognize and enforce the award."

59. Courts will ordinarily recognize and enforce Arbitral awards unless a party demonstrates that the award is affected by one or more of the prescribed grounds for refusal set out under Section 37 of the *Arbitration Act* No. 4 of 1995. Therefore, in the absence of grounds to vitiate the Arbitral award as provided for under Section 37 of the *Arbitration Act*, I am satisfied that the claimant has made out a case for adoption and/or enforcement of the Arbitral award herein.

60. The upshot is that the application dated 24th January, 2022 is bereft of merit and it is dismissed with costs to the claimant. The application dated 29th December, 2021 on the other hand is merited and the same is allowed in the following terms-

    i. The Arbitral award by the sole arbitrator, Arch. Julius Muthui F. Mutunga published on the 22nd November, 2021 is hereby adopted. Consequently, Judgment is hereby entered in favour of the claimant as against the respondents in recognition of the said Arbitral Award;

    ii. The applicant is granted leave to enforce the Arbitral award published on the 22nd November, 2021 as a decree of this Court; and

    iii. Costs of the application shall be borne by the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MAY, 2023.RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of

Mr. Oloo for the claimant

Ms Muyoka h/b for Dr. Mutubwa for the respondent

Ms B. Wokabi – Court Assistant.