



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jilk Construction v County Government of Kericho (Miscellaneous Application  
E001 of 2023) [2023] KEHC 18916 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18916 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS APPLICATION E001 OF 2023**

**JK SERGON, J  
JUNE 15, 2023**

**BETWEEN**

**JILK CONSTRUCTION ..... CLAIMANT**

**AND**

**THE COUNTY GOVERNMENT OF KERICHO ..... RESPONDENT**

**RULING**

1. The instant application for review is premised on a notice of motion dated 28<sup>th</sup> April, 2023 seeking the following orders;
  - i. Spent.
  - ii. Spent.
  - iii. The Honourable Court be pleased to review and/or set aside the ruling dated 24<sup>th</sup> April, 2023 and all its consequential orders
  - iv. The Honourable Court be pleased to issue such further orders as shall be necessary for the ends of justice to be met.
  - v. Costs of this application be provided for.
2. The Application is supported by grounds on the face of it and a supporting affidavit sworn by Sammy Maina of even date.
3. The Applicant avers that this honourable court issued a ruling that set aside an arbitral award in Jilk Construction Company Ltd v the County Government of Kericho delivered by Dr. Mutubwa and further that there was an error on the face of record paragraph 71 of the ruling dated on 24<sup>th</sup> April, 2023, the court relied on section 47 of the *repealed Public Procurement and Disposal Act (2005)* and



- Regulation 31 © and that as a result of reliance on the repealed law the court erroneously arrived at its decision based on a repealed law not applicable to the case.
4. The Applicant further avers that non-compliance with rule 7 of the Arbitration Rules, 1997 was fatal, rule 7 of the Arbitration Rules provides that any application to set aside an arbitral award must be served on the arbitrator or arbitral tribunal and all parties to the arbitration and as a result of the failure to serve the arbitrator, the arbitrator was deprived of the opportunity to respond or defend the validity of the award, which was tantamount to a violation of the principles of natural justice and procedural irregularity.
  5. The Applicant avers that the ruling resulted in a miscarriage of justice and deprived the applicant(s) of the benefits of the arbitral award.
  6. The Applicant faulted the court for the failure to give further directions which occasioned substantial prejudice to the Applicant and undermined the integrity and efficacy of the arbitral process.
  7. The Respondent filed a replying affidavit in opposition to the application. The replying affidavit was sworn by GIDEON MUTAI.
  8. The Respondent avers that the court delivered its ruling on 24<sup>th</sup> April, 2023 on the ground that the price variation in the award was above 15% hence contrary to public policy.
  9. The Respondent avers that whereas the applicant faulted the court for relying on a repealed law, the terms of the contract between the parties, explicitly made provision on the extent under which the tender price may be varied, the respondent highlighted clause 4.0 on variations, annexed and marked “CGK-1” is a copy of the said agreement.
  10. The Respondent avers that the court in its ruling took cognizance that the price variation adopted by the arbitrator, exceeded 15% of the contract amount.
  11. The Respondent avers that whereas the court relied on section 47 of the *Public Procurement and Asset Disposal Act* (2005) as read with section 31 © now repealed, it ought to have relied on section 139 of the *Public Procurement and Asset Disposal Act* (2015) which section is the governing law on price variation.
  12. The Respondent further avers that the applicant seeks to rely on a technicality rather than the substance of the law and that the court relying on a repealed section of the law, notwithstanding, it would still set aside the arbitral award based on the fact that the price variation was more than 15% of the contract price.
  13. The Respondent avers that it would suffer injustice should the court set aside the ruling on the ground of an error on the face of it.
  14. The Respondent further avers that the applicant herein has not set out sufficient grounds to warrant the setting aside of the ruling.
  15. The court directed that the application be canvassed by written submissions
  16. The Applicant on its part filed submissions in support of the application for review and submitted that instant application was pegged on the court’s ruling dated 24th April, 2023 setting aside an arbitral award dated 21st December, 2012 in its entirety.
  17. The Applicant submitted that one hand, the court in its ruling partly concurred with the Applicant / Claimant that the arbitral tribunal was properly appointed whereas on the other hand and on grounds of public policy found that the arbitral tribunal had exceeded its mandate in awarding the variation price, thereby setting aside the award altogether.



18. The Applicant further submitted that the court in its ruling dated 24th April, 2023 relied on a section of the law particularly section 47 of the [Public Procurement and Disposal Act 2005](#) and Regulation 31 (c) both repealed and thus the substance of the instant application was to have the ruling reviewed and subsequently have it set aside on the basis that it was an affront to the principle of legality and is an error of law apparent on the face of the record. The Applicant cited the Court of Appeal case, Civil Appeal No. 2111 of 1996, [National Bank of Kenya v Ndungu Njau](#) in which it was held that; "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established."
19. The Applicant submitted that the court occasioned a mistake on the face of the record since it failed to consider all evidence including the award of certificate no. 7 which was not contested and the interest thereon but only focused on the price variation. The applicant cited section 80 of the [Civil Procedure Act](#) CAP 21 Laws of Kenya and order 45 rule 1 of the Civil Procedure Rules that confers the court with unfettered discretion in cases of review and cited several cases to wit the Supreme Court case of [Fredrick Otieno Outa v Jared Odoyo Okello & 3 Ors, Petition No.6 of 2014](#).
20. The Applicant reiterated that [Public Procurement and Disposal Act, 2005](#) (No. 3 of 2005) was repealed and that the Public Procurement and Disposal Regulations were repealed and replaced by the [Public Procurement and Asset Disposal Regulations, 2020](#).
21. The Applicant contended that rule 7 of the Arbitration Rules 1997 requires that an application to set aside an arbitral award must be served on the arbitrator or arbitral tribunal and all parties to the arbitration, the applicant argued that arbitrator herein was not served with the application to set aside the award.
22. The applicant further argued that rule 7 of the Arbitration Rules, is coached in mandatory terms and that the failure to serve the application on the arbitrator was an error apparent on the face of the record, a procedural irregularity which was fatal and incurable. The applicant cited the following cases [Victoria Furniture Limited v Zadock Furniture Systems Limited \[2017\]](#) eKLR and [Heva Fund LLP v Katchy Kollections Ltd \[2018\]](#) eKLR.
23. The Applicant contended that the court ought to have invoked the principle of severability, that the excess variation was severable from the rest of the award and setting aside the entire award was unjust, the court ought to have severed the excess variation and then segregated the amount that the Applicant/ Claimant should be granted instead of setting aside the entire arbitral award. The applicant further contended that certificate number 7 raised for work done and awarded in the arbitral award which was valued and approved by the Respondents Project Manager at Kshs. 28,105,261.62/= was determined in the arbitral award as payable, ought not to have been disregarded with no reason, also the costs and interests therein and only the excess variations if any should have been severed from the award and the rest left to stand. The applicant further pointed out that under the new [Public Procurement and Asset Disposal Act](#) 2015 and the [Public Procurement and Asset Disposal Regulations, 2020](#) provides for 25 % capping on variation.
24. The Applicant faulted the court in its ruling dated 24th April, 2023 for failing to give further directions on the fate of the arbitration, thereby leaving the parties in limbo and in a state of uncertainty. The applicant argued that the failure to give further directions was a procedural irregularity and a ground for review and setting aside.
25. The Respondent contended that whereas the applicant herein argued that this court's reliance on repealed laws was an error on the face of record, and that the alleged error resulted in an erroneous



decision not applicable to the case, the respondent opined that there was no error of law apparent on the face of the record, but a mere mistake. The respondent reiterated that the mere presence of repealed provisions in a judgment does not automatically establish an error of law. The respondent cited the Court of Appeal case of *Nyamogo and Nyamogo v Kogo* [2001] EA 173.

26. The respondent argued that, to prove the existence of an error on the face of record, the error ought to be glaring and obvious, need not be established from a long process and in the instant case the applicant was required to prove that there was an error in law and the same led to an outcome that would not have been reached by the court had it applied the correct law, in any event the parties entered into an agreement that prohibited variation of contract price above 15%.
27. The respondent argued that the courts reliance on section 47 of the *Public Procurement and Disposal Act (2005)* and regulation 31 (c) of the Public Procurement and Disposal Rules did not meet the threshold for an error apparent on the face of the record and that the court's decision was based on the relevant legal principles and interpretation of applicable laws.
28. The respondent argued that court relied on section 47 of the *Public Procurement and Disposal Act (2005)* and regulation 31 (c) of the Public Procurement and Disposal Rules with the sole purpose being to determine whether the arbitrator herein acted contrary to the law and public policy by making an award that upheld a variation of more than 15% of the contract sum.
29. The Respondent argued that the current law on the allowable percentage of variation of contract price is section 139 (4) (b) of the *Public Procurement and Asset Disposal Act* of 2015 which provides that the quantity variation for goods and services (works) does not exceed fifteen percent of the original contract quantity. Therefore, the respondent argued that the court would not have arrived at a different finding had it relied on the current legislation in its findings.
30. The respondent reiterated the provisions of clause 4.0 of the contractual agreement between the parties, which stated that "...where the contract price variation is allowed, the variation shall not exceed 15% of the original contract price." The net effect of the said contractual term was to deter any variation that exceeds 15%.
31. The respondent argued that the second ground in the application for review, to wit failure to serve the arbitrator, was an issue of fact, which ought to be raised on appeal. In any event this was not new evidence, hence, not a ground for review.
32. The respondent argued that the aforementioned grounds as well as other grounds in the applicant notice of motion, are sufficient that the applicant wants the ruling overturned, rather than a correction of error, the respondent therefore argued that the instant application ought not to be considered as a review as the applicant raises issues which are meant for appeal while citing the case of *Nchapai Leiyang v IEBC & 2 Others Civil Appeal No.18 of 2013*.
33. I have carefully considered the application, the affidavits in support and in opposition and submissions by the parties. I find that the main issue for determination is whether the Applicant has made out a case for setting aside the ruling dated 24<sup>th</sup> April, 2023 in which the court set aside the arbitral award dated 21<sup>st</sup> December 2022.
34. As to whether the court relied on a repealed law in its ruling, the answer is in the affirmative, the current and operative law on contract price variation is section 139 (1) (b) of the *Public Procurement and Asset Disposal Act* No. 13 of 2015. Additionally, section 139 (4) of the *Public Procurement and Asset Disposal Act* No. 13 of 2015 provides as follows

“ Any variation of a contract shall only be considered if the following are satisfied—



- (a) The price variation from the original price is based on the prevailing consumer price index obtained from Kenya National Bureau of Statistics;
- (b) b) The quantity variation for goods does not exceed fifteen per cent of the original contract quantity;
- (c) The price or quantity variation is to be executed within the period of the contract;
- (d) The cumulative value of all contract variations for goods do not result in an increment of the total contract price by more than twenty five per cent of the original contract price; and
- (e) The cumulative value of professional services does not result in an increment of the total contract price by more than twenty-five per cent of the original contract price.”

35. Section 139 (6) of the *Public Procurement and Asset Disposal Act* No. 13 of 2015 provides that where variations result in an increment of the contract price by more than twenty-five percent, such variations shall be tendered for separately.

36. The method for computing price variation under the aforementioned section is prescribed in section 132 of the *Public Procurement and Asset Disposal Regulations, 2020*, which provides as follows;

- “(1) Contract variations or amendments envisaged under section 139(1) (b) of the Act for goods, works and services may either emanate from procuring entity on its own volition or from the contractor because of circumstances that were not foreseen during project design. Amendments or variations to contracts.
- (2) Any variation request shall be reviewed by— (a) the contract implementation team as set out under section 151 of the Act for complex and specialized contracts; or (b) an evaluation committee envisaged under section 139 (2) of the Act for other contracts, before they are submitted through the head of a procurement function to accounting officer for approval.
- (3) The extension of contract period under section 139(2)(a) of the Act where delivery is delayed shall not have a financial implication.
- (4) Any additional funding required shall be secured and committed prior to a variation of contract under section 139(1)(a) of the Act.
- (5) For the purposes of section 139 of the Act and this regulation— (a) “contract amendment” means a change to the terms and conditions of an awarded contract; and (b) “contract variation” means a change to the price, completion date or statement of requirements of a contract to facilitate adaptations to anticipated events or changes in requirements.”

35. As to whether reliance on repealed law constitutes a ground for setting aside this court’s ruling, after an analysis of the current legal framework which I have set out in the preceding paragraphs, I concur with the Respondent’s submissions that this court would not have arrived at a different finding had it relied



on the current legislation on contract variation and furthermore the parties had executed a contract with a clause on variation specifically clause 4 which I will proceed to set out in verbatim;

“No variations may be made to this contract or in respect of the scope of works to be rendered thereunder, except in accordance with the terms provided in the conditions of the contract, provided that where the contract price variation is allowed, the variation shall not exceed 15% of the original contract price.”

36. The court cannot rewrite the contract between the parties. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: “A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
37. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017)* eKLR the Court of Appeal further stated that: “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
38. As to whether failure to serve the arbitrator with the application seeking to set aside the arbitral award as prescribed in rule 7 of the Arbitration Rules, 1997 was fatal and incurable, hence, a ground for setting aside this court’s ruling on account of a procedural irregularity, the answer is in the negative. I find that this is not a ground for review as prescribed in section 80 of the *Civil Procedure Act* CAP 21 Laws of Kenya and Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

“45 Rule (1) Any person considering himself aggrieved-

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

39. After considering the current legal framework, I find that the court could not have arrived at a different finding. Accordingly, I dismiss the application dated 28th April, 2023 and uphold the ruling dated 24th April, 2023. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 15<sup>TH</sup> DAY OF JUNE, 2023.**

**J.K. SERGON**

**JUDGE**

In the presence of:

C/Assistant - Rutoh

Miss Ngetich for the Respondent

Kiletyen for the Applicant

