Semo v Ricosam Engineering Limited (Commercial Miscellaneous Application 006 of 2023) [2024] KEHC 14054 (KLR) (Commercial and Tax) (8 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL MISCELLANEOUS APPLICATION 006 OF 2023

MN MWANGI, J

NOVEMBER 8, 2024

IN THE MATTER OF THE ARBITRATION ACT (NO. 4 OF 1995 REVISED EDITION 2012)

-AND-

IN THE MATTER OF CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH) RULES (2012 EDITION)

BETWEEN

HON ENG BAHATI MUSIRA SEMO ..... APPLICANT

AND

RICOSAM ENGINEERING LIMITED ..... RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 26th September 2022 pursuant to the provisions of Sections 35(2)(a) – (iv) & 35(b)(c)(ii) of the *Arbitration Act* 1995, laws of Kenya, Rule 7 of the *Arbitration Rules*, Order 51 Rule 6 of the *Civil Procedure Rules*, 2010, seeking orders for setting aside of the Arbitral Award delivered on 30th August 2022 by Andrew Waruhiu.

2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Hon. Eng. Bahati Musira Semo, the applicant herein. He averred that the dispute between the parties herein is centered on an Arbitral Award delivered on 30th August 2022, in respect to work done by the respondent on Plot No LR 3734/362 in Nairobi. He claimed that the Arbitrator disregarded key evidence including project drawings, specifications, and the bill of quantities, as well as the agreed-upon rates for payment certificates and variations in accordance with the final contract terms and conditions. The applicant alleged that instead, the Arbitrator relied on an

unexecuted draft preliminary statement of final accounts made on 25th July 2019, which was meant for feedback from the consultants, leading to the current disagreement.

3. He asserted that the Project Quantity Surveyor was responsible for considering the applicant's concerns about incomplete work and preparing the final statement of accounts for execution by the applicant and all the consultants, which would be used to authorize the Project Architect to issue an interim or final payment certificate. Eng. Semo claimed that he consistently disputed the completion of certain works and requested the Arbitrator to visit the site for verification, but his request was denied without any explanation. He contended that the respondent colluded with consultants to bill for incomplete work and that the Project Quantity Surveyor never authorized the Architect to issue the final payment certificate.

4. In opposition to the application, the respondent filed a replying affidavit sworn on 20th January 2023 by Samuel Otete, the Directorate (sic) at Ricosam Engineering Limited. He stated that the respondent was awarded a Tender for external works at Kileleshwa Apartments on LR No 3734/362 for a contractual sum of Kshs 4,237,450.00. He averred that an agreement dated 6th July 2018, allowed for variations, resulting in the contract sum increasing from Kshs 3,856,079.50 to Kshs 4,237,450.00 for phase one works. He further averred that the respondent completed phase one and issued an interim payment certificate on 22nd August 2018, which was sent to the Project Architect for processing and payment. Mr. Otete deposed that on 27th August 2018, the Project Architect sent an email to the Quantity Surveyor, requesting for the processing of the final payment certificate based on his professional opinion. Mr. Otete averred that it was agreed that the respondent would provide a schedule of materials for phase two external works, which was sent to the applicant on 26th September 2018. The applicant then gave instructional drawings for the generator house and water tank floor slab.

5. The respondent asserted that it completed phase two on 11th December 2018, and raised an interim payment certificate on 13th December 2018, and sent it via email to the applicant, the Quantity Surveyor, and the Architect for payment. That on 16th January 2019, the applicant's Architect requested the Quantity Surveyor to finalize the accounts. It was stated by Mr. Otete that Clause 19 of the Agreement between the parties herein required the applicant to assess, certify and make the final payments due to the respondent within ninety (90) days, but despite multiple demands, the applicant failed to assess, certify, and pay the respondent. The respondent deposed that on 18th July 2019, the Project Architect issued the final certificate for Kshs 3,222,233.75, after the Project Team had gone through the draft final accounts sent to them by the Quantity Surveyor vide an email sent on 14th July 2019, stating that the payment was long overdue. The respondent claimed that the total amount due to it for both phases was Kshs 10,522,233.75, of which the applicant had paid Kshs 7,300,000.00 in the years 2018 and 2019.

6. Mr. Otete stated that the respondent referred the dispute over the remaining balance to arbitration. He contended that the issue of the preliminary statement of final accounts not being signed was never raised during the arbitration. Further, he averred that the draft preliminary statement of final accounts was submitted by the Project Quantity Surveyor and not the respondent. He denied claims that some works were incomplete, and pointed out that the applicant failed to specify what works were not done. Additionally, that the applicant could have terminated the contract for breach, as per the contract's provisions, but did not do so. Mr. Otete stated that after completing the work, the respondent submitted detailed payment applications, and it was the applicant's responsibility to assess and certify the payments, which he failed to do, causing the dispute.

7. Mr. Otete dismissed allegations of collusion between the respondent and a consultant in billing for the work, stating that no evidence had been provided to support the said claim.

8. He contended that the current application does not meet the legal requirements for setting aside an Arbitral Award under Section 35(2)(i)-(iv) of the *Arbitration Act* and should therefore be dismissed.

9. The instant application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Jackson Omwenga & Company Advocates, whereas the respondent's submissions were filed by the law firm of Musyoka Murambi & Associates Advocates.

10. Mr. Omwenga, learned Counsel for the applicant relied on the case of *Cape Holdings Ltd v Synergy Industrial Credit LTS* [2016] eKLR, and submitted that the Arbitrator's decision was unjust, led to unjust enrichment, and constituted a misuse of legal power. He contended that the Arbitrator ignored the applicant's changes, comments, and suggestions in the draft statement of final accounts and wrongly relied on an unsigned draft, without proof of execution by all consultants and the applicant.

11. Mr. Omwenga further submitted that the Arbitrator failed to account for the contract sum vis a vis the payments already made, resulting in the respondent being awarded sums already paid. He asserted that the Arbitral Award was contrary to justice, as the respondent had not completed the alleged work, which is the reason as to why the final statement of accounts was not prepared or approved. Additionally, he argued that the Arbitrator's refusal to visit the site, re-measure the works, or allow independent reports from the Quantity Surveyor showed bias.

12. Ms. Omuya, learned Counsel for the respondent cited the provisions of Section 35(2) of the *Arbitration Act*, and relied on the case of *Boleyn Magic Wall Panel Limited v Nesco Services Limited* [2020] eKLR. She submitted that the applicant had not provided sufficient grounds to warrant the setting aside of the Arbitral Award. She further submitted that while the applicant disputed the amount in the final payment certificate raised by the Project Architect, he failed to provide evidence of the correct amount due and owing to the respondent. She suggested that, was an indication that the applicant had no intention of paying the respondent despite the completion of phase two. She referred to the case of *Victoria Furniture's Limited v Zadock Furniture Systems Limited* [2017] eKLR, and argued that allegations of collusion between the respondent and the applicant's Architect were unsupported by evidence, hence the Arbitrator could not reasonably find collusion. She defended the Arbitrator's refusal to visit the site, as the project had been handed over to the applicant on 11th December 2018, meaning the same could not be in the same state in the year 2020.

Analysis And Determination.

13. I have considered the application filed herein, and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondent, together with the written submissions by Counsel for the parties. The issue that arises for determination is whether the Arbitral Award made on 30th August 2022 should be set aside.

14. The applicant is challenging the Arbitral Award made on 30th August 2022 on grounds that the respondent did not produce any documents in support of its claim, the Arbitrator failed to take into account the applicant's evidence, the Award was excessively high, punitive and contrary to the evidence adduced by the respondent. The applicant also challenges the Arbitral Award on grounds that the Arbitrator treated an unsigned draft statement of final accounts as a final settlement of accounts for the parties, the Arbitrator failed to visit the site as requested by the applicant, that he failed to take into account the applicant's submissions, and that the Arbitral Award is contrary to public policy.

15. It is trite law that the High 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 will not hear the claims of factual or legal error by an Arbitrator and disturb the Arbitrator's findings

on the same. The above is anchored on the provisions of Section 32A of the *Arbitration Act* which states that -

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

16. This was the Supreme Court's position in the case of *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR, where it quoted Ochieng Judge'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).

17. This Court's jurisdiction to set aside an Arbitral Award is provided for under Section 35 of the *Arbitration Act*. Section 35(2) of the *Arbitration Act* provides for grounds under which an Arbitral Award may be set aside. It states as follows-

An Arbitral Award may be set aside by the High Court only if -

a. the party making the application furnishes proof –

   i. that a party to the arbitration agreement was under some incapacity; or

   ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

   iii. the party making the application was not given proper notice of the appointment of an Arbitrator or of the Arbitral proceedings or was otherwise unable to present his case; or

   iv. the Arbitral Award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the Arbitral Award which contains decisions on matters not referred to arbitration may be set aside; or

   v. the composition of the Arbitral tribunal or the Arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

   vi. the making of the Award was induced or affected by fraud, bribery, undue influence or corruption;

b. the High Court finds that -

   i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

   ii. the Award is in conflict with the public policy of Kenya.

18. Upon perusal of the applicant's grounds challenging the Arbitral Award made on 30th August 2022, it is manifest that all the grounds save for the allegation that the Award is contrary to public policy, are an invitation to this Court to sit on appeal against the Arbitrator's decision, contrary to the provisions of Section 32A of the *Arbitration Act*, since the said grounds are not provided for under Section 35 of the *Arbitration Act*.In the case of*Bomas of Kenya Limited v Standard Investment Bank Limited* (Civil Application E456 of 2021) [2023] KECA 544 (KLR) (12 May 2023) (Ruling), the Court of Appeal in discussing the import of Section 35 of the *Arbitration Act* held that –

> By agreeing to arbitration, the parties limit interference by courts to the grounds set out in Section 35 of the Act. By necessary implication they waive the right to rely on any further grounds of review, 'common law' or otherwise. Section 35 (1) of the Act provides that recourse to the High Court against an Arbitral Award may be made only by an application for setting aside the Award under subsection (2).

19. Based on the above decision and Section 35(2) of the *Arbitration Act*, the only ground that this Court can consider in determining whether or not to set aside the Arbitral Award made on 30th August 2022, is whether it is contrary to public policy.

20. Public policy was extensively discussed in the case of *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, where Ringera, J., held that-

> 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* as 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.

21. The applicant submitted that the Arbitral Award made on 30th August 2022 is contrary to justice and morality. He contended that the respondent did not render and/or undertake some of the alleged works and that is the reason why the final statement of accounts was not prepared by the Quantity Surveyor and approved by all the consultants and the parties herein. The applicant also argued that the Arbitrator's refusal to visit the site, re-measure the works, or allow independent reports from Quantity Surveyors showed bias on the Arbitrator's part. He urged this Court to interfere with the Arbitral Award by setting it aside, so as to avert the illegal promotion of unfair, unconscionable and unfairly enriching the respondent.

22. From the pleadings filed, it is worthy of note that the applicant contends that the respondent did not undertake some of the works, but he neither specified what works were not done, nor did he demonstrate by way of photographs the works that were not completed by the respondent. The respondent handed over the Project Site to the applicant on 11th December 2018, however no evidence has been tendered by the applicant either before this Court or the Arbitral Tribunal on whether the applicant had to incur extra expenses in getting another contractor to complete the alleged works that were not done and/or completed by the respondent, or whether he engaged the services of another Quantity Surveyor to re-measure the works done by the respondent and prepare an independent report. In the premise, the Project Site having been handed over to the applicant, and with him having been served with the statement of final accounts, he had the duty to take measures such as the ones explained above herein to mitigate his losses, if any.

23. It is further worth noting that despite the foregoing allegations by the applicant, he did not refer any dispute for determination to arbitration, neither did he terminate the contract between him and the

respondent on account of breach of contract. It is the respondent which referred the dispute on non-payment to arbitration. All that the applicant herein did was to decline and/or fail to sign the final statement of accounts. Consequently, and in view of the fact that the only available report was the one prepared by the Quantity Surveyor engaged during the subsistence of the contract in issue, the Project Architect on 18th July 2019 issued the final certificate dated 18th July 2019 for Kshs 3,222,233.75, noting that the payment was long overdue to the respondent.

24. In the circumstances, this Court agrees with the Arbitrator's finding that from the evidence adduced before him, it was more probable than not that works were done and no dissatisfaction with the deliverables was registered or objection to the final account raised during the subsistence of the contract, or immediately after completion of the works. As a result, it is my finding that the Arbitral Award of Kshs 3,222,233.75, and interest of Kshs 418,800.38 as provided for under Clause 15 of the Agreement between the parties, by the Arbitrator was justified.

25. On the issue of whether the Arbitrator was biased for declining the applicant's request for a site visit, I am of the considered view that a site visit conducted two years after the project had been handed over to the applicant would have served no useful purpose since the Arbitrator would have had nothing to compare the state of the site at the time it was handed over to the applicant, and at the time of the proposed visit, more so noting that a considerable period of time had passed since the project was handed over to the applicant. In addition to the foregoing, the applicant had neither specified which works had not been done and/or completed by the respondent, nor taken photos of the site pointing out the areas of works not done. Accordingly, this Court finds that the Arbitrator did not err in declining the applicant's request for a site visit.

26. It is now well settled that an Arbitral Award cannot be said to be contrary to public policy just because it is against one party. In the case of *Christ for All Nations v Apollo Insurance Co. Ltd* (*supra*) Ringera, J., stated as follows -

> Justice is a double-edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust ... in my judgment this is a perfect case of a suitor who strongly believed that the Arbitrator was wrong in law and sought to overturn the Award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the Arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of Arbitral Awards and parties to arbitration must learn to accept Awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the *Arbitration Act*.

27. The applicant does not dispute that the Quantity Surveyor and the Project Architect were acting under his instructions in respect to the project in question. I agree with the Arbitrator's finding that from the evidence presented, the applicant mostly acted through his agents being the Quantity Surveyor and Project Architect, the persons who prepared the final statement of accounts and issued the final payment certificate, respectively. Additionally, in as much as the applicant raises allegations of collusion between the aforesaid agents and the respondent, no evidence has been tendered in support of the said allegation, and no complaints have been levelled against the said agents for the alleged collusion, in tandem with the provisions of Sections 107, 108 & 109 of the *Evidence Act*, which provides that he who alleges must prove. For this reason, all approvals and drawings done by the said agents are deemed to have been duly approved and payment rightfully accrued to the respondent.

28. In the premise, and in the absence of any evidence of collusion between the Quantity Surveyor, the Project Architect and the respondent, I am not persuaded that the Arbitral Award made on 30th August 2022 was contrary to public policy as alleged by the applicant.

29. The upshot is that the application dated 26th September 2022 is not merited. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF NOVEMBER 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence:

Mr. Onderi h/b for Mr. Omwenga for the applicant

Ms Omuya for the respondent

Ms B. Wokabi - Court Assistant.