REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC APPLICATION NO E473 OF 2019 & MISC E 652 OF 2019 (CONSOLIDATED)

IN THE MATTER OF AN APPLICATION TO SET ASIDE THE AWARD DATED 30TH SEPTEMBER 2019

KENYA INDUSTRIAL ESTATES LIMITED.....APPLICANT

VERSUS

MWEHA ENTERPRISES ESTATES LIMITED.....RESPONDENT

RULING

INTRODUCTION AND BACKGROUND

The Applicant, Mweha Enterprises Ltd filed application on 9th January 2020 and sought the Final Arbitral Award of 30th September 2019 be made a decree of the Court and leave is granted to the Applicant to execute the Final Award as a decree.

The Applicant deposed in Supporting affidavit that the Final award was published on 30th September 2019 as per notification marked **RMM-1.** The Respondent was served with the Award and 3 months elapsed before the Respondent filed application to set aside the award. The Applicant confirmed compliance with **Section 36 of Arbitration Act** by filing the Original Final Award and Arbitration Clause.

The Applicant, Kenya Industrial Estates filed on 23rd December 2019(in separate Court file now consolidated) The Application to set aside Final Arbitral Award of 30th September 2019 on the following grounds based on the Applicant's Charity Ndeke's Supporting Affidavit;

1) The said decision was made against the provided legal provisions of **Section 47 of Public Procurement & Disposal (PPD) (2005) Act** (now repealed) which was the statute in operation at the time of making the impugned contract and that bound the Applicant herein being a public body.

2) The said provision categorically provided that an amendment to a contract where a public body has entered shall be permitted through the Tender Committee of the public body issuing authorization, written or otherwise for the intended variation.

3) Under **Rule 31 of the PPD Rules** it gave a variation room of 15% of the contractual price where authorization has been granted legally under **Section 47 of PPD Act.**

4) The awarded sums plus interest were/are illegal as they are against the provided legal provisions as indicated above and thus offend the public policy provision under **Section 35(2)(d) of Arbitration Act** and the express provisions of **section 29(1)** of the Arbitration Act.

REPLYING AFFIDAVIT

The Respondent through the Replying Affidavit of Richard Macharia dated **31st January 2020**, the Respondent opposed the Applicant's Application as follows; -

1. Mweha Enterprises Ltd won Tender No TNO.KIE/07/2012-2013 for construction of K.I.E. Industrial Park in Machakos on LR MACHAKOS MUNICIPALITY/BLOCK 11282.The award of the said tender was accepted on 12th November 2012 and formal agreement was duly signed at contract price of Ksh 159,749,011.00/-

2. The Employer appointed various Project Consultants as Architect/Lead Consultant, Civil & Structural Engineers, Mechanical Engineers,

Electrical Engineers & Quantity Surveyors who were representatives of the Employer and were charged with responsibility of supervising the execution and delivery of the Project by the Contractor.

3. In the course of the execution of the tendered works, the Applicant through its Project Consultants lawfully issued various instructions to the contractor and which instructions invariably led to variation of the tendered works with the attendant cost implications. These instructions were given at various site meetings and by email correspondences

4. At the 4th site meeting of **20th March 2013**, as evidenced by Minutes annexed & marked **RMM-1;** the Architects made variations by revision of the Architectural and Structural drawings, in the presence of 2 employer's Managers namely Mr Jonathan Muthama & Mr David Ogogo amongst the Employer's Consultants.

5. At the 5th Site Meeting of **24th April 2013** as per Minutes annexed & marked **RMM-2**; the Architects made variations, by revision of washrooms and Quantity Surveyor to advise on financial implications.

6. At the 8th Site Meeting of **24th April 2013** as per Minutes annexed & marked **RMM-3;** the Architects made variations, Window seal heights and windbreakers to be reviewed and revised window Schedules to be resent to the MC.

7. At the 9th Site Meeting of **28th August 2013** as per Minutes annexed & marked **RMM-4;** the Quantity Surveyor made variations that Substructure work be remeasured and also factor windows revision and suspended slab thickness in the variation being processed.

8. At the 13th Site Meeting of **22nd January 2014** as per Minutes annexed & marked **RMM-5**; the Architect made variations Cypress door

installed on Ground Floor…Mahogany timber frames and doors preferred.

9. The variations were contractually provided for in **Clauses 5, 30, 30.1 & 30.2** of the contract and the Contractor was obliged under Clause 4.1 to abide by the instructions.

10. None of these variations were made by the Contractor but by the Employer and it was incumbent upon the Applicant to have them ratified by its Tender Committee if such approval/ratification was ever required.

11. The Applicant both expressly or by conduct represented to the Contractor that the variations were approved, the Contractor relied on such representation, executed the works in accordance therewith and conferred value thereof to the Applicant who is now estopped from feigning lack of authority**.**

12. The variation room of 15% of the contract price of **Ksh. 159,749,011.15** is **Kshs.23,962,351.65** thereby making the maximum contract price to be **Kshs.183,711,362.65.**

13. The Project Architect issued a total of 15 interim certificates with a cumulative value of **Kshs.179,205,697.64** which is well within the legal variation price. Interim certificates numbers 1 to 12 had gross cumulative value of **Kshs.167,519,952.64** of this sum. The Applicant deducted and paid VAT to KRA i.e. **Kshs.4,807,546.65** withheld 10% of the gross value being retention money (moiety of retention) **Kshs.16,751,986.27**, paid the contractor the net balance of **Kshs.145,960,329.75**. **Interim Certificate Numbers 13A and 13B were never paid by the Applicant. (RMM - 9).** The Applicant has cleverly not given an itemized break down of the alleged sum of **Kshs.162,144,352.78.**

14. The claim for interest on delayed payments is provided for at **Clause 34.5 and 34.7** of the Contract and **Section 48 of the PPD Act**. The same is a penalty charge for the late payment of certificates which cannot be included when determining variation of the contract price. The same applies to costs of the arbitration which was mutually agreed upon by the parties and the same were settled only that the contractor is to be reimbursed its share of the costs of the reference.

15. The Arbitrator acted well within the law gave a reasoned determination and the final award herein should not be set aside but made a decree of the court and be executed as such.

APPLICANT'S SUBMISSIONS -(MWEHA ENTERPRISES ESTATES LTD)

The Applicant's submission is premised on **Section 35 (2) (b) (ii)** of the Arbitration Act and the Application grounded on the allegations that; -

The award violated the provisions of **Section 47 of the Public Procurement and Disposal Act of 2005** in that the Arbitrator failed to appreciate statutory requirement that variation of a contract by a public body cannot be effected without permission of the Tender Committee of the said Public Body.

That the Final award is totally illegal as it is way above the 15% variation limit provided for under **section 47 of the PPDA Act and Rule 31 of the Public Procurement Disposal Rules 2006.**

The Claimant/Applicant submits on two issues

1. **Whether there was a variation in the tendered works and contract price?**

2. Whether the final award is way above the 15% variation room limit?

Whether there was a variation in the tendered works and contract price?

The Applicant relied on the Contractor's Replying Affidavit paragraphs

4-17 (highlighted above) and the Arbitrator's finding at paragraph 8.4 of the Final Award that there were variations to the tendered works as found from minutes of site meetings which were sent to the Respondent/Applicant/Employer.

It is the Claimant/Applicant's submission that the Project Architect and Manager i.e. Messrs Habitech Consultants was an appointee and overall representative of the Respondent. The Contractor was pursuant to **Clauses 4.1 and 22.0** required by the Respondent to comply with all the instructions issued by the Architect in respect to matters that the Architect was expressly empowered to issue instructions.

Further, the variations were dealt with under **Clause 30.0** of the conditions of the contract and at **Clause 30.2** thereof, the Respondent had empowered the Architect to issue instructions varying the contract up to **15%** of the builder's works and all the instructions for variations were copied to the Respondent. These variations were therefore lawfully issued by the Respondent through their duly appointed Project Management Consultants and were fully executed and value conferred by the contractor. A copy of Minutes of Site Meetings marked **"RMM -1 to 6".**

In light of the above submissions; it has been demonstrated that the Respondent authorised the variations and it was incumbent upon the Respondent to constitute its Tender Committee to grant the formal approval where necessary. Further, the Respondent can not deny approving the variations as instructed by the Architect as they had the opportunity and time to object but they did not.

The Respondent both expressly and by conduct led the Contractor to believe that the variations were duly approved and the Contractor relied upon such representations and incurred expenditure and conferred a benefit to the Respondent. The Respondent is consequently estopped from denying that they approved the variations and cannot reprobate and approbate on the issue of variation of tendered works. This principle was discussed in ***Republic vs Institute of Certified Public Secretaries of Kenya Ex parte Mundia Njeru Geteria (2010) eKLR*** **wherein Wendo J**. stated that: -

> ***"It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in Evans Vs Bartlam (1973) where Lord Russel of Killowen said: the doctrine of approbation and reprobation requires for its foundation inconsistency of the conduct, as where a man, having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred the benefit….. in Aberdare Freight (supra) J. Nyamu held that an applicant cannot be applied to approbate and reprobate at the same time."***

The Applicant further submits that the doctrine of estoppel is today constitutionally underpinned in **Article 10(2)(b) of the Constitution** as one of the national values that courts must protect while exercising judicial authority. In ***Willian Kipsoi Sigei vs Kipkoech Arusei & Another (2019)*** **the Court of Appeal** rendered itself thus; -

> ***"Since the current Constitution has by virtue of Article 10 (2)(b) elevated equity as a principle of justice to a constitutional principle and requires courts in exercising judicial authority to protect and promote that principle , amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppels are applicable to and super cede the Land Control Act, where a transaction relating to an interest in land is void an unenforceable for lack of consent by the Land Control Board."***

Whether the final award is way above the 15% variation room limit?

The Applicant submits that the Final Award is well within the legal variation limit of 15% (Par. 15 of the Affidavit). It is a settled fact that the Respondent only paid the value of the first twelve interim Certificates as shown in **Annexure RMM 8 - RMM 9.** On all the twelve interim certificates, the Respondent deducted 10% retention money (**Clause 34.12**) withholding tax and VAT and only paid the net amount to the contractor. These twelve certificates had a gross value of **Kshs.167,517,862.67** and after the foresaid deductions the Respondent paid the Contractor a total sum of **Kshs.145,960,329.75.**

It follows therefore that interim **Certificates 13A and 13B** were not paid and formed part of the claim before the Arbitrator. **Interim Certificates 14 and 15** were for the release of the 1st and 2nd moieties of retention and were not additional costs but represented the cumulative value of the 10% retention funds withheld by the Respondent on certificates 1 to 12

The other claim was for interest on late payment of certificates. The claim for interest is contractually provided for at **clause 34.7** of the contract and **Section 48 of the PPDA**. The same is a penalty charge for late payment of certificates and cannot be reckoned when determining variation sum of the contract price.

In summary the Applicant submits that there is no valid challenge to the Final Award rendered by the Arbitrator and it is the Applicants prayer that the Respondents application seeking to set aside the Arbitral award be dismissed with costs and the Applicant's application **dated 6th January 2020** be allowed as prayed.

RESPONDENT'S SUBMISIONS –(KENYA INDUSTRIAL ESTATES LTD)

The Applicant highlights three issues for courts determination; -

1. What is the scope of the Court's jurisdiction while exercising its powers under Section 35 of the Arbitration Act?

2. Whether the Arbitral Award dated 30th September 2019 contravened public policy?

3. Whether the court should set aside the Arbitral award dated 30th September 2019?

What is the scope of the Court's jurisdiction while exercising its powers under Section 35 of the Arbitration Act?

The Applicant defined jurisdiction in the case of ***Nyutu Agrovet Ltd vs Airtel Networks Ky Ltd 9[2019] eKLR*** The Court's power to entertain, hear and determine a dispute before it and the sphere of Court operations. The Applicant submits that the issue of jurisdiction is well cemented by the case of owner of ***Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] eKLR*** where the court emphasized that; -

"Jurisdiction is everything and without it, a tribunal, a court or panel has no power to make one more step. This has also been defined under section 35 of the Arbitration Act.

The Court of Appeal in ***Kenya Oil Company Limited & Another Vs Kenya Pipeline Co. [2014] eKLR*** while citing with approval the English case **of *Geogas S. A vs Trammo Gas Limited ("The Baleares")*** took the position that;

> ***"The Arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the Arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of financial consequences of the mistake of the fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the Arbitrators Award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings."***

The Applicant has invoked the courts power to set aside the award dated **30th September 2019** as the Arbitrator erroneously granted the Respondent an award not in accordance with **PPD Act**.

Whether the Arbitral Award dated 30th September 2019 contravened public policy?

It is the Respondent's submission that the Arbitral tribunal contravened public policy in awarding the Applicant a value **25%** more than the contract price without the appropriate approval. In understanding the public policy,

In *Christ for all Nations vs Apollo Insurance Company Limited [2002] E.A. 366* Ringera J. (as he then was) while considering the concept of public policy from the prism of **Section 35 (2)(b)(ii)** held: -

> ***"I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you, an award could be set aside under section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it has shown that it was either; (a) inconsistent with the Constitution or other laws of Kenya whether written or unwritten or (b) inimical to the national interest of Kenya or (c)contrary to justice and morality."***

The Respondent submits that the Arbitral award was inconsistent with the PPDA, the statute in operation at the time of making the impugned contract, and that binds the Respondent herein as a public entity whose actions have to be inconsonance with the law at all times. From the onset the Applicant as a public entity which ought to and abide to all Government procedures. The Respondent undertook tendering exercise in compliance with the PPDA and awarded the tender to the Respondent and subsequently, both the Applicant and Respondent entered into an Agreement (**Annexture CN-03**). The two instruments namely the PPD Act and the Contract became binding upon the parties.

It is the Respondents submission that the Arbitrators decision was made against the provided legal provisions of **section 47 of the PPD Act** which provides that an amendment or variation to a contract where a public body has entered shall be permitted only through the Tender Committee of the public body, Respondent herein, issuing any authorization, written or otherwise for the intended variation. **Rule 31 of the PPD rules** gave a variation of 15% of the contractual price where authorization has been granted legally.

Was there approval by the Tender Committee? - The Respondent submits that the Respondent did not expressly or by conduct lead the Applicant to believe that the Respondent duly approved the variation. The Applicant has produced no evidence proving this assertion. It is trite law in evidence that he who asserts must prove.

Furthermore, **Clause 30.14 of the contract** required the Architect to have the written approval of the Respondent for additional work exceeding 0.01% of the contract price. The Respondent submits that a written approval from the Respondent was mandatory.

Was the variation above 15% of the contract price? -

The Respondent affirmed that the variation was above 15% of the contract price as follows;

a) The Arbitral Tribunal awarded the Respondent **Ksh 44.600,528** in addition to **Ksh 162,144,352.78** the Applicant paid the

Contractor.

b) The total amount paid would be Ksh **206,744,880.78**.

c) Accordingly, the resulting variation would be 29% more than the contract price, a variation above the limits in the contract, **Section 47 of PPDA & Rule 31 of the PPD Rules.**

The Respondent avers that the material difference between the intended contract and the award granted was of significant increase to the tune of 29% thus the award failed to meet the twin standard requirements under the PPD Act read together with the PPD Rules.

Moreover, Courts place a burden on all parties in procurement contract to be vigilant on variations and observance of the law. The court in ***Centurion Engineers & Builders Limited vs Kenya Bureau of Standards [2017] eKLR*** held as follows; -

> ***"The contractor cannot play ignorance because the law is clear in respect to variations. The contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the contractor has no business acceding to a request to carry out prohibited works without having been properly contacted through fresh bidding. The contractor must be vigilant as the Public entity in the observance of the law."***

Therefore, the Respondent submits that it is only the Respondent's Tender Committee that is to give the requisite approval in writing in accordance with **Section 47 (a) of the PPD Act**. The Respondent did not approve of the variation of the contract price.

Was the award in conflict with Public Policy? - The Respondent submits that it gave no approval for the variation of the contract price, the award was beyond the prescribed limit and the Applicant failed to prove otherwise, the award of the Tribunal was in conflict with Public Policy. The award upheld a variation contrary to statute. That is, a variation of 29% more than the contract price, the same is against public policy and should be set aside forthwith.

Whether the court should set aside the Arbitral award dated 30th September 2019?

The Respondent submits that the court should set aside the arbitral award in strict compliance with **section 47 of the PPD Act** and accordance with the decision in ***Centurion Engineers & Builders Company Limited*** that partly held as follows; -

> ***"The court must subject that finding on its own independent evaluation, otherwise awards will never be subjected to review under section 35(2)(b)(ii) of the Act once an Arbitrator self declares that the award is not against Public Policy. The Principle of Party Autonomy can never mean that an Arbitrator's own finding that hi/her award is not against public policy must be accepted without question; the Court's mandate under section 35(2)(b)(ii) would require that the court relooks at the question and gives its its independent answer. And it cannot be said that the court has sat on appeal over the arbitration award simply because it has reached a different conclusion. This is because when asked to determine a setting aside application premised on section 35(2)(b)(ii) Arbitration Act, the court must make its own finding on whether or not award is on the right side of Public Policy."***

ANALYSIS AND DETERMINATION

After consideration of pleadings and submissions by parties /Counsel the Issues for Determination are;

1. **The Court's jurisdiction**

2. **Whether the Arbitral Award dated 30th September 2019contravened public policy?**

3. **Whether the variations were authorised by the Applicant?**

4. **Whether the Court should set aside the arbitral award?**

This Court's jurisdiction is limited by **Section 10 of the Arbitration Act. Section 32 of the Arbitration Act** mandates the Arbitration Award as Final and matters costs, expenses and/or interest unless agreed by parties is by the Arbitral Tribunal.

In this instance, the Court invokes the mandate prescribed by **Section 35 2 b of the Arbitration Act** thus;

> **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 KenyaWhether the variations were authorised by the Applicant?***

On 21st November 2012, the parties executed a contract for construction of K.I.E. Industrial Park in Machakos on LR MACHAKOS MUNICIPALITY/ BLOCK 11282. The award of the said tender was accepted on 12th November 2012 and formal agreement was duly signed at contract price of **Ksh 159,749,011.00/-**

As highlighted above, as the project was underway, the Contractor as instructed by the Architect & Quantity Surveyor, carried out variations as evidenced by Site Meeting Minutes marked **RMM1, 2,3,4,5 & 6** that increased the cost of the Project.

The Applicant relied on **Section 47 of the PPD Act 2005 (now repealed)** that provides;

> ***"An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if—***
>
> ***a) the amendment has been approved in writing by the tender committee of the procuring entity; and***
>
> ***b) any contract variations are based on the prescribed price or quantity variations for goods, works and services."***

Further, **Regulation 31 (c) of the PPD Rules** provides;

> ***"Rule 31. Variations to contracts for the purposes of section 47(b) of the Act, any variation of a contract shall be effective only if —***
>
> ***a) the price variation is based on the prevailing consumer price index obtained from Central Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya;***
>
> ***b) the quantity variation for goods and services does not exceed ten per cent of the original contract quantity;***
>
> ***c) the quantity variation for works does not exceed fifteen per cent of the original contract quantity;***
>
> ***d) the price or quantity variation is to be executed within the period of the contract; and***
>
> ***e) the cumulative value of all contract variations do not result in an increment of the total contract price by more than twenty-five per cent from the original contract sum.***"

The variation(s) ought to be within the prescribed limit of 15% of the original contract quantity.

It is the Applicant's submission that the finding of the Tribunal, at Paragraph 8.5 of the award, is inconsistent with the Contract and the PPD Act.

Clauses 30.2, 30.3, 30.4,30.5, 30.13 and 30.14 of the Contract in summary, required;

> a) The Architect may issue instructions requiring variation or sanction any variation by Contractor in writing but no variation shall substantially change, scope or object of the contract without consent of employer.
>
> b) If the net value of all variations should equal 15% of the builders' work the Architect shall not issue further instructions requiring variation for additional work without consent of the Employer and the Contractor.
>
> c) All instructions for variations shall be copied to the Employer.
>
> d) All variations required by the Architect or subsequently sanctioned by him in writing and all work executed by the Contractor for which provisional sums are included shall be assessed by Quantity Surveyor.
>
> e) Where the Architect with the consent of the Employer and the Contractor issues instructions requiring variation beyond the limit provided in Sub Clause 30.3, the Employer may require additional performance bond over and above that provided.
>
> f) The Architect shall not issue an instruction requiring a variation for additional work exceeding 0.01% of the contract price without prior written approval of the Employer unless otherwise communicated by the Employer to the Architect and the Contractor.

The Claimant/Applicant, on the other hand, submits that the Respondent/ Applicant both expressly and by conduct led the contractor to believe that the variations were duly approved and the Claimant/Applicant relied upon such representations and incurred expenditure and conferred a benefit to the Applicant.

Thus, the Applicant is estopped from denying that they did not approve the variations to the tendered works. Further, that vide a letter dated 29th January 2015, the Architect granted the Respondent 40 weeks extensions after noting the variations and additional works.

Clause 30.2 of the Contract provides as follows; -

> ***"No variation required by the Architect or subsequently sanctioned by him shall vitiate this contract provided that no such instructions shall substantially change the scope or object of the contract without the consent of the employer and the Contractor."***

The Claimant/Applicant annexed documents namely; Interim Certificates 1-12 that were approved by the Lead Architect/Consultant and paid by the Respondent/ Applicant. The bank Statements annexed confirm payment of **Ksh 145,960,329.75** with 10% retention moiety of **Ksh 16,751,986** all totalling to **Ksh 167,519,862** as per Claimant's letter of 27th February 2018 to their advocates on record.

All seemed to run smoothly until the1st letter of 14th July 2015 that referred to **Architect's Interim Certificates Nos 13 A& 13 B (Revised)**which reads in part;

> ***"We refer to Certificate No 13 of 29th May 2015 for Ksh 11,685,745 in favour of the Contractor. This certificate brought the total amount certified to Ksh 179,205,697.64. This exceeds the amount of Ksh 175,667,295.44 approved in Financial Appraisal No. 1 of December 2013.***
>
> ***We therefore advise that Certificate No 13 to be divided into 2 payable parts; Certificate 13A amounting to Ksh 8,147,142.80 & Certificate 13 B to comprise the remaining amount Ksh 3,538,402.20***
>
> ***By dividing the indicated certificate, the 1st Part of the Certificate 13A shall be accommodated within the projected sum and the client can seek approval for the remaining monies in the revised financial appraisal No.2 sent to your office."***

The import of this letter is that the Employer had no knowledge of the amount sought to be paid for Certificate 13, did not consent or approve the same at the time. Secondly, the Employer earmarked funds for contracted price of the project **Ksh 159,749,011.00/-** and already paid **Ksh 162,144,352.78/-** by their admission to the Contractor. The Respondent/Applicant did not respond to the said letter and did not acknowledge and/or settle the subsequent interim Certificates in terms of payment. This was the genesis of the dispute that was the subject of Arbitration culminating to the Final award.

From the foregoing the written Approval of the variations by the employer was required **Under Section 47 of PPD ACT** and thus the variations carried out by the Respondent were not authorised by the Applicant.

In the case of ***Centurion Engineers & Builders Ltd v Kenya Bureau of Standards [2017] eKLR Misc Application. No.506 of 2012 (supra)*** as follows; -

> ***"The Court reaches its decision even in the face of the submissions by the Claimant's Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other.***

The Respondent was well aware of the terms of the Contract which required the written approval by the Applicant for the variations to be carried out. It ought therefore to have ensured that the Architect accompanied his instructions with the written approval of the Applicant.

Whether the arbitral award dated contravened public policy?

The Applicant relied on the ground of public policy under **section 35(2)(b)(ii)** of the ***Act***. The subject and scope of public policy as a ground of setting aside an arbitral award has been a subject of various decisions which had been cited by the parties. In ***Christ for all Nations v Apollo Insurance Co. Ltd* [2002] EA 366**, which was quoted with approval by the Court of Appeal in ***Kenya Shell Limited vs Kobil Petroleum Limited NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR***, Ringera, J., (as he then was) elucidated the meaning of public policy under **section 35** of the ***Act*** (supra)

It is the Respondent/Applicants submission that it did not give approval for the variation of the contract price, the Award was beyond the prescribed limit and the Respondent failed to prove otherwise, thus, the Award was in conflict with public policy under **Section 47 of the PPD Act and Rule 31 of the PPD Rules.**

Further, **Regulation 31 (c) of the PPD** Rules provides that the variation ought to be within the prescribed limit of 15%. It is the Applicant's submission that the finding of the Tribunal, at Paragraph 8.5 of the award, is inconsistent with the Contract and the **PPD Act**.

In terms of **Section 47 PPD Act 2005** it was mandatory to obtain written approval from the Tender Committee of the procuring entity and contract variations based on prescribed price and/or quantity of goods. From the pleadings and evidence on record no approval consent was availed by the Respondent even after the letter by the Architect of 14th July 2015 advising on seeking approval.

At that point the Contractor ought to have halted the process awaiting the Respondent's approval. The Final Award is therefore contrary to Public Policy as it is contrary to and in conflict with mandatory statutory provision of **Section 47 PPDA 2005** repealed.

The Arbitrators being masters of facts, there is no evidence before the Arbitrator or the Court record that written approval was obtained.

The contract by the parties stipulated that the Architect could issue instructions for variation but not change scope of object of the contract without consent of employer.

The net value of variations should equal 15 % of the builders work.

The Claimant tabulated 15% as follows;

> ***The variation room of 15% of the Contract Price of Ksh 159,749,011.15 is Ksh 23,962,351.65 there by making the maximum contract price to be Ksh 183,711,362.65.***

The Quantity Surveyor (Kanjumba Consultants Ltd) in the Bill of Quantity dated 15th November 2016 tabulated 15% as follows;

> ***"Contract sum Ksh 159,749,011.00, variation Ksh 21,290,823.63 there by making the projected final Account figure to be Ksh 181,039,834.63***.

The Architect by letter of 14th July 2015 was as follows;

> ***"We refer to certificate No. 13 of 29th May 2015 for Ksh 11,685,745 in favour of the Contractor. This certificate brought the total amount certified to Ksh 179,205,697.64. this exceeds the amount of Ksh 175,667,295.44 approved in Financial Appraisal No. 1 of December 2013.***

The Arbitrator's Final Award of 30th September 2019 was as follows;

> ***"9.1 The Respondent shall pay to the Claimant the sum of Kenya Shillings forty four million six hundred thousand, five hundred twenty eight (Ksh 44,600,528.00), being the outstanding payments together with accrued interest.***
>
> ***9.2 The total sum of Kenya Shillings Two Million Forty five thousand, nine Hundred ninety five (Ksh 2,045,995.00) being the cost of this reference, plus of value Added Tax, shall be borne by the Respondent. Any sum by the Claimant shall be reimbursed by the Respondent.***
>
> ***9.3 The total sum of Kenya Shillings forty three thousand five hundred (Ksh 43,500.00), being the stenographer's charges, shall be paid by the Respondent. The cheque in the name of Messrs Ultimate Hansard Services shall be delivered to the Arbitrator's office."***

The Respondent/Applicant did not tabulate payments but confirmed payment of Ksh 162,144,352.78/-. Whereas the Court is not to delve into facts of the dispute as the same is within the purview of the Arbitral Tribunal as for the Arbitral Agreement/Clause, it is an uphill task to determine if the variations surpassed 15% or not in light of diverse calculations and payments and whether, the moiety was already factored in the Final Award which was exclusive of costs, interest and Arbitral fees would amount to 15% contract price or builders work. However, even then, the 15% of the Contract sum or builders work ought to have been with written approval of the Respondent/Applicant **vide Section 47 PPD Act & Clause 30 of the Contract**.

The parties were aware of the terms of the Contract which required the written approval by the Respondent/Applicant for the variations to be carried out. It ought therefore to have ensured that the Architect accompanied his instructions with the written approval of the Applicant.

Whether the court should set aside the arbitral award? The Claimant/Applicant claim should only be in terms of the mandatory provision **of Section 47 PPD Act 2005 repealed** written consent from the Respondent's Tender Committee and variations not exceeding 15% of builders work or original contract quantity. It was emphasized in the decision of Havelock J. in ***Kenya Research Foundation vs Kenchuan Architect ltd [2013] eKLR.***

> ***"In the case of MORAN v. LLOYDS [1983] 2 ALL ER 200 it was reiterated that the Courts cannot interfere with findings of facts by an arbitrator. The Court's intervention is limited to errors of law. The Court's intervention is limited to such errors of law which are apparent in the face of the Award. It is only when an erroneous proposition of law is stated in the Award that a Court can set aside the award or remit it to the arbitral tribunal for re-consideration on the grounds of such error or law apparent on the face of the record. The Court will not interfere with the Award unless some real injustice or substantial diversion from the law can be proved".***

DISPOSITION

For the reasons I have set out above, I find that the Applicant has discharged the burden and indeed proved that the Final Award is contrary to public policy. Whether the monies accruing from the variations are within 15% of the original quantity or not, 1st & foremost with approval/consent ought to have been obtained from the Tender Committee pursuant to **Section 47 of PPDA repealed.** The variations carried out by the Respondent were not carried out with the written approval of the Respondent/Applicant as required by the **Section 47 of the PPD Act** as well as **Clauses 30.3, 30.5, 30.13 and 30.14** of the Contract between the parties.

A written approval from the Applicant was mandatory. The Respondent, should not have relied upon the representation by the Architect that the Applicant had duly approved the variations by conduct without proof or communication to the said effect.

If approval /consent was obtained the same would have been to the ceiling of 15% of the original contract price or quantity. In the light of the foregoing evidentiary findings, the legal provisions of **Section 47 of the PPD Act** and the submissions of both parties, I find that the Final award based as it is, is in breach of our statutory laws and is therefore contrary to public policy. Any variation that is contrary to statute is in conflict with and contrary to public policy. An award that is in conflict with public policy cannot stand and is not upheld. In the circumstances, the Arbitrator's final award is hereby be set aside.

The application by the Claimant/Applicant of 6th January 2020 to have the Final award of 30th September 2019 executed as a decree is dismissed.

The application by the Respondent/Applicant of 18th December 2019 to have the final award of 30th September 2019 set aside is upheld.

DELIVERED SIGNED & DATED IN OPEN COURT ON 13TH APRIL 2021 (VIDEO CONFERENCE DUE TO CORVID 19 PANDEMIC LOCKDOWN)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

PAUL MUNGLA& CO. ADVOCATES FOR CLAIMANT/APPLICANT

TRIPLEOKLAW LLP ADVOCATES FOR RESPONDENT/APPLICANT

COURT ASSISTANT - TUPET