REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. E648 OF 2019

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

NEWSPACE CREATORS LIMITED.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MERU.....RESPONDENT

RULING

INTRODUCTION AND BACKGROUND

The Applicant filed a Chamber Summons Application dated **18th December 2019** for orders; -

1. That the court partially set aside the sole arbitrator's, findings on quantum as contained in the arbitral award made and published on **30th September 2019.**

2. That the Court does remit the award back to the Sole Arbitrator for purposes of the Arbitrator *inter alia* taking measures and computations in terms of **Clauses 37.6 and 37.7 of the General Conditions of Contract.**

3. That in the alternative, the court does set aside the whole award of the Sole Arbitrator made and published on **30th September 2019.**

Which application is supported by the Affidavit of **Patrick Kithome** on the grounds that; -

Following an advertisement by the Respondent for Tender for upgrading of Kinoru Stadium to International Standards, the Contractor tendered and won the bid. Through a notification of Award dated **6th June 2014**, the Applicant was awarded the said Tender and the parties executed the contract for the renovation works on **26th June 2014**. The contract was inclusive of General Conditions of Contract and it allowed for variations to the works which were to be measured and valued accordingly.

The commencement date of the contract was **26th June 2014** and the completion date **29th January 2015** while the contract price was set at **Kshs.167,392,817.40** inclusive of VAT. The contract period was for **24 weeks.**

The Respondent forcefully ejected the Applicant from the site on **30th July 2016** thus breaching the contract between the parties. The Applicant had been on site for **109.29 weeks**, an extension time of **78.29 weeks** for reasons and circumstances created solely by the Respondent and as confirmed by the Arbitrator in his award.

In addition, there were variations and additional works undertaken at the Respondent's request thus leading to additional expenses for which the Applicant was entitled to be compensated on. Total financial claim for loss and/or expenses arising out of extension of time, additional works and forceful stoppage of works at **Kshs.332,710,654.20.**

In addition to the above claim, the Applicant also performed work under the contract as well as additional work arising out of variations that arose in the course of the project. The Applicant has a further claim of **Kshs.180,389.071.12** after considering the contract sum, the work done, the additional work done as well as the undone work.

The Applicant's major contention was that, the Respondent frustrated and breached the Contract and in turn not only frustrated and delayed Construction of the project, but also made it impossible for the Contractor/Applicant to complete various sections of the works by the agreed dates.

The Applicant avers that the Arbitrator violated the tenets of Public Policy by disregarding the arbitration clause which comprised the terms of reference as contained in the contractual agreement dated **26th June 2014** and that by disregarding the terms of the contract the Arbitrator misconducted himself acted without jurisdiction and did not deal with the dispute before him and within the scope given to him under the contract.

REPLYING AFFIDAVIT

The Respondent responded to the above-mentioned Application through the Replying Affidavit of **Irah Nkubi** dated **6th July 2020**. The Respondent opposes the Applicant's Application by stating that; -

Clauses 37.6 & 37.7 of the MCG Contract **(Pgs 124-125 of the bundle of the Applicants application)** of the powers of the Arbitrator do not compel the Arbitrator to act in a certain way, they merely enable him to take steps to take measurements, computations, tests or valuations as may in his opinion be found desirable in order to determine the rights of the parties and assess and award sums. Thus an exercise of Arbitrator's discretion either way as given above in itself cannot be taken as disregarding the powers, jurisdiction and authority conferred upon him under the said clauses and neither can it be said to have violated public policy.

The Respondent deposed that it cannot be the duty of the Arbitrator to help a party build its case. The applicant exaggerated its losses and/or could not meet the standard of proof of damages sought before the Arbitral Tribunal and that had the Arbitral Tribunal bowed to the Applicant's wishes to award the value claimed the same could have offended public policy under **Article 201(d)** of the Constitution, that public money shall be used in a prudent and responsible way. In this case;

· Contract value was/is **Kshs.167,392,817.40**

· Work done before vacating the site **Kshs.94,422,626**

· Amount already paid to Contractor was **Kshs.111,702,291.90.**

· Amount claimed as special damages was **Kshs.414,161,621.17.**

· If the Claimant was to be awarded the special damages the total amount paid to the Claimant would have been **Kshs.525,863,913.07** against a contract value of **Kshs.167,392,817.40.**

The Respondent further deposed that the Application is not an appeal and thus the Court is precluded from looking into the merit of such an Award, the Court cannot delve into the manner in which the Arbitrator exercised his discretion if the Applicant had offered good reasons for the court to do so.

That with respect to lamentation that the Arbitral Award was not conformed to fundamental characteristic of an Arbitral Award, the Court was not been informed in the Application or the Supporting Affidavit of how the said award departed from requirement of **Section 32 of the Arbitration Act**. The award met all standard requirements and forms of an Arbitral Award.

At paragraph 15 of the grounds in support of the Applicant's application – the Arbitrator after an inordinate delay of approximately one year and after a constant request from the Applicant herein and the Respondent, ultimately made and published an award on **30th September 2019**- the delay was explained by the Arbitrator as caused by the Arbitrators medical condition at the time and both parties expressed their sympathy and wished him well. It would be very unbecoming of the Applicant if it uses the sickness of the Arbitrator to disparage his competence.

APPLICANTS WRITTEN SUBMISSIONS

1. **Whether the arbitrator violated the tenets of public policy?**

The Applicant submits that the Arbitrator made findings on liability page 25 – 34 of the Applicants bundle and proceeded to dismiss all the claims save for the materials locked up on site on the basis that all the claims were in the nature of special damages and the applicant did not prove the same claims. The Arbitrator disregarded the fact that he was an expert Arbitrator empowered by the contractual arbitration clause to take measures, tests and computation. He ought to have taken measurements and computation of the extra works and variations which he already found had been authorized by the Respondent. The taking of measurements and computation was mandatory considering the facts of the case that the Applicant was not only forcefully evicted but no handing over was done and hence no measurements were taken.

The Arbitrator at page 373 – 378 dealt with variations to the original contracts and found that there were variations.

It is the Applicant's submission that that the Arbitrator made finding of breach of contract by the Respondent and the Applicant was entitled to certain losses outlined at pages 372 – 398 of the Applicant's bundle/Final Award, and costs related to the breach but failed to assess and determine the extent of such loss as required by the contract. The Applicant was thus left with a finding of breach of contract and liability but no remedy which is not only against the principles of natural justice but also against public policy.

2. **Whether the arbitrator misconducted himself?**

The Arbitrator deliberately disregarded provisions of **Section 29(5)** of the Arbitration Act which requires an Arbitral Tribunal to determine a dispute according to the terms of the particular contract and shall consider the usages of the trade applicable. The contract between the parties Clauses 37.6 & 37.7 provided the Arbitrator had powers to direct measurements, computations tests or valuations as may in his opinion are desirable in order to determine rights of the parties and to open up, review and revise any certificate or notice to determine matter in dispute. By failing to take measures, computations and tests the Respondent submits the Arbitrator equally shied away from the real issues which were in dispute which amounted to an act of gross misconduct that vitiates the award. The parties had inter alia disagreed on variations, quantity of work, nature and extent of delay and by failing to determine the real issues that were before him it amounted to gross misconduct that vitiates the award. The Court of Appeal in ***Josephat Murage Miano & Anoither Vs Samuel Mwangi Miano & Another [1996] eKLR*** noted; -

> ***"Misconduct is not necessarily personal misconduct. If an Arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, 'misconduct' in the hearing the matter which he has to decide, and misconduct which entitles the persons against whom the award is made to have it set aside. It would appear to us therefore that failure by the arbitrators to adjudicate the real dispute before them amounted to misconduct in hearing of the matter that had to decide and that entitled the appellants to have the arbitration award set aside. This is where, we think, the learned judge was in error when he dismissed the appellants application to set aside the award holding that there was inter alia no proof of misconduct on the part of arbitrators".***

Whether the Applicant is entitled to the prayers sought?

The Applicant submits that the foregoing submissions are a clear evidence that the award made and published on **30th September 2019** clearly violates the dictates of public policy. It is also clear that the arbitrators conduct amounted to gross misconduct thus vitiating the award aforesaid. The Court should remit the award back to the Arbitrator for purposes of the Arbitrator inter alia taking measures and computations in terms of **Clause 37.6 and 37.7** of the General Conditions of Contract.

The Applicant cited the following cases to support its position on the award being contrary to public policy;

> ***a) Charles Gatheca vs Atlas Copco Cmt & Ct Management Ltd & 2 Others [2019]eKLR***
>
> ***b) Evangelical Mission for Africa & Anor vs Kimani Gachuhi & anor [2015] eKLR***
>
> ***c) National Oil Corporation of Kenya Limited vs Prisko Petroleum Network Ltd [2014] eKLR***

RESPONDENT'S WRITTEN SUBMISSIONS

The Respondent submits that the at **paragraph 7.13.3.62** of the award the Arbitrator put a self-explanatory conclusion informed by **Article 10** of the Constitution. The Applicant has incorrectly discerned that the Arbitrator in finding the Respondent at fault but failing to grant the unproven and excessive damages sought by the Applicant in its claim.

The Arbitrators powers in **Clauses 37.6 and 37.7** did not compel the Arbitrator to act in a certain way but merely enabled him to take steps as may in his opinion find desirable in order to determine the rights of the parties and assess and award any sums and the exercise of this discretion cannot be taken as disregarding the powers, jurisdiction and authority conferred upon him under the contract.

It is the Respondent's submission that **Paragraphs 7.13.3.8 to 7.13.4.16** of the Final Award gives details for the Arbitrator's reasons for denying damages as claimed by the Applicant in the arbitration proceedings. By these findings, it is not suggested that Court ought to fact check the Arbitrator's finding, as in the case of ***Kenya Oil Co. Ltd & Another vs Kenya Pipeline Co. [2014]eKLR***, it is settled that;

> ***"……all questions of fact remain the sole domain of the arbitrator and it does not matter how obvious a mistake by the Arbitrator on issue of the fact might be, or what the scale for the financial consequences of the mistake of fact might be, all that is intended to be achieved is to exhibit that the Arbitrator made substantive findings on evidence presented to him."***

Further, the Respondent submits that on the conclusions reached by the Arbitrator, there was no cause for the Tribunal to take steps as to direct measurements, computations, tests or valuations in order to determine the rights of the parties and assess and award any sums as it was very clear from the evidence already tendered before the Tribunal, the Claimant merely threw figures at the Tribunal without any credible evidence in support thereof and expected the Tribunal to award them.

The Arbitrator acted in accordance with the evidence on record – the Arbitrator in **paragraphs 7.13.3.8 to 7.13.4.16** of the award analyzes the evidence before him in great detail and gives good reasons for denying the Applicant damages sought in the claim. The Tribunal rightly found the Applicant's claim unconscionable. The Tribunal was well guided by **Article 190(2)** of the Constitution that County Government shall operate financial management systems that comply with any requirements presented by National Legislation. In ***EPCO Builders vs Kenya Bureau of Standards [2017] eKLR*** it was held; -

> ***"In the face of express provisions, EPCO does not begrudge the Arbitrator for taking into account the trade usage but assails him for failing to afford the parties an opportunity of addressing him on the trade usage. There is undoubtedly great force in the submission by Counsel for EPCO that whilst the arbitral tribunal (I would add courts of law) does not have to consult parties on***

its thinking process on reaching a decision, it must do so if it reached a decision which does not reasonably flow from any of the arguments already presented to it (Re Ahmani (supra). But this submission is not available to EPCO in this instance because it had already made arguments on the profit margin to be applied but the arbitrator found it unacceptable and instead applied what he found to be the margin that accorded with the trade usage of the industry."

From the foregoing, if the Applicant had any conviction that the evidence it presented before the Tribunal would need to be reassessed by exercise of the powers granted to the Arbitrator under the said **clauses 37.6 and 37.7** of the contract nothing would have been easier than for the Applicant to move the Arbitrator to do so during the proceedings.

Concerning the critical matter of whether a question of law on which the Arbitrators erred was identified in ***Kenya Oil Co. Ltd (supra***) case, in the words of Justice Steyn in the case of Geogas S. A vs Trammo Gas Ltd [1993] 1 Lloyd's LR.215 cited in the above case, he stated; -

"It is often difficult to decide what is a question of law, or a question of mixed law and fact, rather than a pure question of fact. In law the context is always of critical importance. The enquiry "is it a question of law?" must therefore always be answered by the counter enquiry "for what purpose?". What is the question of law in a judicial review case may not necessarily be a question of law in the field of consensual arbitration. In short, the closest attention must always be paid to the context in order to decide whether a question of law arises. Given the fact that the resolution of this preliminary issue determines whether the court has jurisdiction to substitute its view for the view of the tribunal, freely chosen by the parties of full contractual capacity, there is in my view no sensible reason for adopting an enlarged view of what constitutes a question of law."

Justice Gikonyo in ***National Oil Corporation of Kenya limited vs Prisko Petroleum Network Limited [2014] eKLR*** quotes with approval Justice Warsame's findings in **Nairobi HCCC No. 16 of 2012** ***Stirling Civing Engineering Limited vs TM-AM Construction group Africa*** that; -

"… where a matter has been referred to arbitration, the parties are required to put all matters and evidence before the arbitrator….."

This is an avoidable duty of any party, any other discretion left on the Arbitrator to require additional evidence is secondary obligation.

The Arbitrator's discretion as stipulated in the contract is not subject to replacement by the court's jurisdiction – it is submitted that in the event the parties intended to have the Arbitrator to mandatorily take steps such as direct measurements, computations, tests or valuations in order to determine the rights of the parties and assess the sums owing they would have stated so expressly in the contract. The court in ***Matrix Business Consultants Limited & 4 others vs Safaricom Limited [2020] eKLR*** allowed discretion in the interpretation of the contract by Arbitrator stating thus; -

"In my view the issue of termination notices, the manner of service and whether the termination was valid were matters entirely within the purview of the matters framed for determination by the Arbitrator and whether the Arbitrator misconstrued the provisions of agreements were matters for him to decide. In this respect I agree with the observation of Ransley J. in Mahican Investments Limited & 3 others Vs Giovanni Gaids & Others NRB HC Misc Civil Application No. 792 of 2004 [2002] eKLR where he held that a court will not interfere with the discretion of an arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interferer would place the court in the position of a court of appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

There is no ground advanced for setting aside the award on ground of misconduct – it is submitted that the lamentation of the Applicant on the subject of misconduct arose from the interpretation of **Clauses 37.6 & 37.7** of the GCD Contract that the Arbitrator 'elected' to exercise his powers under the said Clauses to direct taking of measurement and/or opening up, review and revise any certificate. Those clauses permitted the Arbitrator to elect as may in his opinion find desirable anyway. This cannot be misconduct.

3. **The award of the arbitrator is consistent with public policy**

The Respondent referred to ***Rwada Farmers Cooperative Society Ltd vs Thika Coffee Mills Ltd [2012]eKLR*** .

Any claim that an award is contrary to public policy should always arise from something more than mere discontent of a party with the findings of the arbitrator there should be a clear demonstration of that which is injurious to the public, offensive, an element of illegality or that which is unacceptable and violates the basic norms of society as also was held in ***Glencore Grain Limited vs TSS Grain Millers Limited [2002] eKLR*** **606.** The Applicant has not dispensed the onus of showing that the award is inconsistent with the Constitution or to other Laws of Kenya, whether written or unwritten or inimical to the National interest of Kenya is contrary to justice or morality as held in ***Christ For All Nations vs Apollo Insurance Co. Ltd [2002] E.A 606.***

The Respondent urges the court to uphold and respect the principle of finality of arbitration, a vital public policy encapsulated in **Section 32A** of **the Arbitration Act.**

DETERMINATION

Issues for Determination; -

Whether the arbitrator violated the tenets of public policy?

The key factors to take into consideration in determining whether or not an award is in conflict with public policy. Thus, in ***Christ for all Nations Vs Apollo Insurance Co. Ltd. (2002) EA 366,*** **Ringera, J,** (as he then was), considered the concept of public policy from the prism of **Section 35 (2)(b)(ii)** and stated as follows: -

> ***"An award could be set aside under page 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 to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality."***

The Applicant submits that the Arbitrator proceeded to dismiss all the claims save for the materials locked up on site on the basis that all the claims were in the nature of special damages and the applicant had not proved the same. The Applicant in its submissions stated that it was forcefully evicted and hence no measurements were taken. It is therefore clear that it was upon the Applicant to take the measurements and carry out a computation of the extra works and variations which had been authorized by the Respondent. The Arbitrator analyzed the evidence before him and found it was not required to carry out measurements and computation of the extra works.

The Arbitrator in **paragraphs 7.13.3.8 to 7.13.4.16** of the award analyzed the evidence and made conclusions and findings that constitute the award.

In light of the foregoing, the Applicant failed to demonstrate how the Arbitral Award was in conflict with the public policy of Kenya. It did not show what written law or provisions of the Constitution or any other ground that contrary to public policy the arbitral award contravened.

Whether the Arbitrator misconducted himself?

It is the Applicant's submission that the Arbitrator deliberately disregarded provisions of **Section 29(5)** of the Arbitration Act which requires an Arbitral Tribunal to decide a dispute according to the terms of the particular contract and shall consider the usages of the trade applicable. By failing to take measures, computations and tests the Respondent submits the arbitrator equally shied away from the real issues which were in dispute which amounted to an act of gross misconduct that vitiates the award.

The Court found no grounds or cogent evidence to prove misconduct on the part of the Arbitrator. The terms of the contract between parties specifically **Clauses 37.6 & 37.7** which spell out powers of the Arbitrator to direct measurements, computations, tests, valuations as may in his opinion be desirable to determine rights of the parties and assess and award sums and to review or revise any certificate which shall be submitted to him are terms that are not mandatory to be undertaken by the Arbitrator. There is no compulsion to carry out rights/powers under the cited clauses which the Arbitrator may only employ if found necessary. These are enabling provisions to assist the Arbitrator in resolving the parties' dispute if the need arises.

Whether the applicant is entitled to the prayers sought

The provisions of **Section 35(1)** circumscribe the only instances when a party can seek the setting aside of an Arbitral Award.

Kenya Shell Ltd vs Kobil Petroleum Limited, Civil Appeal No. 57 of 2006 where the Court underscored the importance of the principle of finality of Arbitral Awards provides: -

> ***"The Arbitration Act, which came into operation on 2nd January 1996, and the Rules thereunder, repealed and replaced Chapter 49 Laws of Kenya, and the rules thereunder, which had governed arbitration matters since 1968. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to courts.....The message we think, is a pointer to the public policy the country takes at this stage in its development..... At all event, the tribunal was bound to make a decision that did not necessarily sit well with either of the parties. It would nevertheless be a final decision under Section 10 of the Act, unless either party can satisfy that court that, it ought to be lawfully set aside. In this case, the decision was final. We do not feel compelled therefore to extend the agony of this litigation on account of the issues raised by the Applicant."***

> ***Cape Holdings Ltd vs Synergy Industrial Credits Ltd [2016] eKLR*** where the court held that**;**

> ***"The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award."***

The Applicant herein invoked the Courts jurisdiction in **Section 35(2) (a)(iv), 35(2)(b), 35(3) of the Arbitration Act.**

The Court has gleaned through the Final Award of 30th September 2019 at Pg 368, the Arbitrator found that that the Respondent was forcefully evicted by the Claimant from the construction site. Consequently, there was breach of contract. At Pg 360, the Respondent admitted that it held and retained motor vehicles, construction equipment, tools and materials on site as lien over debt owed to it.

The Arbitrator at Pg 409 under heading Equipment/Plant/Tools& materials on site locked up on site from 30th July 2016, stated that it is mandatory under Clause 33.4 of GCC that if contract is terminated, the PM (Project Manager) shall immediately thereafter arrange for a meeting for the purpose of taking record of works executed, and materials, goods, equipment and temporary buildings on site. Such a record by the PM was not submitted before the Tribunal.

If the Arbitrator found the Respondent liable for evicting the Claimant from site, and the Respondent admitted to retaining **motor vehicles, construction equipment, tools and materials** on site, how would the Claimant be held responsible for not producing PM's Report? If PM's, Report was/is mandatory according to the GCC, why was the Clerk's Report admitted instead and reimbursement based on the itemized list and not the Claimant's or PM's report as required? What became of the PM and even if the Claimant was evicted from the site overstaying from the contract period? What explanation was given to the Arbitral Tribunal why the meeting and report were not done by the Respondent?

At Pg 378, the Arbitrator found that there were variations to the original contract. Consequently, the Respondent is liable to the Claimant for all the Costs incurred in variations.

At Pg 401-403 the Arbitrator outlined the various components of Additional works and refuted claims that were not proved as special damages. However, with regard to Terraces and Stadium facilities, at Pg 391, the Arbitrator accepted evidence of the Joint Parliamentary Committee Report as it was independent from parties; that as at 14th May 2016, that terraces were 80% complete but those rates for reinforced concrete in columns and murram binding to hardcore were increased making them inconsistent to contract rates elsewhere. The Arbitrator found the rate for reinforced concrete per cubic metre was Ksh 11,000/- yet the Claimant claimed Ksh 14,000/-. Murram Binding per square metre was found to be Ksh 120/- and not Ksh 200/- as claimed by Claimant. Since the Arbitrator found terraces were done and determined the cost from what Claimant claimed, why disregard the whole claim and not award the amount he found reasonable in the circumstances?

This Court concurs that special damages must be specifically pleaded and proved but in the above instances, proof of claim was made but contested and the Arbitrator made findings but failed to award his finding as a matter of law and fact. Even where special damages pleaded and proof is contested or quantum cannot be ascertained nominal damages suffice.

The Court finds that whereas the Arbitrator is in charge of findings of fact and the matter is not before this Court on appeal, the 2 cited instances depict parallel and/or inconsistent findings on liability and quantum. The Arbitrator is confronted with fundamental questions of dispute resolution with regard to the 2 identified issues among others with regard to findings on liability and not quantum except where special damages have not been proved.

For these reasons, this Court shall suspend the Arbitral proceedings and/or setting aside proceedings for 90 days and remit these issue(s) of quantum for reconsideration and determination by the Arbitrator as provided by **Section 35 (4) of the Arbitration Act** which provides as follows;

> ***"The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."***

DELIVERED SIGNED & DATED IN OPEN COURT ON 13TH APRIL 2021(VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS WAWERU GATONYE &CO. ADVOCATES FOR APPLICANT

PROF. TOM OJIENDA & ASSOCIATES FOR RESPONDENT

COURT ASSISTANT - TUPET