



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS COMMERCIAL & TAX DIVISION**

**CASE NO. E075 OF 2020**

**SBI INTERNATIONAL HOLDINGS (KENYA).....PLAINTIFF**

**VERSUS**

**KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaintiff dated 4<sup>th</sup> March 2020, the Plaintiff sought the following reliefs against the defendant: -

- a. *The sum of Kshs. 341,857,828.16 as determined in the decision of the DB of 8<sup>th</sup> June 2018;*
- b. *The sum of USD 4,708,314.00 as determined in the DB decision of 5<sup>th</sup> April 2019;*
- c. *The sum of Kshs. 279,946,606.41 as determined in the DB decision of 5<sup>th</sup> April 2019;*
- d. *The sum of USD 1,210,515.55 as determined in the DB's decision of 15<sup>th</sup> April 2019, revised on 20<sup>th</sup> April 2019;*
- e. *The sum of Kshs. 62,962,244.54 determined in the DB's decision of 15<sup>th</sup> April 2019, revised on 20<sup>th</sup> April 2019;*
- f. *Interest on (a) above at 3% above Central Bank of Kenya Base Lending rate per annum from 23<sup>rd</sup> June 2018 until payment in full;*
- g. *Interest on (b) and (c) above at 3% above Central Bank of Kenya Base Lending rate per annum for payment in Kenya Shillings and LIBOR of 3 months maturity for USD payments from 20<sup>th</sup> April 2019 until payment in full;*
- h. *Interest on (d) and (e) above at 3% above Central Bank of Kenya Base Lending rate per annum for payments in Kenya Shillings and LIBOR of 3 months maturity for USD payments from 30<sup>th</sup> April until payment in full.*
- i. *Costs of the suit on indemnity basis.*

2. Upon being served with Summons to Enter Appearance on 16<sup>th</sup> March 2020, the defendant filed an appearance on 30<sup>th</sup> March 2020 accompanied by an application under section 6 of the Arbitration Act[1] seeking to stay these proceedings and to refer the dispute to arbitration. Vide a Ruling dated 15<sup>th</sup> September 2020, Majanja J dismissed the said application. However, the defendant did not file its defense within 14 days from the date of the said ruling, as a consequence, the Plaintiff applied for interlocutory judgment in default of defense which was entered on 6<sup>th</sup> October 2020 only on prayers (a) to (e) of the Plaintiff. Prayers (g), (h) & (i) were to proceed for formal proof, now the subject of this judgment.

3. Vide an application dated 26<sup>th</sup> October 2020, the defendant applied to stay these proceedings pending the hearing and determination of its application in the Court of Appeal in which it sought extension of time to file a Notice of Appeal out of time and its appeal to the Court of Appeal against the above ruling. Alternatively, it prayed for leave to file its defense of time. The said application was dismissed on merits on 9<sup>th</sup> December 2020.

4. On **28<sup>th</sup>** April 2021, formal proof proceeded in respect of on prayers **(f), (g) & (h) relating** to interests and prayer **(i)** relating to costs.
5. In order to bring the said prayers into a proper perspective, it is necessary to set out the Plaintiff's case, albeit briefly as disclosed in the Plaintiff. The facts as pleaded in the Plaintiff are essentially uncontroverted. Vide an Agreement dated **17<sup>th</sup>** May 2016 the defendant engaged the Plaintiff to undertake road construction works for dualling of Kisumu Boys Roundabout particularized as (JnA1/B1) Mamboleo Junction described as (Jn Al/C34) Road Al. The said agreement incorporated General Conditions of Contract for Construction MDB Harmonised Edition for Building and Engineering Works, MDB Harmonise Edition 2005 prepared by FIDIC, commonly known as "the Pink Book" and Particular Conditions of Contract.
6. The Plaintiff avers that the contract and conditions were designed by the defendant, so, any prejudicial construct is to be construed Contra Proferentem. The General Conditions of Contract provided at Sub-Clause **20.2** for the appointment of a Dispute Board (DB) which would be the first forum for adjudication of any dispute that may rise between the parties concerning the contract. Further, the determinations of the DB, being assessment of rights and obligations of parties under the Contract, are enforceable and binding and continue to be binding unless upset by amicable settlement of the parties or by an arbitral award.
7. The Plaintiff' states that it performed its part of the contract, but the defendant disputed payment and, as per contract, the Plaintiff referred the disputes to the appointed DB who heard the **3** disputes and rendered his determinations under sub-clause **20.4** of the General Conditions of Contract as follows: -
- a. On the Plaintiff's claim for extension of time and reimbursement of additional costs, the DB rendered its decision on **8<sup>th</sup>** June 2018 awarding the Plaintiff: - (i) Extension of time of 360 days of **5<sup>th</sup>** January 2019; (ii) Directing the defendant to pay the Plaintiff **Kshs. 341,857,828.16** within **14** days of the decision of Dispute Board.*
- b. Regarding the claim for reimbursement of additional costs, the DB rendered its decision on **5<sup>th</sup>** April 2019 (i) directing the defendant to pay the Plaintiff **USD 4,708,314.00** within **14** days of the decision of DB; and (ii). Directing the defendant to pay the Plaintiff **Kshs. 279,946,606.41** within **14** days of the decision of DB.*
8. Regarding the extension of time and reimbursement of additional costs, the DB rendered its decision on **15<sup>th</sup>** April 2019, which was corrected for clerical and mathematical errors on **20<sup>th</sup>** April 2019: - (i) Directing the defendant to pay to the Plaintiff **USD 1,210,515.55** within **14** days of the decision of the DB and, (ii) Directing the defendant to pay to the Plaintiff **Kshs. 62,962,244.54** within **14** days of the decision of DB.
9. The Plaintiff avers that the above decisions of the **DB** have not been set aside, either by amicable settlement or by arbitration, hence, they are enforceable and contractually binding upon the defendant. It also avers that notwithstanding the clear, express and coherent provisions of the General Conditions of Contract, Clause **20.4**, and the repeated exhortations of the DB, the defendant has neglected to make payment of the sums determined, in egregious breach of contract.
10. The Plaintiff avers that by Sub-Clause **14.8** of the General Conditions of Contract, delayed payments contractually attract interest at the annual rate of three percentage points above the discount rate of the Central Bank of Kenya or the interbank offered rate for payments in Kenya Shillings and LIBOR of 3 months maturity for USD payments. Further, that there is no arbitral award in existence that has upset the binding determinations of the DB. Further, that the Plaintiff claims payment of the sums determined by the DB together with contractual interest(s) at the annual rate of **3%** points above the discount rate of the Central Bank of Kenya or the interbank offered rate for the payments in Kenya Shillings and LIBOR of 3 months maturity for USD payments until payment in full.

### **The evidence**

11. Mr. Gilad Mishni, the Plaintiff's Director/Financial Controller adopted his witness Statement dated **4<sup>th</sup>** March 2020. His testimony is essentially a replica of the averments in the Plaintiff, so it will add no value to rehash it here. Upon cross-examination by Mr. Kivindy, the defence counsel, Mr. Mishni admitted that the DB decision did not mention interest, but only stated the period of payment. He also admitted that the contract did not indicate interest. Upon re-examination, by Mr. Bwire, Mr. Mishni reiterated that the DB ordered the payments to be made within **14** days, and that the DB decision must be read together with the contract document.

### **Plaintiffs advocates submissions**

12. Mr. Bwire, the Plaintiffs' counsel submitted that the contract provided for interest on delayed payments. He cited Sub-Clause **14.6** of the General Conditions of Contract as amended by the Particular Conditions of Contract and argued that the decision of the DB issued under Clause **20.4** ranks as an Interim Payment Certificate. He argued that all the claims in respect of which judgment was entered are decisions of the DB issued under Sub-Clause **20.4**, and for purposes of the Contract, have the force of the Interim Payment Certificates.

13. He argued that under Sub-Clause **14.7 (b)** of the General Conditions of Contract as amended by the Particular Conditions of Contract, the Employer (the defendant) is to pay the amount contained in the Interim Payment Certificates and or the sum due in accordance with a decision by the DB. He referred to sub-clause **14.8** and argued that the contractor is entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay if payment is not made in accordance with Sub-Clause **14.7**. He argued that unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of the three percentage points above the discount rate of the Central Bank in the country of the currency of payment, or if not available, the interbank offered rate, and shall be paid in such currency.

14. He submitted that the Judgment dated **6<sup>th</sup>** October 2020 on prayers **(a), (b), (c), (d)** and **(e)** of the Plaintiff is enforcement of DB decisions under Clause **20.4** of the General Conditions, and that the decisions of the DB was payable and fell due on the dates given in the particular

DB decisions, failing which, the provisions for interest on delayed payment under Sub-Clause 14.8 apply. Counsel explained how the interest should be calculated and where to refer. Lastly, he urged the court to be guided by section 27 of the Civil Procedure Act and award the Plaintiff costs of this case.

### The defendant's advocates submissions

15. Mr. Kivindy, the defendant's counsel submitted that interest is governed by the Civil Procedure Act and relied on *B.O.G Tambach Teachers Training College v Mary Kipchumba*[2] which laid down the principles to guide the court in awarding interests. The principles are:- (a) at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously; (b) under Section 26(1) of the Civil Procedure Act, the court has discretion to award and fix the rate of interests to cover two stages namely, the period from the date the suit is filed to the date when the court gives its judgment; and the period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix; (c) when it comes to the period before the filing of the suit, Section 26 of the Civil Procedure Act has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where: - (i) under an agreement; there is stipulation for the rate of interest (contractual rate of interest) or (ii). where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or (iii). where there is statutory right to interest or (iv) where an agreement to pay interest can be implied from the course of dealing between the parties.

16. Counsel submitted that due to the party's agreement granting power to DB to deal with disputes between them, the parties divested the court any powers to interfere with the factual finding of the DB including the issue of interests and costs. Mr. Kivindy submitted that the court's role is only to enforce the DB's decisions and not a trial court. For this proposition, he relied on *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* [3] which held that a court can only enforce an adjudicator's decision when that right has crystallized. He also cited *Esor Africa (Pty) Ltd/ Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd* [4] which held that this court is required to give effect to the terms of the decision made by the adjudicator. Mr. Kivindy drew parallel from section 35 & 36 of the Arbitration Act and argued that the court is not invited to do more or reduce what has been done. (Citing *Kenya Oil Company Limited & Another vs. Kenya Pipeline Co.*[5]). Further, Mr. Kivindy submitted that the DB decision is not explicit on interest.

17. Regarding costs, he cited Section 27 of the Civil Procedure Act and argued that the nature of this case does not warrant granting of costs. He relied on *Judicial Hints On Civil Procedure*[6] for the proposition that the object of ordering a party to pay costs is to reimburse the successful party amounts expended on the case and not to penalize a party.

### Determination

18. For starters, the DB is a creature of contract. Accordingly, the DB only has those powers that are expressly given to it by agreement. There is no place for implied powers. The process is not underpinned by legislation or conventions, unlike arbitration or statutory adjudication. The contractual provisions will be contained within the dispute resolution section of the underlying contract. It will state how and when the DB is to be formed.

19. A typical DB clause will provide that parties shall comply with a DB decision. It will also normally provide a period within which a party dissatisfied with the decision issues notice of dissatisfaction. In the event that such notice is not issued within the specified time, the clause will provide that the decision is final and binding. The decision is stated to be binding on both parties, and parties shall promptly comply with it whether or not the dissatisfied party has given a notice of dissatisfaction.

20. Arbitration law recognizes and respects the parties' choice of arbitration as the method for settlement of their disputes by providing the necessary framework for facilitating fair and just resolution of disputes through the arbitration process, notably the ready recognition and enforcement of orders and awards made and through adherence to the agreements governing and impacting on recognition and enforcement of the arbitral decision, by limiting court intervention in disputes that parties have agreed to resolve by arbitration.

21. Courts and arbitral tribunals will typically enforce contract provisions under which the parties have agreed to submit disputes to give a DB jurisdiction. The English case of *Peterborough City Council v Enterprise Managed Services Ltd*[7] illustrates this general principle, and how it may be upheld even under trying circumstances for the parties. The current legal framework prescribes that the courts should not without good reason interfere in the arbitral process. This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.

22. The role of this court is to facilitate the enforcement of the DB decision, but not to re-hear the dispute on merits. The issue here as I understand it is to interpret the DB decision. As I do, I may profitably benefit from *Firestone South Africa (Pty) Ltd v Genticuro AG*[8] which made some observations about the rules for interpreting a court's judgment. It stated: -

*"...the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it..."*

*It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."*

23. The Plaintiff's counsel urged the court to award the interests and even suggested methods of computing the interest and where to refer. *First*, it is basic that it is for an arbitrator to consider what interest to include in the award. *Second*, before making any award of interest, an arbitrator must consider the basis on which any claim for interest is being made and must take into account the submissions of the parties. *Third*, it is for the claimant to assert the basis on which any claim for interest is being advanced. It would be wrong for an arbitrator to award interest on a basis which the claimant has not asserted and to which the respondent has had no opportunity to comment or object. *Fourth*, the making of an award of interest involves consideration of a number of factors including: (a) the period for which interest should be awarded; (b) the rate of interest to be awarded; (c) whether simple or compound interest should be granted; if compound, on what basis should it be compounded. *Fifth*, the proper resolution of the above matters will depend on whether in a particular case interest is recoverable as of right or whether an award of interest is discretionary.

24. *Sixth*, there are three main cases where interest may be recoverable as of right. *One*, under an express term of the contract or trade usage. The Plaintiff's counsel suggested that the award is to be read together with the contract. Whereas this sounds appealing, it is for the DB to make such a determination after hearing both parties on the issue. Even if I were to be persuaded by the said argument, a reading of Clause 14.8, shows that the nomenclature of the said clause does not talk about interests but financing charges. Whether the said terminology is the same as interest is a matter for discussion and determination by the DB not this court. *Two*, interest is recoverable under the Late Payment. Again, other than the DB stating that payment be made within 14 days, it did not go a step further to state that failure to pay would attract interests and at what rate. I cannot read into the decision words which are not deployed in the ruling. Put differently, I decline to strain the meaning of the wording of the award for fear of unduly straining the language with the attendant risk of ascribing a meaning not intended or contemplated by the DB. *Three*, interest can be paid on damages for late payment. Again, an award, like court judgment should have been specific on this point. Unfortunately, that is not the case. (The above categories are not exhaustive but suffice for present purposes.)

25. The other situation under which interest is payable is referred to "Interest under an Express Term of the Contract. This applies where the contract expressly provides for interest. Unfortunately, the contract does not seem to have an express term to that effect nor was I referred to any save Clauses 14.7 & 14.8 which to me are not express as far as the issue of interest is concerned nor can I read into the said clauses a meaning that is not clear from the natural and ordinary meaning of their language. For the sake of clarity, I should mention that where an express term as to interest is included in the contract it will usually govern the period for which interest can be awarded, the rate, and whether interest is to be simple or compound. Unless the term confers a discretion, an arbitrator will be bound to award interest on the basis set out in the contract. Where interest is not recoverable as of right, an arbitrator will still be able to make an award of interest by the exercise of his discretionary power to do this. A discretionary power to award interest is also provided by the law. In this regard, a very wide discretionary power is contained in section 32 C of the Arbitration Act which reads

### **32C. Interest**

*Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award.*

26. The above discretion is conferred upon the Arbitrator by the law. The section gives the parties the option to agree otherwise, and where they do not, the discretion is vested on the arbitrator. It is not conferred to this court. There is no basis, either under the rules, or under the law or the parties' contract for this court to determine the interest payable. Put differently, it is not for this court to determine the interest on the award. Such a determination falls within the mandate of the DB and to the extent that the decision did not include such a determination. It is not the function of the court to descend into the arena of the dispute and make such a determination. I decline the invitation to travel that route for the simple reason that this court is not ordained by the law to make such a determination.

27. It should be remembered that before me is a formal proof. A formal proof hearing is similar to a trial without a defendant in some ways. The defendants might be allowed some limited right to participate in some circumstances but formal proofs often proceed without them. The point of a formal proof is to put the judge in a position to make a ruling. That means submitting evidence and making submissions as you would in a trial or hearing. This position was appreciated in *Samson S. Maitai & Another v African Safari Club Ltd & Another*<sup>[9]</sup> thus:-

*"... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."*

28. Moreover, determining the interest after formal proof involves some assessment which will require interpretation of the contract, determination of the applicable rates and a finding of the amount payable. As stated above, the agreement does not seem to have a clear provision on application of interests nor did the DB award interest. The invitation I am being urged to undertake is essentially a merit hearing to determine the veracity or otherwise of the correctness of the respective party's arguments and the amounts in question. In my view, such a function and a merit assessment dangerously amount to urging this court to determine an arbitration dispute a clear breach of the role of the courts in Arbitration disputes. The question here is whether the arbitral clause which is the party's preferred dispute resolution provided for the court to assess or determine the interest. I do not think so.

29. Arbitration law and practice including FIDIC agreements restrict the jurisdiction of the court in peremptory terms to only such matters as are provided for by the Act or the agreements. This restriction epitomizes the recognition of the policy of party's "autonomy" which underlie the arbitration generally and in particular the law governing arbitration.

30. The deliberate restriction of court intervention in arbitration agreements and arbitral law articulates the need to restrict the court's role in arbitration so as to give effect to that policy.<sup>[10]</sup> This is because the principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair

resolution of disputes between parties without unnecessary delay and expense. This is a core feature of FIDIC agreements which are designed to increase and protect party autonomy and minimize court intervention.

31. The rigid language deployed in FIDIC agreements which embraces the “pay now argue later” principle leave no doubt on the restricted manner in which courts can intervene. Such situations include where the agreement or the law expressly provides so or permits the intervention of the court. And, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the agreement or under the law. The bottom line here is that FIDIC agreements underscore the need for adherence to the four corners of the agreement and the principle of party autonomy which requires a high degree of deference to decisions made under such agreements and minimises the scope for intervention by the courts.

32. FIDIC agreements are designed to ensure predictability and certainty of DB decisions and arbitration proceedings flowing there from. The import of the foregoing is that parties who resort to FIDIC agreements or arbitration must know with certainty instances when the jurisdiction of the courts may be invoked. By agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the agreement and where applicable the law and nothing else; and by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out under the law, and, by necessary implication, they waive the right to rely on any further grounds of review, “common law” or otherwise.

33. In *Northwood Development Company Limited v Shuaib Wali Mohammed* [11] this court stated that the objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator’s jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal’s statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal’s statutory duty to conduct the proceedings in a fair and impartial manner.

34. Flowing from my reasoning and findings herein above, I decline the invitation to award the interests claimed in prayers (f), (g), & (h) of the Plaintiff. I decline to make an order as to costs. The judgment of this court shall remain as per the interlocutory judgment.

Orders accordingly

Right of appeal

Dated, Signed and Delivered via e-mail at Nairobi this 14<sup>th</sup> of July 2021

**John M. Mativo**

**Judge**

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[1] Act No. 4 of 1995.

[2] {2018} e KLR.

[3] (20088/2013) {2013} ZAGPJHC 388.

[4] (12/7442) [2013] ZAGPJHC.

[5] NRB CA CA No. 102 of 2012 [2014] e KLR.

[6] Richard Kuloba 2<sup>nd</sup> Edition, Law Africa, page 94.

[7] *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC); [2014] 2 C.L.C. 684 (United Kingdom).

[8] 1977 (4) SA 298 (A) Trollop JA

[9] {2010} eKLR.

[10] See Sutton D.J et al (2003), *Russell on Arbitration* (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[11] Misc. Civil Application No. E 1200 of 2021.