



**Jinsing Enterprises Company Limited v Fortress Engineering Limited
(Miscellaneous Application E1302 of 2020 & Cause E002 of 2021 (Consolidated))
[2021] KEHC 336 (KLR) (Commercial and Tax) (3 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1302 OF 2020
& CAUSE E002 OF 2021 (CONSOLIDATED)**

**DAS MAJANJA, J
NOVEMBER 3, 2021**

BETWEEN

JINSING ENTERPRISES COMPANY LIMITED APPLICANT

AND

FORTRESS ENGINEERING LIMITED RESPONDENT

RULING

1. By an agreement dated 3rd June 2016 (“the Agreement”), the Applicant sub-contracted the Respondent to carry out plumbing, drainage, sanitary ware and firefighting installations at Rehema House situated in Nairobi for the National Fund for the Disabled of Kenya for KES 15,928,966.68.
2. A dispute arose between the parties and pursuant to clause 31 of the Agreement, it was referred to arbitration. On 12th September 2017, the Chartered Institute of Arbitrators appointed Mary Ang’awa FCIArb (“the Arbitrator”) as the sole arbitrator to adjudicate the matter. The Respondent claimed that the Applicant was in breach of the Agreement and sought, inter alia, a final account for the sum KES 21,300,345.35 due and owed to it as at 2nd March 2018, compound interest at 14% per annum or any other commercial bank lending rate as the Arbitrator may award and costs of the Arbitration.
3. After hearing the matter, the Arbitrator published the Final Award on 31st January 2020 (“the Award”) in favour of the Respondent by awarding it KES 7,401,798.00, interest at the rate of 12% from the date of the filing for arbitration, interest on delayed payments at 12% from the number of days of the delay and VAT @ 16%.
4. The Applicant has now approached the court by the Chamber Summons dated 17th December 2020 made, inter alia, under sections 32(3), 34 and 35 of the *Arbitration Act* seeking to set aside the Award.



The application is grounded on the facts set out on its face and the supporting affidavit of Jin Xia, the Applicant's Manager, sworn on 17th December 2020. The application is opposed by the Respondent through the Preliminary Objection dated 9th March 2021 and the replying affidavit of its director, Martin Kibe sworn on 23rd March 2021.

5. The application was canvassed by way of written submissions with the parties advancing their respective positions.

The Application

6. The thrust of the Applicant's application is that the Award deals with disputes not contemplated by or not falling within the terms of the reference to arbitration; that it contains decisions on matters beyond the scope of the reference to arbitration; that parts of it do not disclose reasons of the Award contrary to section 32(3) of the *Arbitration Act* and that it contains computational and clerical errors, ambiguities and inconsistencies making it inadequate and inoperable.
7. The Applicant further avers that the Arbitrator misconstrued and misrepresented the Agreement and rewrote the same in the impugned Award and was derelict in her duties by failing to correct and eliminate computational and clerical errors, ambiguities and inconsistencies duties leading to a failure of justice.
8. The Applicant states that in as much as the Award was published in favour of the Respondent, the amount awarded is ambiguous and not clear. The Applicant explains that after the receiving the Award, it noted computational and clerical errors, ambiguities and that aspects of the Award has no reasons for the decision. When it raised this issue with the Arbitrator, it was not considered despite the fact that the Arbitral Tribunal was bound by section 34 of the *Arbitration Act* to give reasons and correct any errors or ambiguity in the Award. The Applicant submits that it is prejudiced by the Award that is erroneous and unjust.
9. The Applicant further contends that by awarding nominal damages, the Arbitrator rendered a decision on matters beyond the scope of the reference to arbitration. It submits that the Court is empowered by section 35 of the *Arbitration Act* to set aside an award if the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration. The Applicant urges the court to allow the application.

The Respondent's Reply

10. The Respondent submits that this Court lacks jurisdiction to determine the application as it barred by section 35(3) of the *Arbitration Act* which provides that an application to set aside an arbitral award may not be made after 3 months have elapsed from the date of the arbitral award is received. The Respondent states that the Applicant has filed its application 11 months after delivery of the Award. The Respondent further contends that the matters raised in the Applicant's application do not constitute grounds for setting aside an arbitral award under section 35(2) of the *Arbitration Act* as the dispute was determined in accordance with the provisions of the Agreement and the Award delivered did not in any way regard matters extraneous to the contractual rights and obligations of the parties.
11. The Respondent points out that the Arbitrator did not award nominal damages as such but did as part of the Respondent's claim for tools' daily use at KES 5,764,600.00 and confiscated tools at KES 216,000.00 set out in its Statement of Claim. It submits that the Arbitrator granted the prayer in partly by awarding KES 2,000,000.00 and KES 200,000.00 respectively as the nominal award. The Respondent adds that the Arbitrator explained that the nominal awards were in respect to compensation for use of tools and confiscated tools respectively. The Respondent therefore submits



that the Applicant's claim that the Arbitrator, in making the nominal award, rendered a decision on matters beyond the scope of the reference to arbitration is baseless and misguided.

12. In response to the argument that the Arbitrator did not provide reasons for the Award, the Respondent submits that the Court does not have jurisdiction to determine this issue as it does not constitute grounds for setting aside of an arbitral award under section 35(2) of the *Arbitration Act*. In any event, the Respondent states that the Arbitrator took into account the parties' pleadings, evidence, agreements made by the parties in the course of the proceedings and submissions and provided reasons for the determinations clearly stating the rationale for the Award.
13. The Respondent states that in the course of the arbitral proceedings and with the leave of the Arbitrator, the parties agreed on sums owed by the Applicant to the Respondent. Further and almost a year after the termination notice, the Applicant released a draft final account and after reconciliation, both parties indicated that the outstanding monies for work done as at the time of termination of the Agreement was the KES 6,666,638.00 which the Arbitrator awarded. Likewise, the Respondent submits that the Arbitrator awarded the KES 150,000.00 for remedial works which the Applicant admitted.
14. On the allegation that the Award is wrought with computational and clerical errors, ambiguities and inconsistencies, the Respondent submits that these are matters of fact within the jurisdiction of the arbitrator. It submits that the total outstanding amount due under the Agreement after taking into account all payments made by the Applicant was KES 6,666,638.00 and the statements which the Applicant complains about in the Award contain citations by the Arbitrator of the Applicant's assertions and not determinations made by the Arbitrator as alleged by the Applicant. The Respondent further submits that the KES 888,000.00 and KES 1,410,340.35 were awards for interest on the total sum claimed at 12% from the date of filing for the arbitration and a further 12% interest on delayed payments from the number of days of the delay respectively as explained by the Arbitrator in the Award. Based on the aforesaid, the Respondent submits that the Applicant does not disclose how and to what extent the Arbitrator misconstrued, misrepresented and rewrote the parties' contract. It further submits that the Arbitrator was correct in finding that the Applicant terminated the Agreement irregularly and that the Applicant was liable for outstanding payments for works done under the Agreement.
15. In answer to the contention that the Arbitrator was derelict in her duties by failing to correct and eliminate computational and clerical errors, ambiguities and inconsistencies leading to failure of justice, the Respondent submits that section 34(2) of the *Arbitration Act* grants the Arbitrator the discretion to determine whether a request for clarification, removal of ambiguities and rectification of errors and ambiguities as contemplated in the Applicant's application is justified. It states that in any event, the parties had reached an agreement on the monies paid by the Applicant to the Respondent as evidenced by filing of the statement on reconciliation of payments dated 10th June 2020.
16. The Respondent concludes that the Applicant's application is part of its deliberate efforts to stall and delay the arbitral proceedings which were commenced in August 2017 contrary to the requirements of the *Arbitration Act* which provides that parties to arbitration shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

Analysis and Determination

17. From the application, deposition and submissions, there are two issues for determination in respect of the Applicant's application. First, whether the application is time barred. Second, whether the Applicant has established a case for setting aside the Award.



18. The Respondent raised the issue that the Applicant's application is time barred as it was filed 11 months after the date of the Award, contrary to section 35(3) of the [Arbitration Act](#) which provides that:

35 (3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

19. Section 34 of the [Arbitration Act](#) empowers the arbitral tribunal to correct any computation, clerical or typographical errors or any other errors of a similar nature in the arbitral award on application of the parties or at the arbitrator's instance. It provides as follows:

34(1) Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties-

(a) A party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and

(b) A party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.

(2) If the tribunal considers a request made under subsection (1) to be justified it shall, after giving the other party 14 days to comment, make a correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.

(3) The arbitral may correct any error of the type referred to in subsection (1) (a) on its own initiative within 30 days after the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

20. In the Applicant's admits that it received the Award on 30th January 2020 hence it is not in dispute that time for setting aside begun to run from that date, meaning the Applicant ought to have filed the application to set aside at least on or before the 30th of April 2020. The record indicates that the present application was filed on 19th December of 2020, which was about seven months late.

21. On the other hand, it is also not in dispute that the Applicant moved the arbitral tribunal on or about 28th February 2020 for clarification, removal of ambiguities and rectification of error pursuant to section 34(1) of the [Arbitration Act](#). The Arbitrator considered the request and rendered a ruling dismissing the request on 30th October 2020. Under section 35(3) of the [Arbitration Act](#), it is this date when the request was disposed of that is the point of reference in this matter. Thus the application ought to have been filed within a period of 3 months, latest 31st January 2021. Since the application was filed on 19th December 2020, it was filed within the time prescribed.

22. Turning to the merits of the application, the Applicant's grievance is that the Arbitrator awarded nominal damages which was beyond the scope of the reference coupled with her refusal to give reasons,



correct and amend the Award which is full of the errors, inconsistencies and ambiguities are valid reasons to have the Award set aside.

23. Section 35 of the *Arbitration Act*, at the part material to this application, provides as follows:

35 (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if-

(a) the party making the application furnishes proof-

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

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

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

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

(v) -----

(3) ----- [Emphasis mine]

24. In considering whether or not an arbitral award deals with matters not contemplated or falling within the terms of the reference to arbitration, the Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited NRB CA Civil Appeal No. 81 of 2016 [2020] eKLR* observed as follows:

In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in *Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc.* (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.

25. In *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited ML HC Misc. Application No. 129 of 2014 [2015] eKLR*, the court held that the jurisdiction of the arbitrator is tethered to the arbitration agreement, reference and the law. The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether



the issues raised by an applicant are contemplated by the agreement or fall within the terms or scope of the reference to arbitration. Even where general, broad, generous and elastic words are used in an arbitration agreement or reference to arbitration, courts will still interpret them by reference to the subject matter of the contract.

26. Clause 31.1 which is the arbitration clause in the Agreement provides that, 'In case any dispute or difference shall arise between the Contactor and the Sub-Contractor, either during the progress or after the completion or abandonment of the sub-contract works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within 30 days of the notice'. It is not in contention that a dispute arose under the Agreement and the Respondent in its Statement of Claim dated 2nd March 2018 itemized his claims which included, "Sums outstanding on contract; Interest on delayed payments; Retention Fund; Tools daily use; Confiscated tools; Loss of Profits; 10% administration costs and; VAT at 16%."
27. In the Award, particularly, para. 13, the Arbitrator stated that the parties had agreed on a number of issues for determination which included whether the parties were entitled to the reliefs sought in their respective claims and to what extent. The Award also shows that the Arbitrator itemized each of the issues raised, rehashed the arguments of the parties and made a finding on each of the issues.
28. Having read the Award, I am in agreement with the Respondent that the Arbitrator did not award nominal damages in respect of the Tools daily use and Confiscated tools specifically pleaded by the Respondent in its Statement of Claim, but rather, these were discretionary sums awarded on what the Arbitrator thought was reasonable in the circumstances. This is well captured at para. 94-96 of the Award where the Arbitrator stated as follows:
 - 94) The Respondent argued that the prayer for Tools for daily use should not be granted that amounted to the sum of Kshs. 5,764,600.00. The reasons being that the Claimant did not prove that indeed the tools were bought to sight and or left there. No such record existed. No proof the rate calculated of such amounts. The Claimant ought to have mitigated his losses. The Respondent then referred to the case law of *African Highland Produce Limited v John Kisoriao* (2001) eKLR.
 - 95) The Respondent also said that the prayer for Confiscated Tools amounting to Ksh. 216,000.00 should not be paid.
 - 96) It is noted that when parties initially came to this tribunal, the main issue that was being agitated, was the release of the tools from site, which site the Claimant had no access to, having been locked out. To my mind, the parties conceded that there were tools onsite and that the same having been hired was to be returned to the Claimant. The tools were released. Not all the tools had been released and as such the Claimant was then required to claim the loss incurred. The Respondent's argument is, that they did not know what proportion was released or was being held. The Claimant was shifting the burden of proof on the Respondent. The respondent asked that this claim be not awarded.
29. The remit of the Arbitrator under the arbitration agreement was to determine the dispute including giving such relief arising therefrom. It is apparent from what I have cited that the Arbitrator did not deal with anything not contemplated or falling outside the terms of the reference and that the Award did not contain any decision on matters beyond the scope of the reference to arbitration. All the issues



raised were agreed upon by the parties, the Arbitrator weighed the parties' arguments and made finding on the same. As the court noted in *Mabican Investments Limited & 3 Others v Giovanni Gaida & 80 Others* [2005] eKLR,

In order to succeed (in showing that the matters objected are outside the scope of the reference to arbitration) the application must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute.

30. Further, an arbitral tribunal is entitled to review the evidence and come to its own conclusion and even if it is wrong, or that the court might, upon consideration of the matters, reach a different conclusion, the court cannot intervene under section 35 of the *Arbitration Act* as it was never meant to elevate the High Court to an appellate court in arbitration matters. The arbitrator is the master of facts and the court must resist that temptation as stated by the Court of Appeal in *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR* where it cited with approval the following dicta by Steyn LJ., in *Geogas S.A v Trammo Gas Ltd (The "Balears")* 1 Lloyds LR 215:

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 the financial consequences of the mistake of 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 the 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 of fact.

31. It is for this reason that I decline the invitation by the Applicant to sieve through the Award and correct any grammatical or computational errors of omission or commission by the Arbitrator. That is not the work of the court and falls outside its jurisdiction and the grounds for setting aside an award under section 35 of the *Arbitration Act*. In any event, I have gone through the final orders of the Arbitrator and I do not find any ambiguity or lack of clarity as has been contended by the Applicant. I therefore dismiss the Chamber Summons dated 17th December 2020.

Application for recognition and enforcement

32. Dismissal of the application to set aside the Award, paves way for determination of the Respondent's Chamber Summons dated 27th January 2021 made under section 36 of the *Arbitration Act* in which the Respondent seeks leave to enforce the Award. The application is supported by the affidavit of Martin Kibe Nganga sworn on 29th January 2021 and opposed by the Applicant through the replying affidavit of its Managing Director, Carolyne Muthue, sworn on 12th April 2021.
33. The substance of the Applicant's opposition to the application for recognition and enforcement is that the application to set aside the Award under section 35 of the *Arbitration Act* was still pending. In any case, the Applicant reiterated the same grounds it had put forward to attack the Award as the grounds to resist the application for recognition and enforcement under section 37 of the *Arbitration*



Act which sets out the grounds upon which the court may decline to recognize or to enforce an arbitral award as follows:

37. Grounds for refusal of recognition or enforcement
 - (1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—
 - (i) a party to the arbitration agreement was under some incapacity; or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;
 - (iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or
 - (vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or
 - (vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;
 - (b) if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.
- (2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application



of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

34. The grounds in section 37 aforesaid mirror those in section 35 hence having dismissed the application to set aside the award, the only issue is whether the Respondent has complied with the procedural requirements of section 36 of the *Arbitration Act* which states as follows;
36. Recognition and enforcement of awards
- (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—
- a. the original arbitral award or a duly certified copy of it; and
- (b) the original arbitration agreement or a duly certified copy of it.
35. The Respondent has furnished a certified copy of the Award and a certified copy of the Agreement containing the arbitration clause. These documents are not disputed and indeed formed the basis of the Applicant's application. Consequently, I allow the Chamber Summons dated 27th January 2021.
36. In conclusion and for the reasons set out above, I now order as follows:
- a. The Chamber Summons dated 17th December 2020 be and is hereby dismissed.
- b. The Chamber Summons dated 27th January 2021 be and is hereby allowed on terms that the Award dated 31st January 2020 issued by the arbitrator, Hon. Mary Ang'awa, FCI Arb, be and is hereby recognized as a judgment of this court and leave be and is hereby granted to the Respondent to enforce the same as a decree of this court.*
- c. The Application shall bear the costs of both applications which are assessed at KES. 100,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Kale instructed by Nyaanga and Mugisha Advocates for the Applicant.

Mr Mutinda instructed by Tito and Associates Advocates for the Respondent.

