REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL SUIT NO. E299 OF 2020

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF THE ARBITRATION RULES, 1997

AND

IN THE MATTER OF ARBITRATION

BETWEEN

LEMNA INTERNATIONAL INC.....CLAIMANT/APPLICANT

-VERSUS -

NATIONAL HOUSING CORPORATION..... RESPONDENT

RULING

This ruling relates to the applicant's Chamber Summons dated 21st July, 2020 seeking the following orders;

> **i. THAT the Honourable Court be pleased to adopt the final award delivered by Prof. Githu Muigai on 10th May, 2019 as the Judgement of this honorable court.**
>
> **ii. THAT the honourable court be pleased to calculate the sums due to the Claimant/Applicant pursuant to the order for interest awarded on the prayer for damages.**
>
> **iii. THAT the honorable court do grant the applicant leave to enforce the Award less the sums already paid to the Claimant/Applicant as a decree of this Honorable Court.**
>
> **iv. THAT the costs of this application be payable by the Respondent.**

The application is supported by the affidavit of **JOASH MAANGI**, a Director of the applicant company, sworn on 21st July, 2020 and the grounds thereof. The grounds are that the respondent is indebted to the applicant as per the final award of 10th May, 2019 which award, has not been challenged or appealed and therefore the applicant seeks to enforce it subject to adoption by this court.

The applicant case is that following a dispute arising from its agreement with the respondent dated 21st May, 2010, they referred the same to arbitration as agreed. That the dispute was heard and determined by a sole arbitrator; Prof. Githu Muigai, who made an award on 10th May, 2019. Following the parties request for clarification, the Arbitrator made an additional award dated 9th August, 2019. The respondent vide a settlement agreement dated 19th December, 2019 released the undisputed sum to the applicant and left the issue of interest to be decided by the court hence the present application.

The issues identified for determination by the claimant are;

> **a. Whether the Court may adopt and recognize the Arbitral Award of 10th May 2019 as Judgement of the Court and to be executed as an Order of the Court?**

b. Whether the arbitrator was correct to decline the award of interest in the additional award dated 9th August 2019 contradictory to the final awarded dated 10th May 2019 which himself delivered and I quote" interest for the contractual sum is allowed"?

c. What is the interest payable to the applicant

On the first issue, the applicant submits that since there is no challenge to the arbitral award and that the said award has not been honored, the application satisfies the legal and evidential threshold set out at Section 36 and 37 of the Arbitration Act. The applicant relies on the case of **ANNE MUMBI HINGA VS VICTORIA NJOKI GATHARA [2009] eKLR** where the court discussed the finality of a decision from an Arbitral Tribunal and stated that the courts have no right to intervene in the arbitral process, or the award except in circumstances specifically set out in the Arbitration Act or previously agreed by the parties. Further reliance has been placed on the case of **NYUTU AGROVET LTD VS AIRTEL NETWORKS LTD [2015] eKLR** where the Court of Appeal opined that where parties agree on their own to take disputes between them from the courts to a particular body, such awards shall be final and binding but if such an award is set aside by the High Court, the order is final and the parties cannot appeal the same.

On whether the arbitrator's refusal to award interest in the additional award was justified, the applicant submits that the arbitrator erred in declining to award interest as he had already awarded the same in the final award dated 10th May, 2019. On the amount of interest payable, the applicant makes reference to Section 32 of the Arbitration Act and restates the arbitrator's holding that; **"Interest will accrue thereon at the rate of 14% per annum effective from twenty-one (21) days after the Award is taken by either party if payment is not made within the said period until payment in full."**

According to the applicant, the outstanding interest payable by the respondent herein is Kshs. 176,087,584.00 calculated as herein under; Interest Liability that has accrued on the contractual sum is Kshs 115,581,255.3 (which the respondent had already admitted and accepted to pay, but have not paid which is calculated as follows:

14% x 119,361,021.00 = 16,710,542.94 (interest for one year)

16,710,542.94 x 6years 11 months = 115,581,255.3 (interest payable)

While the Interest Liability that has accrued on the retention sum is Kshs 60,506,328.6 which is calculated as follows:

14% x 62,485,021.20 = 8,747,902.94 (interest for one year)

8,747,902.94 x 6 years 11 months = 60,506,328.6 (interest payable)

Parties expounded their written submissions with oral highlighting. Mr. Nyaencha, Counsel for the applicant reiterated that the Arbitrator awarded interest from the date of completion of contract as per the statement of claim. The total award became Kshs. 119,361.021 plus interest. Parties were already in agreement on the award as per a letter from the respondent's counsel who computed interest at Kshs.43 million. It was also argued that the retention should earn interest as under normal circumstances this is money put in an escrow account and earns interest. According to Mr. Nyaencha, the issue of interest on the retention was not raised before the arbitrator in the application for additional award.

With regard to the consent, counsel submitted that the consent led to partial settlement of the award. The sum of Kshs. 119,361.021 was paid with interest in three instalments. Paragraph 3 of the consent allowed parties to seek interpretation on the interest from 23rd May 2014 to 26th June 2019. Counsel maintain that interest on the contractual sum and retention before 2019 was not paid. The claim is for interest from 24th May 2014 until the money is fully paid. The two applications by both parties filed after the award were dismissed and therefore nothing was awarded.

In opposing the application, the respondent filed a replying affidavit dated 22nd October, 2020 in which he urged this court to strike out the application on the ground that it is misconceived and bad in law. The respondent avers that the applicant has failed to demonstrate that the present application can be brought under the purview of Section 36 of the Arbitration Act, 1995. According to the respondent, upon receipt of the final award and the additional award, it filed an application, Misc. Civil Application No. 315 of 2019, seeking to set aside the award delivered on 10th May, 2019. Subsequently, the parties entered into a mutual settlement agreement dated 19th December, 2019 allowing payment of the award in three phases and capping the interest at 30th November, 2019 from 26th July, 2019. The undisputed amount of Kshs. 126,323,748(One Hundred and Twenty-Six Million, Three Hundred and Twenty-Three Thousand, Seven Hundred and Forty-Eight Shillings Only) was fully paid, receipt of which was acknowledged by the plaintiff.

The respondent asserts that the present application is an afterthought by the applicant to protect litigation since the final award of 10th May, 2019 does not contain any clerical or arithmetical mistakes or errors that may be corrected by this court. Highlighted also is the negative macroeconomic effect that any further awards might occasion on the respondent, which is a public body. The issues identified for determination by the respondent are whether the Court has jurisdiction to hear and determine the application, whether the Application meets the threshold for the orders sought and lastly, what interest (if any) is payable to the Applicant.

The respondents submit that the arbitration process none of the grounds relied upon by the applicant herein falls under the provision of Section 36 and 39 of the Arbitration Act. This it contends is because all the grounds raised were dealt with at the arbitration proceedings and therefore the court's intervention is only limited only to the circumstances under Section 39 of the Arbitration Act. To buttress this assertion, the respondent has made reference to the case of **ANN MUMBI HINGA VS VICTORIA NJOKI GATHARA [2009] eKLR** where the court held that the provisions of the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration

Act makes the Act a complete code which cannot be overruled by Rule 11 of the Arbitration Rules.

According to the respondent, the application offends the established practice of arbitration and the resultant arbitral award as it seeks to review the arbitral award in an application for enforcement under Section 36 of the Arbitration Act. The respondent has relied on Dr. Kariuki Muigua's definition of 'Recognition of an arbitral award' and 'Enforcement' in his article **'Settling Disputes Through Arbitration In Kenya'** where he states;

> **"The recognition of an arbitral award entails the official acknowledgement of the award as valid and capable of enforcement..... Recognition is a defensive process. It can be used to shield against an attempt to raise, in fresh proceeding, issues that have already been decided in an earlier arbitration resulting in the award sought to be recognized" (Page 192, para. 2)**
>
> **"Enforcement", on the other hand is the process of compelling the party against whom an award is made to perform it by applying all available legal sanction." (Page 193, para. 1)**

Dr. Kariuki further makes reference to the case of **BRACE TRANSPORT CORPORATION OF MONROVIA, BERMUDA VS ORIENT MIDDLE EAST LINES LIMITED AIR 194 SC 1715** where the court stated that where it is asked to enforce an award, it must recognize not only the legal effect of the award but must use legal sanctions to ensure that it is carried out.

The respondent submits that all the interest owing under the award have been fully settled in three installments between December, 2019 and March 2019 leaving no interest payable or owing to the applicant. Counsel for the respondent submits that the Arbitrator in his additional award of 9th August, 2019 made a clarification on the matter of interest on retention at Paragraph 29 and 30 of the Additional Award. Paragraph 1 of the Settlement Agreement also clarified that the settlement amount would include interests covering 26th June, 2019 to November, 2019, which interest was capped at 30th November, 2019.

It is submitted for the respondent that Section 32 of the Arbitration Act allows for determination of interest by the operative law but subject to the agreement of the parties. As such the arbitrator has the discretion to provide for interest in the award and at such a rate as specified in the award hence the applicant is estopped from raising issues of interest.

Miss Bella Mose while highlighting the respondent's submission contend that subsequent to the delivery of the award on 10th May 2019 parties entered into a settlement agreement and the award was fully paid. Therefore, there is no award to be recognized. The issue of interest as per clause three (3) of the settlement agreement was settled. The letter from the respondent's counsel computing interest was written prior to the signing of the consent. In the additional award the Arbitrator dealt with the issue of interest. No interest was to be calculated backwards but interest should be calculated from the date of the award.

Counsel for the respondent further submitted that parties sat down and agreed on what was payable and should not come to court to seek calculation of the interest. The claimant is estopped from bringing the issue of interest. Under Sections 10 and 32A of the Arbitration Act, the courts are precluded from intervening from dealing with final awards unless it is provided by the law. The award was settled and it would be difficult for the respondent's counsel to go back to their client and explain what all the other payment is all about.

Analysis and Determination;

The issues that emerge for determination in this application are whether the claimant has made a case for adoption and recognition of the Arbitral award of 10th May, 2019 as an order of this court and whether this court can alter the arbitral award of 9th August, 2019 in terms of the interest awarded.

The Claimant filed this application seeking to have that Final Award recognized and adopted by the Court. **Section 32A** of the **Arbitration Act** provides that an Arbitral Award is final and is binding upon the parties. No recourse is provided against a Final Award otherwise than in the manner provided for in the **Act** itself.

Section 36(1) of the **Arbitration Act** provides as follows:-

> **"36. (1) A domestic arbitral award, shall be recognised as binding and, upon application in writing to the High Court, shall be enforced subject to this Section and Section 37.**
>
> **(2) …**
>
> **(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.**
>
> **(4) ….**
>
> **(5) …."**

In ***OPEN JOINT STOCK CO ZARUBEZHSTROY TECHNLOGY VS GIBB AFRICA LTD [2017] eKLR*** *referred to in* ***FILI SHIPPING CO LTD VS PREMIUM NAFTA PRO DUCTS & OTHERS [2007] UKHL 40****, where the Court stated;*

> **"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same Tribunal. The Clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from Arbitrator's jurisdiction."**

From the rival submissions, the issues which comes out clearly for determination are:-

1. **Whether this court has jurisdiction to her and determine the matter.**

2. **Whether the consent entered on 29th December, 2019 between the parties settled the dispute.**

3. **Whether the Arbitrator awarded the applicant/contractor interest and if so to what extent.**

4. **What was the award?**

According to the respondent the dispute has been settled. The jurisdiction of the court under the Arbitration Act is restricted to matter expressly provided under that Act. Reference was made to the Nyutu Agrovet Limited case (supra). Further reliance was made to the case of **Ann Mumbi** (supra) where the Court of Appeal further held:-

> **"We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act"**

Counsel for the respondent went on to argue that the court lacks jurisdiction to entertain a challenge to the award dated 10th May, 2019 as the application falls outside the provisions of Section 36 of the Arbitration Act.

On his part, Counsel for the applicant maintain that the court has jurisdiction to entertain the application. After the delivery of the award both parties returned to the arbitrator seeking some clarification on the award. The two applications were dismissed by the arbitrator and therefore the only recourse was to the court.

The application is brought under Section 36 of the Arbitration Act and Rules 6,9 and 11 thereof. Sections 1A, 1B and 3A of the Civil Procedure Act are also part of the basis of the application. Section 36(1) of the Arbitration Act No 4 of 1995 states as follows:-

> **"A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37."**

On its part, the respondent filed miscellaneous Civil Application number 315 of 2019 on 26th September, 2019 seeking to set aside the award. Under Section 35(3) of the Arbitration Act, an application to set aside an award has to be made within three months from the date of receipt of the award by the applicant. Section 36 of the Act does not provide the timelines within which an application for recognition and enforcement of an award has to be made.

The application herein seeks to have the award adopted as the judgment of this court so that it can be enforced. The applicant is of the view that award has not been fully settled while the respondent's position is that the dispute has been finalized and there is nothing to adopt. It is my considered view that given the two rival positions, the court has to determine the dispute on its merit and decide whether the matter has been fully settled or not. This can only be done by the court as the timelines under the Arbitration Act granted to the parties to approach the Arbitrator after receipt of the award has lapsed. Further, the parties themselves have grappled with the dispute after they took the award meaning they felt that certain issues were not clear from the award. I do find that this court has the jurisdiction to determine the dispute.

Whether the consent between the parties settled the dispute.

The respondent through the replying affidavit of Mr. William Keitany maintain that after the receipt of the award and the clarification by the Arbitrator, parties entered into a settlement agreement. The agreement provided that the amount awarded was to be settled in three instalments as per clause two (2) thereof and the respondent duly settled the awarded sum of Kshs.119,361,021.94 plus interest making a total payment of Kshs.126,323,748. That last instalment was to be paid on or before the 30th of March, 2020.

On its part, the applicant contend that the settlement agreement led to partial payment of the award. The relevant clauses of the settlement states as follows:-

> **"3. INTEREST The Award will not attract interest after 30th November 2019. However, Claimant is at liberty to make necessary application to seek interpretation on the disputed issue of the Award on interest accruing between 23rd May 2014 and 26th June 2019.(emphasis added)**

4. NO ADMISSION OF LIABILITY. Neither this Settlement Agreement nor anything contained within it shall be admissible in any proceeding as evidence of liability or wrongdoing on the part of either party. However, this Settlement Agreement may be introduced in any proceeding instituted to enforce its terms.(emphasis added)

5. MUTUAL RELEASE OF ALL CLAIMS. In consideration for their faithful performance of the terms of this Settlement Agreement, the Parties, do hereby relinquish, waive, release, acquit and forever discharge each other of and from any and all claims relating to the undisputed Award."(emphasis added)

According to Clause 4, the settlement agreement could be introduced in any proceedings instituted by a party with the intention of enforcing its terms. Also under clause three (3) on interest, the claimant/contractor was at liberty to make necessary application to seek interpretation on the issue of award of interest between 23rd May, 2014 and 26th June, 2019. The settlement covered interest for the period 26th June 2019 to 30th November 2019. Interest was capped at 30th November, 2019 and the award was not to attract interest after 30th November 2019. My understanding of the capping provision is that the respondent was to pay the three instalments with effect from on or before 31st December, 2019 upto 30th March, 2020 and parties did not wish to keep on recomputing the interest payable during the period 19th November 2019 to 30th March, 2020.

Given the provisions of the settlement agreement two issues can be discerned namely:-

1. If there was any default on payment of the instalments, the claimant could have sought for enforcement of the settlement agreement.

2. Under clause three (3) on interest, the settlement agreement permitted the claimant to seek for interpretation on the disputed interest covering the period 23rd May 2014 to 26th June, 2019.

It is therefore evident that the settlement agreement did not settle the issue of interest claimed by the contractor. Clause three (3) of the agreement does acknowledge that there was a dispute on that part of interest covering the period 23rd May, 204 to 26th June 2019. From the record, the project was handed over to the respondent on 23rd May 2014. The date of 26th June, 2019 is clearly explained in the record. I do therefore find that the settlement agreement of 19th December 2021 did not settle the dispute fully. It only managed to settle the awarded amount plus accumulated interest. The agreement allowed the claimant to approach the court to seek for interpretation of the interest accruing after the project was handed over before any pending dues are paid.

Whether the arbitrator awarded interest and if so to what extent

The dispute leading to the filing of the application can be attributed to the issue of interest between the completion of the project and the payment of what was awarded by the Arbitrator. This issue is also flamed by the decision of the Arbitrator which is open to various interpretations. The crucial paragraphs of the Arbitrators original award of 10th May, 2019 are:-

24.The claimant prays for an Award against the Respondent for:-

a. Outstanding balance of Kenya Shillings Three Hundred and Seventy Million Nine Hundred and Twenty Nine Thousand Six Hundred and Ninety Nine and Thirty Cents Only (Kshs.370,929,99.30) being the contractual claim for variation;

b. The retention amount held by the Respondent amounting to Kenya Shillings Sixty Two Million Four Hundred and Eighty Five Thousand and Twenty one and Twenty Cents Only (Kshs.62,485,021.20);

c. Interest on (a & b) above at 14% per annum from the period the amount was due being 23rd May 2014 and 23rd November, 2014 respectively;

d. Interest on the award till payment in full;

e. Costs of these Arbitral proceedings;

f. Any other relief that this Arbitral Tribunal may deem fit to grant.

56. Reason whereof the Respondent prayed for judgment against the Claimant that the Statement of Claim be dismissed, the liquidated damages for each day that the contract overrun the 27th December 2011 anticipated completion date as Kshs.2,000.00 per day of overrun, the costs of extending, the Bank Guarantee as earlier authorized by the Claimant of Kshs.2,194,206.23 as costs of making good defects on the project, interest of awarded sums as per commercial rates, general damages for breach of contract, and any other relief deemed just.

160. In quantifying the sums due to the Claimant for the variations, delays, and extensions occasioned by the Respondent, I turn to their Statement of Claim where the Claimant has provided an itemized breakdown of the values of their claim". Unfortunately, this offers limited guidance as the Claimant four claims do not offer insight into the costs that they would perceive as these arising from the variation but merely provide four basis for the claims. They merely provide six reasons and an all-inclusive figure of Kshs. 200,599,214.027 and I am restrained to make provisions for the same.

Consequently, I partially allow the Claimants claim in similar proportions as those made for in the determination of blameworthiness. The Claimant claim is therefore entitled to 70% of the value of the Claim raised within the contractual period of 90-days as provided by their letter of 10th June 2014 that quoted the value of Kshs. 200,599,214.027. The all-inclusive figure as regards to delays is therefore Kshs. 140,419,449.82 less the assessed amount of Kshs. 78,726,992.85 that had been provided for in Payment Certificate No. 10. The balance that the claimant could, therefore, conceivably recover from the Respondent solely on the contract for delays, variations, extensions, and amendments made to their scope of works becomes Kshs. 61,692,456.97.

162(h) Is the Claimant entitled to the prayers in the Claim? Partially, having partially proven their claim as against the Respondent the Claimant is entitled to part of the prayers sought.

(i) Is the respondent entitled to the prayers in the counter claim? Partially, while being estopped from claiming for liquidated damages for the delay, the Claimant is entitled to recover the costs of providing the Bank guarantee as the Claimant had expressly allowed the same. They may further recover the costs of making good defects in line with the contractual provisions.

163. On the basis of the foregoing findings and flowing from the reliefs sought in the Statement of Claim and the Respondent's Reply to the Statement of Claim and the Counterclaim,

a. In respect of the Claim for Kshs. 370,929,699.30 being the contractual claim herein, I award Kshs. 61,692,456.97 being the balance due to the Claimant to compensate them for the costs of delays, variations, and amendments proportionately occasioned by the Respondent less any taxes and statutory deductions that the Respondent would have ordinarily had to recover from the Claimant under the contract;(emphasis added)

b. In respect of the Kshs. 62,485,021.20 being the retention amount, the same is allowed subject to the respondent recovering the sums contemplated below;(emphasis added)

c. The claim for interest for the contractual sum is allowed;(emphasis added)

d. In respect of the Counterclaim, I hereby Award the respondent the costs of extending the bank guarantee being Kshs. 2,194,206.23 and the costs of making defects being Kshs. 2,622,250.00 as being recoverable from the retention amount due to the Claimant as per the Award in (b) above. All other prayers in the counterclaim are dismissed save for costs as provided below."

Apart from the above paragraphs, paragraph one (1) of the award at Page 79 states as follows:-

"The Respondent shall pay to the Claimant the sum of Kenya Shillings One Hundred and Nineteen million, Three Hundred and Sixty-One Thousand, and Twenty-One Shillings and Ninety-Four Cents (Kshs. 119,361,021.94), such payment to be made within twenty-one days of the date on which the Award is taken up by either party. Interest will accrue thereon at the rate of 14% per annum effective from twenty-one (21) days after the Award is taken by either party if payment is not made within the said period until payment in full."(emphasis added)

After the delivery of the award both parties approached the arbitrator. The respondent sent a request dated 5th July, 2019 seeking correction of the award on the grounds that the final award contained glaring computation errors on its face. On its part, the applicant filed a request dated 8th July, 2019 for an additional arbitral award on the grounds that the final award did not provide for interest on retention sum which was thought to be a simple omission by the Arbitrator.

The two requests by the parties led to the Arbitrator's **"communication subsequent to the Final Award"** on 9th August, 2019. The crucial paragraphs of the communication are:-

"THE CLAIMANTS REQUEST FOR ADDITIONAL AWARD

28. On 4th June 2019 Messrs. Nyaencha Wachari & Company Advocates collected the Award. As such, the thirty days contemplated under Section 34 of the Act began running on 5th June 2019 and run out on or before 5 July 2019, Their request is therefore by a statutory limitation as to time that the Arbitral Tribunal has no-discretion to extend.

29. On award for interest on the retention amount, having found that the Respondent was obliged to have recovered the costs of making good the defects and the cost of bank guarantee from the retention sum, the decision not to award interests on the same retention amount was made consciously by the Tribunal. It was neither a mistake nor an

oversight but a determination that sought to place the parties at parity as interests to the arbitral award were only made to the final sum determined to be due and owing as to parties at the conclusion of the proceedings.

30. I would further draw their attention to the holding at paragraph 158 of the Final Award at page 73. The Award was based on equitable need to compensate them for the extra work done while ensuring no party would unjustly enrich themselves. He who comes to equity must come with clean hands, both parties did not have clean hands and their claims were partly allowed and partly disallowed. It was therefore deemed just, equitable and fair for the interest on any award to run from the time of issuance of this award and not earlier."

The Arbitrator's decision can be the subject of different interpretation.

Paragraphs 163 and 164 of the original award are titled "RELIEFS" and they are followed by 'THE AWARD". The claimant reiterate that its claim for interest as pleaded was allowed. Paragraph 24(c) of the decision captures the claimant's claim for interest at the rate of 14% per annum from 23rd May 2014 and 23rd November 2014 respectively. It can be interpreted that the claimant was awarded interest as prayed but only on the contractual sum and not on the retention. The retention, in my view, is part of the contractual sum and is only retained to cover the defects period and later on paid. It is not a sum far too separate and distinct from the contractual sum. Paragraph 163 (c) can also be interpreted to mean that the awarded sum of Kshs.119,361,021/94 globally attracted interest from 23rd May, 2014 as prayed by the claimant.

There is paragraph one (1) of the Award which can also be interpreted differently. The first interpretation is that the awarded sum of Kshs.119, 361,021/94 was to attract interest at the rates of 14% twenty one (21) days after the collection of the award by either party. This interpretation would mean that the arbitrator clawed back paragraph 163 (c) of the decision and interest was not to accrue from the time the project was handed over to the respondent/client on 23rd May, 2014.

A third interpretation relates to paragraph 28 of the additional communication. The simple interpretation of that paragraph is that all the prayers sought by the claimant were dismissed and parties were to revert to the original award. This interpretation would render paragraphs 29 and 30 superfluous as nothing was awarded. The interpretation is supported by paragraphs 31, 32 and 33; Paragraph 31 states as follows;-

> **"31. On the basis of the foregoing findings and flowing from the reliefs sought in the Request to Correct an Arbitral Award, the Request for Additional Award and the Grounds of Opposition to the Request to Correct an Arbitral Award it is hereby deemed that all the requests made by the parties having failed, no further orders are necessary as to the specific reliefs prayed for.**
>
> **32.The Claimant request for Additional Arbitral Award is hereby dismissed.**
>
> **33.The Respondents request to Correct Arbitral Award is hereby dismissed."**

A fourth interpretation involves paragraph 29 of the additional communication. The paragraph at the onset only relates to the retention. It can be interpreted that interest was awarded on the retention sum but subject to the deduction of the sums of Kshs.2,194,206/23 being costs of extending the bank guarantee and Kshs.2,622,250 being recovered for correcting defects The balance would be Kshs.57,668,565 which amount would attract interest either as prayed or twenty one days after date of the award..

The opposite interpretation would be that the entire retention sum was not to attract interest.

Another way of interpreting paragraphs 29 is to consider only part of the paragraph which reads:-

> **"It was neither a mistake nor an oversight but a determination that sought to place the parties at parity as interest to the arbitral award were only made to the final sum determined to be due and owing as to the parties at the conclusion of the proceedings."**

The above sentence refers to interest made to the final sum determined to be due. The final sum of Kshs.119, 361, 021/94 covers both balance under the contract and retention. One can conclude that only that final sum was to attract interest and not the subtracted sum for extension of the bond and cost of making good the defects. That is quite logical since the respondent incurred those two expenses before the matter went to arbitration.

Paragraph 30 indicate that it was deemed just, equitable and fair for the interest to run as from the time the award was issued and not earlier. This statement could refer to the balance of the contractual sum or the retention. Counsel for the applicant reiterated that their request for additional award was only on the retention and not on the original contractual sum and therefore the arbitrator could have only dealt with the retention sum only.

Section 32(c) of the Arbitration Act states as follows:-

> **"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."**

The above section allows an arbitrator to award interest either simple or compound. The interest can be granted from such a date as the arbitrator would decide.

The record shows that indeed soon after collecting the award, both parties had their own respective interpretation of the award by the Arbitrator. The record shows that on 4th June, 2019, the same date counsel for the applicant collected the award, he wrote to the respondent's counsel computing what he deemed to have been awarded by the Arbitrator. Part of the letter reads as follows:

> **Ogetto, Otachi & Company Advocates**
>
> **Sifa Towers, 7th Floor**

Ring Road, Kilimani, Lenana Junction

P.O. Box 79438-00200,

NAIROBI

Dear Sirs

RE: IN THE MATTER OF ARBITRATION BETWEEN LEMNA INTERNATIONAL INC. AND NATIONAL HOUSING CORPORATION

We refer to the award issued herein on the 10th May 2019 in which the Arbitrator granted a 21 stay period for its settlement.

The 21 days expired on 1st June 2019; however, that having been a public holiday expiry of the days was on 3rd June 2019.

Applying the calculations in the award interest payable as at the 23rd May 2019 will be Kshs. 202,913.736.00 worked out as follows:

119,361,021 x 14 100 x 5=83,552,715.00

83,152,715+119,361,021= 202,913,736.00 (emphasis added)

Kindly now may we have your client settle this sum. We will advise you of our client account to have the sum forwarded.

Our client is amenable to having the sum settle vide reasonable instalments.

Yours faithfully

KENNEDY K. NYAENCHA"

On his part, counsel for the respondent collected the award on 6th June, 2021 and on the same day responded to the applicant's counsel's letter. The letter dated 6th June 2019 reads as follows:-

"Nyaencha Waichari & Co. Advocates

Hurlingham Plaza

3rd Floor

Nairobi

Dear Sir, Attn: Ken Nyaencha

RE: LEMNA INTERNATIONAL INC. VS. NATIONAL HOUSING

CORPORATION

We refer to the above matter and acknowledge receipt of your letter dated 4th June 2019.

In response thereto we state as follows:-

1. The awarded amount (Kshs.119,361,021.94) is stated to be paid "within Twenty-One (21) days of the date on which the Award is taken up by either party" Now, the Award was available for collection and was taken up by both parties on 4 th June 2019. It is as at this date that the 21 days of stay start running so that interest can only properly start accruing after 26th June 2019.

2. You will note that interest was allowed with respect only to the

"contractual sum" (to the exclusion of the retention monies) which was assessed at Kshs. 61,692,456.97. Accordingly,

this forms the correct base figure for purposes of calculating interest liability.(emphasis added)

Interest Liability:

14% of the Assessed Contractual Claim x 5 years

14% x 61,692,456.97x5

Kshs. 43,184,179.88

As such, the total sum payable under the Award is:

Kshs. (119,361,021.94 +43,184,179.88)

Kshs. 162,545,201.82 (emphasis added)

Yours Faithfully,

GERSHOM OTACHI

FOR: OGETTO, OTACHI & COMPANY ADVOCATES"

From the above correspondence it is established that both counsel interpreted the award differently. Whereas counsel for the applicant/contractor was of the view that interest on the entire award was to be applicable from May, 2014, counsel for the respondent/client was of a different view. According to the respondent's counsel, only the contractual sum of Kshs.61,692,456/97 was awarded interest from May, 2014. Miss Bella while highlighting the respondent's submissions contended that parties later on discussed and entered into a settlement agreement. That is true but once again the settlement agreement did not finalize the issue as evidenced by paragraph three (3) thereof. To this end, having allowed either party to seek interpretation on the disputed issue of interest accruing between 23rd May, 2014 and 26th June, 2019, the respondent cannot invoke the doctrine of estoppel. There is no indication that the applicant made the respondent to believe that the dispute is fully settled. The mutual release clause five (5) of the consent only involved the undisputed award that was fully paid. Nothing stopped either of the parties from approaching the court on the issue of interest.

Section 39 of the Arbitration Act provide that where there is a question of law involving a domestic arbitration parties can agree to have an application made to the High Court. Under Section 39(2), the court may determine the question of law, confirm, vary or set aside the arbitral award or remit the matter to the Arbitration Tribunal for reconsideration. Both parties went back to the Arbitrator and their respective applications were dismissed. I do find that the issue of interest is a question of law.

Counsel for the respondent emphasized on the finality of disputes and maintain that the matter has been fully settled. Section 32A of the Arbitration Act states that an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the Act.

The dispute is only on interest and specifically the date when interest became payable. In the case of **HINGA –V- GATHARA (2009) KLR 698**, the Court of Appeal held inter alia:-

a. **The provisions on recourse to the High Court against Arbitral Awards implied that the High Court had no other power against an arbitral award outside section 35 and 37 of the Arbitration Act. It was clear, that a party could not ground an application to set aside an award outside Section 35 of the Arbitration Act 1995 Act. Failing to serve any process after an award had been made was not one of the grounds for setting aside an award or any subsequent judgment or decree.**

b. The Arbitration Rules 1997 where appropriate applied the Civil Procedure Rules as regards the enforcement of the award. Rule 11 of the Arbitration Rules 1997 was not meant to import the Civil Procedure Rules to regulate arbitration under the Act. No application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny the finality and speedy enforcement of an award both of which were major objectives of arbitration.

c. No intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act was the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Although public policy could never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers were exercised. There was nothing whatsoever indicating that the award fell under any of the above definitions of public policy, so as to warrant a challenge under the public policy exception.

The Civil Procedure Act provide for award of interest in civil disputes. Section 26 of the Act has endured several amendments and states as follows:-

"1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further

interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

The question would be whether making reference to section 26 of the Civil Procedure Act would be importing the Civil Procedure Act or Rules into an arbitration dispute. In the case of **BISHAN DAS SHA –V- I GIRDHARILAL SETHI & ANOTHER (1964) E.A. 246** the dispute involved an arbitration award. Just like in this dispute the award was to be settled by way of three instalments. The court (Rudd J) held:-

i. Section 26 of the Civil Procedure Ordinance is wide enough to empower the court to order interest, but whether it should do so depends on the circumstances;

ii. In the circumstances the applicant was entitled to interest on the balance owing at 6 per cent per annum.

Cheque dated January 31, 1958 for Shs.14,000

In the case of **PREM LATA –V- PETER MUSA MBIYU (1965) E.A.292,** the dispute involved interest on special and general damages arising from an accident claim. The Court of Appeal held at page 593 as follows:-

"It is agreed by both counsel for the appellants and counsel for the respondent that, immediately after judgment was pronounced, counsel for the appellants applied for an order that interest be awarded on the amounts awarded as general and special damages from the date of filing suit until judgment. It is also agreed that the Chief Justice rejected this application. Nothing appears on the record as to the reasons for which the application was rejected. The award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by s. 26 of the Civil Procedure Act. Such a discretion must of course be judically exercised, and whereas as in this case no reasons are given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown (Toprani v. Patel (1) [1958] E.A. at p. 349). In an attempt to satisfy us that the normal practice is to award interest on the amount of a money judgment from the date of filing suit counsel for the appellants referred us to Eastern Radio Service v. R. J. Patel (2) and Y. F. Gulamhusein v. French Somaliland Shipping Co. Ltd. (3). In both these cases the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest. But suits for damages for personal injuries are in a different category. It cannot be said that, at the date of filing suit, the plaintiff is entitled to any particular amount. This depends on the decision of a number of factors, including liability, contributory negligence, and the assessment of the damages which may include, as in this case, a considerable element in respect of future disability. In these circumstances, we do not consider that the Chief Justice wrongly exercised his discretion in refusing to award interest from the date of filing suit in respect of the general damages, as the infant plaintiff cannot have been said to have been deprived of the money represented by these damages from any particular date before judgment. Counsel for the respondent does not, however, oppose an order for the payment of interest on the special damages awarded to the next friend, as these represent out of pocket expenses actually paid or incurred at the date of filing suit. We agree. In our opinion the Chief Justice was right in refusing to award interest on the general damages from the date of filing suit, but it is conceded, and rightly so in our opinion, that interest should have been given on the amount of Shs. 1,742/80 awarded to the next friend in respect of special damages. We allow ground 2 of the appeal to this limited extent, and order that paragraph 1 of the decree be amended by the addition of the words "together with interest at 8 per cent per annum from the date of filing suit until the date of judgment". Apart from this we dismiss the appeal and the cross-appeal, without any order as to costs. Each side will bear its own costs of the proceedings in this court."

In the above case, interest on special damages was awarded from the date of filing suit. The award was divided into two parts. There is the award of Kshs.61,692,256/97 out of the contractual sum. This amount was fully paid but the applicant reiterate that interest on this amount ought to have been paid from 23rd May, 2014. The nature of the contract was that the applicant was paid an advance deposit of 20% out of the contractual sum of Kshs.902,146,259/80. Thereafter the applicant was to carry out the work and payments were secured by the bank guarantee. The respondent used to make payments as the work progressed. The entire project was completed and handed over to the respondent on 23rd May, 2014. The arbitrator awarded the applicant a balance of Kshs.61,692,456/97 out of the contracted sum as well as the extra work and variations. It is my considered view that this was a special damage claim and the amount ought to attract interest from the date it was due on 23rd May, 2014. This was money spent by the contractor to complete the project. It was payable as of that date but it was not known how much was to be paid as a result of the dispute.

My decision is supported by the respective views of both counsel soon after taking the award. Both counsel were of the considered view that interest was payable on the contractual sum from 23rd May, 2014. I am of the same view that interest on the contractual sum ought to be computed from 23rd May, 2013. Further, since the decretal sum was fully paid, I do find that the interest payable should not be left to continue accruing in abstract yet the foundation upon which it flows from has been fully settled. In other words, the interest shall not accrue until when it is paid. I do order that such interest will accrue upto 26th June, 2019 as per the consent agreement. The principal sum has already been paid.

The next issue is interest on the retainer. Retainer is part or portion of the contractual sums in construction agreement. The underlying objective is to ensure that the contractor does the work professionally as per the contract while knowing that any defects on the work will be deducted from the retainer. The money is held back to safeguard the client's interest. In this case some money was deducted from the

retainer. The respondent was of the considered view that no interest was awarded on the retainer. There is no dispute that the sum of Kshs. 62,485,021/20 was the retention money. This is part of the undisputed contractual sum and it ought to have been paid after the expiry of the defects period from 23rd November, 2014. It was not paid and it is my finding that it ought to equally attract interest from the date it was due upto 20th June, 2019. Thereafter no interest shall be payable as the retention has already been paid. None of the parties annexed the construction agreement. Clause 26 of the contract provided for the retention and there is no reference as to what the contract provided on interest. Since this was not disputed, I do find that it is a special damage claim that was awarded by the arbitrator as claimed and it ought to attract interest from the date it was due.

Section 32C allows the arbitrator to award interest from such a date as he deems to be proper given the circumstances of the claim. In view of the available different interpretations of the award, I do find that since this was a special damages claim that was proved and incurred before the arbitration was filed and determined in 2019, interest should accrue from the respective dates the claimed sum were due and payable. My finding is supported by the words of Donald J in the case of **MYRON (OWNERS) –V- TRADAX EXPORT S.A PANAMA CITY R.P. (1969) 2 ALL ER, 1263** where it was stated:-

> **"All matters of costs in the arbitration and interest on any moneys found due are for the arbitrators or umpire. However, it may assist if I expressed my views on the principles which are applicable. It is of paramount importance to the speedy settlement of disputes that a respondent who is found to be under a liability to a claimant should gain no advantage and that the claimant should suffer no corresponding detriment as a result of delay in reaching a decision., Accordingly awards should in general include an order that the respondent pay interest on the sum due from the date when the money should have been paid. The rate of interest is entirely in the discretion of the arbitrators, but I personally take the view that in an era of high and fluctuating interest rates the principles which I have expressed is best implemented by an award of interest "at a rate one cent, in excess of the Bank of England discount rate for the time being in force". When interest is awarded, arbitrators commonly award it for a period ending with the date of the award.(emphasis added)"**

In the end, I do find that the balance of the contractual sum of Kshs.61,692,456/97 shall attract interest from 23rd May 2014 upto 26th June 2019. This is a period of five (5) years and one month. The rate of 14% is not disputed.

The interest payable yearly is: Kshs.61,692,456/97x14/100= Kshs.8,636,943.97

The interest for one month is Kshs.719,745.33. The total interest payable is:-

Kshs.8,636,943.97x5=43,184,715

Kshs. 43,184,715.00

719,745.33

43,904.460

The sum of Kshs.43,904,460 is almost similar to the sum of Kshs.93,184,179.88 Mr. Otachi indicated in his letter of 6th June, 2019.

Turning to the interest on the retention the arbitrator deducted the sum of Kshs.2,194,206/23 for the costs of extension of the bank guarantee and Kshs.2,622,250 being cost of correcting defects. This left a payable retention balance of Kshs. 57,668,565. That amount attract interest from 23rd November 2014 upto 26th June 2019, a period of four (4) years and seven (7) months.

Kshs.57,668,565x14/100=8,073,599.

Kshs.8,073,599x4 =32,294,396.

The interest payable for one month is Kshs.672,799. For the seven months upto 26th November 2019 the amount payable would be Kshs.4,709,599. This gives a total retention interest of Kshs.32,294,396+ Kshs.4,709,599=37,003,995.

The applicant is entitled to interest on both the contractual sum as well as the retention as hereinabove. The total interest payable is:-

Contractual sum – Kshs. 43,904,460

Retention sum - Kshs. 37,003,995

Total - Kshs. 80,908,455

In the end I do find that the application dated 21st July 2020 is merited and the same is granted in terms of prayers one (1), two (2) and three (3). The applicant is awarded Kshs. 80,908,455 as interest for both the contractual sum and the retention. The above amount is all inclusive and shall not attract any future interest. Parties shall meet their respective costs of the application.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2021

• • .....

S. CHITEMBWE

JUDGE