Pevans East Africa Limited v Kenya Rugby Union & another (Miscellaneous Application E282 of 2021) [2021] KEHC 201 (KLR) (Commercial and Tax) (2 November 2021) (Ruling)

Neutral citation: [2021] KEHC 201 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E282 OF 2021

WA OKWANY, J

NOVEMBER 2, 2021

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

IN THE MATTER OF THE ARBITRATION INVOLVING AN ARBITRATION

BETWEEN

KENYA RUGBY UNION..................CLAIMANT

AND

PEVANS EAST AFRICA LIMITED...RESPONDENT

BETWEEN

PEVANS EAST AFRICA LIMITED .... APPLICANT

AND

KENYA RUGBY UNION .... 1ST RESPONDENT

ATTORNEY GENERAL .... 2ND RESPONDENT

RULING

Introduction

1. The applicant herein, Pevans East Africa Limited, is a limited liability company involved in the provision of online betting services (hereinafter also referred to as "the Sponsor").
2. The respondent, Kenya Rugby Union (KRU/the Claimant) is also a company incorporated in the Republic of Kenya.

3 On 1st July 2016, the parties herein entered into a Sponsorship Agreement wherein the applicant agreed to sponsor the respondent's rugby events, teams and activities for a period of 5 years expiring on 30th June 2021. In the said agreement, it was agreed inter alia that: - In consideration of the rights and obligations outlined in the agreement, the Sponsor would pay a Consideration Amount of Kshs. 607,819,439 during the term of the agreement.

4 The sponsorship agreement kicked off to a smooth start and continued till 28th December 2017 when the Sponsor issued KRU with a termination notice citing the government's imposition of hefty taxes in the gaming industry. Kenya Rugby Union was however dissatisfied with the reasons advanced by the Sponsor for terminating the contract and contended that the termination was premature thus amounting to a breach of their contract.

5 A dispute arose over the termination of the contract which dispute the parties referred to arbitration in line with Clause 17.1 of their contract. The arbitral Tribunal, presided over by the sole arbitrator Dr. Wilfred Mutubwa heard the dispute and rendered a verdict 20th November 2020 in which it awarded KRU the sum of Kshs. 417,019,439 together with interest at 12% per annum. The Sponsor's subsequent application for review of the said Award was dismissed through a ruling delivered by the sole arbitrator on 24th February 2021 thereby precipitating the filing of the three (3) applications that are the subject of this ruling.

The Applications

6 This ruling is in respect to three applications, namely;

7 The application dated 19th April 2021 (hereinafter "the Enforcement Application") wherein the applicant (KRU) seeks orders for the adoption, recognition and enforcement of the arbitral award made by the sole arbitrator on 20th November 2021.

8 The application dated 21st April 2021 (hereinafter "the Setting Aside Application") wherein the applicant, Pevans East Africa Limited (the Sponsor) seeks orders to set aside the said arbitral award, and

9 The application dated 2nd June 2021 (hereinafter "the Joinder Application") in which the Sponsor seeks to enjoin the intended second respondent to the suit.

10 Parties canvassed the applications by way of written submissions. I however wish to point out, from the outset, that the outcome of the setting aside application will have the effect of determining the enforcement application. This is to say that should the setting aside application be unsuccessful, then the court will move to consider the enforcement application and conversely, should the setting aside application be successful then the enforcement application will fall by the wayside. I will therefore consider the setting aside application first.

Application dated 21st April 2021

11 The Sponsor seeks the following orders in the setting aside application: -

a. Spent

b. Spent

c. THAT this Honourable Court be pleased to set aside the arbitral Award published on 20th November 2020 and issued to the parties on 19th February 2021.

d. THAT in the alternative to prayer 3 above, this Honourable Court be pleased to make such further or other order(s) as it may deem appropriate including remitting the Award for corrective action on the impugned portions of the Award, inter alia, the computation of the award sum; the interpretation of what constitutes ‘action by government agencies’; the Applicant’s duty to mitigate; the computation of damages for breach of contract and the award of interest, so as to eliminate the grounds for setting aside the arbitral Award.

e. THAT the costs incidental to this Application be provided for.

12 The application is supported by the affidavit of Robert Macharia and is premised on the grounds that: -

a. THAT the arbitral Award is against the Public Policy of Kenya in the following respects: -

i. The Arbitrator incorrectly computed the Award amount. This not only amounted to unjust enrichment to the Respondent, but was also an award against the agreed contractual entitlement submitted for arbitration. The Applicant’s uncontested position is that it had paid a sum of Kshs 191,100,000.00 to the Claimant by the date of the termination of the Agreement. Even if it was assumed that the whole contract sum of Kshs. 600,000,000.00 was payable as held by the Arbitrator, the balance due ought to have been Kshs 408,900,000.00 and not the sum of Kshs 417,019,439.00 awarded.

ii. Despite the Review Request from the Applicant to the Arbitrator dated and submitted on 19th February 2021 clearly pointing this error, the Arbitrator despite acknowledging the same, failed to correct the arithmetic error in his Review Ruling published on 24th February 2021 and notwithstanding being empowered by the Act to so do.

iii. The Arbitrator failed to interpret what constitutes an ‘an action by government agencies’ as provided in the force majeure clause of the Agreement consequently tainting his finding on the issue of what constitutes force majeure as defined in the Agreement also taking into account that the Arbitrator had previously acknowledged that the issue was central to the dispute between the parties.

iv. The Arbitrator proceeded to make a finding on whether the Applicant undertook its duty to mitigate the consequences of force majeure without giving reasons for this finding contrary to Section 32(3) of the *Arbitration Act* which provides that an award shall provide for the reasons upon which it is based.

v. Disregarding, misconstruing and/or failing to consider crucial evidence produced or presented by the Applicant in the course of the hearing in relation to the steps it took to mitigate the consequences of force majeure thereby occasioning a serious miscarriage of justice.

vi. The Arbitrator erred in concluding that the Respondent had made out a case for damages for breach of contract, then proceeding to award for the balance of the contract sum which is tantamount to an order of specific performance.

vii. The Arbitrator failed to consider the terms of the Agreement which provided for quarterly payments. Had such consideration been made, an award of an amount payable for a quarter would have been appropriate as opposed to issuing an Award for the balance of the full contractual sum which includes a period that the "Sportpesa' brand was not displayed by the Respondent. This amounts to a miscarriage of justice.

viii. The Arbitrator did not provide reasons for placing the commencement date for application of interest as the date of filing the Claim as opposed to the date of the Award. The Arbitrator did not take into account that at the time of the termination of the Sponsorship Agreement of the proceedings, there was no outstanding sum on the part of the Applicant.

b. THAT the Award is riddled with serious irregularities and glaring inconsistencies and irreconcilable findings in its analysis of facts which have occasioned substantial injustice to the Applicant.

c. THAT the Arbitrator predisposed his mind in favour of the Respondent and demonstrated outright bias and partiality in favour of the Respondent consequently rendering an Award containing findings whose basis is unexplained and which did not emanate from the submissions or pleadings filed by the parties. The Arbitrator blatantly declined to correct glaring errors in the award pointed out in the Request for review despite being empowered to do so.

d. THAT the Award will occasion a great injustice to the Applicant if enforced, as it is, to the extent of the wrongful computations on the Award and interest thereof.

e. THAT the Award is replete with inconsistencies and biased findings which amount to depriving the Applicant of the right to have its dispute resolved before an unbiased arbitrator and the application of the rules of natural justice.

f. THAT the Arbitrator by predisposing his mind to a position favorable to the Respondent failed to accord the Applicant the right to be heard by an impartial tribunal as commanded by Article 50 of the Constitution.

g. THAT the public policy of Kenya demands that arbitration proceedings are conducted within the confines of the law be consistent with the Constitution, and that such award is not contrary to justice and morality within the test set by *Christ for All Nations vs. Apollo Insurance Co. Ltd* [2002] EA 366. The Award clearly flouted the said cardinal principles and should, therefore, be set aside in its entirety.

h. THAT it is in the best interests of justice that the prayers sought be granted.

13 The respondent (KRU) opposed the application through the replying affidavit of its Chief Executive Officer Mr. Thomas Odundo who states that Section 35 of the *Arbitration Act* does not confer jurisdiction on the court to interrogate the merits of the Arbitration award. He further states that grounds listed in the application challenge the merits of the arbitral award and constitute an attempt to re-open and litigate the Sponsor's request for review under Section 34 of the *Arbitration Act*. He further states that this court does not have jurisdiction to refer the arbitral award back to the arbitrator with the instructions to take any corrective action as this would amount to a review. It is the respondent's case that there is no error in computation of the award and the issue of wrongful computation was dealt with through the Arbitrators ruling dated 24th February 2021.

14 The respondent also filed Grounds of Opposition dated 4th May 2021 in response to the application wherein it listed the following grounds:

i. This Honourable Court has no jurisdiction to entertain the application as time allowed under Section 35 of the *Arbitration Act* 1995 lapsed on 20th February 2021.

ii. The Application herein was filed on 21st April 2021 after an inordinate delay of six (6) months after publication of the Award by the Honourable Arbitrator.

iii. The Application herein is an abuse of the Court process as this Honourable Court is now functus officio.

iv. The Respondent's Application offends the provisions of Section 37 of the *Arbitration Act* 1995 as none of the reasons advanced for seeking to set aside the Arbitral Award published on 20th November 2020 fall within the categories envisaged Under Section 37.

v. This Honourable Court has no jurisdiction to hear and determine this Application for Review dated 21st April 2021 as the provisions of the *Civil Procedure Rules, 2010* (Cap 21) Laws of Kenya are not applicable.

15 Parties canvassed the application through written submissions wherein they reiterate the grounds stated in their respective pleadings.

16 I have carefully considered the pleadings filed by the parties herein, their written submissions and the authorities that they cited. The main issues for determination are as follows: -

1. Whether the Preliminary Objection is merited and,

2. Whether the applicant has made out a case for the granting of the orders to set aside the arbitral award.

Preliminary Objection.

17 What amounts to a preliminary objection was discussed in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, where it was held that: -

> " a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

18 The main ground in the notice of Preliminary Objection is with regard to the jurisdiction of this court to entertain the application. According to the respondent, since the award was published on 20th November 2020, the three months' period allowed for the filing of the application under Section 35 of the *Arbitration Act* (the Act) lapsed on 20th February 2021 yet the instant application was filed on 21st April 2021.

19 My finding is that the objection to the court's jurisdiction is a point of law, since it has the potential of determining the setting aside application with finality without the need of ascertaining any additional facts. The issue for consideration is whether the application was filed outside the 3 months' period provided for under Section 35 (3) of the Act.

20 In *Ezra Odondi Opar vs Insurance Company of East Africa Limited KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR*, the Court of Appeal observed that: -

> " (22) The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in *Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another*, SC Petition No. 12 of 2015 "the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes" "in a manner that is expeditious, efficient..." while also observing that Section 35 of the Act, "also provides the time limit within which the application for setting aside should be made."

21 It was not disputed that the arbitral award was published on 20th November 2020 in which case the time for filing an objection to the award lapsed on 20th February 2021. It was further not disputed that the applicant herein filed an application before the arbitrator under Section 34 of the Act seeking a review the award published on 20th November 2020. The ruling on the said review application was rendered on 24th February 2021.

22 My finding is that in view of the fact that the ruling on the review application was delivered on 24th February 2021, the 3 months' period within which the setting aside application ought to have been

filed had not expired as at 21st April 2021 when the instant application was filed. Section 35(3) of the Act stipulates as follows: -

> (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.

23. I note that even though the above provision states that an application to set aside an 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, the said section also states that where a request has been made under Section 34, the 3 months start to run from the date on which that request had been disposed of by the arbitral award.

24. I have already observed in this ruling that the ruling on an application made under Section 34 of the Act was rendered on 24th February 2021 in which case the 3 months expired on 24th May 2021. The instant application was filed on 21st April 2021 at least one month to the expiry of the 3 months' period from the date of the delivery of the ruling on the review application. I therefore find that the preliminary objection is not merited and I dismiss it with no orders as to costs.

Setting Aside

25. Section 35 of the Act stipulates as follows regarding the setting aside of an arbitral award: -

> " (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—
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> (a) The party making the application furnishes proof—
>
> (i) that a party to the arbitration agreement was under some incapacity; or
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> (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
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> (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) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) The making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

(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.

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

26. In *Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR*, the Court of Appeal, addressed the import of Section 35 of the *Arbitration Act*, as follows: -

> "An award could be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) inimical to the national interest of Kenya or (c) contrary to justice or morality."

27. One of the grounds that the applicant listed for the setting aside of the award is that it is against public policy that requires that the arbitral proceedings be conducted within the confines of the law and be consistent with the Constitution and not contravene justice and morality. In *Matrix Business Consultants Limited & 4 Others vs Safaricom Limited [2020] eKLR* the court considered the subject of public policy and held that: -

> "Public policy, as defined above, is a broad, infinite and malleable concept and when considering it, the salutary warning of Burrough J., in *Richardson v. Mellish* [1824] 2 Bing 228 that, "Public policy is a very unruly horse, and when you get astride, you never know where it will carry you" must be kept in mind. It must be considered alongside the principle that parties who enter into an arbitration agreement expect a level of finality. Ringera J., in the Christ for All Nations Case (Supra) further stated that:

[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the *Arbitration Act*."

28. In the case of *Glencore Grain Ltd vs TSS Grain Millers Ltd. [2002] 1 KLR 606*, it was held that; -

" A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word "illegal" here would hold a wider meaning than just "against the law". It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive".

29. I will now turn to consider the principles stated in the above cited cases to the present case in order to determine if the Award offends public policy.

30. The applicant contended that the award is contrary to the public policy of Kenya because the arbitrator failed to correctly compound the amount awarded to KRU and thus made an award that amounts to unjust enrichment of KRU. The applicant also faulted the arbitrator for failing review the computation error in his ruling dated 24th February 2021 and for failing to interpret what constitutes an action by government agencies. The applicant further faulted the arbitrator for failing to consider crucial evidence produced in the arbitration proceedings among other grounds listed on the body of the application.

31. In a rejoinder, the respondent argued that the Award is not against the public policy in Kenya and that Section 35 of the Act does not confer jurisdiction on the court to interrogate the merits of the Arbitration award. According to the respondent, the grounds in the application challenge the merits of the Award and seek to reopen and litigate the applicants request for review.

32. My finding is that apart from the applicant's contention that the award offends public policy for granting the respondent an award that amounts to unjust enrichment, the rest of the grounds advanced by the applicant do not fall among the grounds for the setting aside of an Award as envisaged under Section 35 of the Act. I find that the said grounds challenge the merits of the arbitrator's findings on law and facts which this court cannot deliberate upon as such an action will amount to sitting on appeal from the arbitrator's decision. I am guided by the decision in *Cape Holdings Ltd vs Synergy Industrial Credits Ltd [2016] eKLR* where the court held that; -

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

33. Similarly, in *Kenyatta International Convention Centre (KICC) vs Greenstar Systems Limited [2018] eKLR* the Court stated thus: -

> "In any event, matters to do with the propriety or otherwise of the Arbitrator awarding a specific sum, or interest or costs are matters over which only the Arbitrator had jurisdiction to deal; and which this Court would have no mandate to interfere. I would therefore concur with the decision in *D. Manji Construction Limited vs. C & R Holdings Limited* [2014] eKLR in which the Court observed that:
>
> > "The applicant has cited some alleged erroneous decisions by the arbitrator on matters to do with completion date, double gauge windows, rate of interest awarded, final accounts, disregard of evidence, extension of time, only to mention but a few...those arguments did not really show that the law was violated as they are matters which fall within the fallibility of every person who is exercising judicial or quasi-judicial authority. They also relate to the merits and factual appreciation of the case by the arbitrator; which again falls squarely on the competence of the arbitrator as the master of facts..." (Emphasis added)
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> [42] I also find persuasive the English case of *Geogas S.A vs. Trammo Gas Ltd* (The "Baleares") which was cited with approval by the Court of Appeal in *Kenya Oil Company Limited & Another vs. Kenya Pipeline Co.* [2014] eKLR. In that case, the question arose as to whether it was permissible to review, as an error of law, a finding of fact by arbitrators, which was challenged on the ground that there was no evidence to support it. The English Court (per Lord Justice Steyn) took the position that:
>
> > "The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of 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."
>
> (43) Similarly, in *Mahican Investments Limited and 3 others vs Giovanni Gaida & Others* [2005] eKLR, Ransley J. was of a like view when he held that: "A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

(44) Consequently, in respect of the first issue herein, I am not satisfied that the Applicant has shown, to the requisite standard, that the Arbitrator travelled out of the confines of the reference or that he dealt with any issue that was not contemplated by or falling within the terms of the Reference; or even that the Arbitrator granted a relief that was not envisaged by the Agreement and therefore not specifically pleaded before him."

34. Turning to the claim that the Award offends public policy as its implementation would amount to unjust enrichment of the respondent, I find that unjust enrichment is one of the grounds that courts have held, would necessitate the setting aside of an arbitral award. In *Centurion Engineers & Builders Ltd vs Kenya Bureau of Standards [2017] eKLR* it was held that: -

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

35. Similarly, in *Root Capital Incorporated vs Tekangu Farmers Co-operative Society Ltd & another [2016] eKLR* the court held that: -

> " policy considerations would bar a claimant from enforcing an illegal contract, the same considerations should not allow a defendant who has benefited from such a contract to possess or keep what he has been paid under the contract; in the Court's view, a cause based on unjust enrichment is sustainable."

36. I will now turn to consider the terms of the parties' agreement alongside the Award made by the sole arbitrator in order to determine if the arbitral award is against the public policy of Kenya, if it is immoral or illegal or would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society.

37. Parties agreed as follows at Clause 5 of their agreement regarding the Consideration Amount: -

1. In consideration of the rights and obligations outlined herein, the Sponsor agrees to pay KRU a consideration amount of Kenya Shillings 607,819,439 during the term of the agreement. This amount excludes any taxes.
2. The payment schedule for the Consideration Amount is detailed in schedule 3 hereto.
3. The relevant payment by the Sponsor shall be made subject to receipt of a satisfactory invoice 30 days prior to the required payment from the KRU.
4. Sponsor may at its discretion provide KRU with such further assistance as it deems beneficial to the Sponsors interests. To this end KRU shall liaise with the Sponsor's representative in the project management team on all matters relating to the sponsorship under this agreement.

38. It was not disputed that on or about 28th December 2017, slightly over one year into the agreement, the Sponsor/applicant herein issued a notice to terminate the agreement. The respondent's case was that the termination notice was irregular and amounted to a breach of the terms of their agreement. According to the respondent, the sponsor did not only fail to give the 30 days' notice as provided for in the contract, but did not also offer any valid reason for the termination. The question that arises is whether the termination notice complied with the terms of the agreement and the consequences of such a termination.

39. Clause 14 of the agreement stipulates as follows on termination and consequences of termination: -

> 14.1 Termination on notice
>
> Either party may terminate this Agreement by giving to the other party not less than thirty (30) days written notice.
>
> 14.2 Termination by Sponsor
>
> Sponsor shall have the right to terminate this Agreement forthwith at any time if:
>
> a. Any –re-contractual statements made by KRU and on which sponsor has relied upon are found to have been false, misleading or geared towards self-enrichment.
>
> b. If KRU is found to be non-compliant with the provisions of Clause 6.2(Corrupt Practices) of this Agreement.
>
> c. If KRU fails to account for any part of the Sponsorship Amount advanced under this Agreement.
>
> d. If the governing body of KRU, or any representative or agent of such body is found to have exploited any participant or acted in a manner likely to affect the wellbeing of such member.
>
> e. If KRU is found to have acted in a manner reasonably likely to affect the reputation or good name of Sponsor.
>
> 14.3 Termination on default.
>
> Either party shall be entitled to terminate this Agreement immediately by giving notice of termination:
>
> a. In the event of the other party failing to observe or perform any of its obligations under this Agreement and failing to remedy such default within five days or service of written notice specifying the default and requiring its rectification.
>
> b. In the event of either party being prohibited by any law or official requirement from complying with the terms of this Agreement or carrying out its business.
>
> c. If the other party enters into liquidation whether compulsorily or voluntarily otherwise than for the

purposes of amalgamation or reconstruction or shall suffer the appointment of a Receiver of any of its property or income or make any deed or arrangements with or composition for the benefit of any of its creditors.

14.4 Consequences of termination.

a. The expiration or termination of this Agreement shall be without prejudice to all accrued rights and obligations of the parties under this Agreement and to all obligations under this Agreement expressed to continue or take effect after expiration or termination.

b. The parties shall forthwith stop using each other's intellectual property and shall dispose of any such promotional material containing such Trademarks as may be advised by the other party.

c. In the event of termination under Clause 14.2 above, KRU shall forthwith refund to sponsor the portion of the sponsorship Amount already disbursed to it by sponsor but not expended at the time of the termination. Upon receiving written notice, KRU shall not expend any monies that are part of the Sponsorship Amount.

d. Save as may otherwise be agreed with the participants whose original compositions are uploaded on the sponsor portal, sponsor shall remove such content from its portal within a reasonable time.

40. A simple reading of the above clauses reveals that the contract was not cast on stone and could be terminated under 3 distinct circumstances as follows: -

a. Clause 14.1 of the agreement is a blanket provision that gives liberty to the parties to terminate the agreement by giving not less than 30 days' written notice. Under this clause the party giving the notice is not required to provide any reasons for the termination of the contract.

b. Clause 14.2 allows the Sponsor to terminate the contract forthwith for the reasons enumerated under the said clause. My understanding of the use of the word 'forthwith' under this clause is that the Sponsor was not required to give the 30 days' notice if its decision to terminate the contract was informed by any of the reasons listed under that clause.

c. Clause 14.3 provides for termination by either party in the event of failure, by the other party, to perform or observe any of its obligations (default), if the other party enters into liquidation or if they are prohibited, by law, from complying with the terms of the contract. My take is that the use of the words 'immediately by giving notice' under this clause connotes that the notice would take immediate effect upon being issued.

d. Clause 14.4, on the other hand, provides for the consequences of such termination.

41. The bone of contention was that the notice issued by the Sponsor was illegal for not meeting the 30 days' termination requirement and for not stating the reasons for the termination. According to the Claimant, the Sponsor could only terminate the contract if the Claimant was at fault. The arbitrator held as follows regarding the said notice: -

> " In sum, I find that the Respondent's letter dated 28th December 2017 fell afoul Clause 14 of the contract by failing to give adequate notice of termination of at least 30 days to the claimant as required. This constitutes a breach of contract."

42. It was not disputed that the Sponsor's letter terminating the contract was dated 28th December 2017 and that the notice was to take effect on 31st December 2017. From the language of the said letter it is clear that the same was a not a 30-day notice of termination of the contract in accordance with Clause 14.1, but a notification that the contract had been terminated forthwith under Clause 14.2 of the contract. As I have already stated in this ruling, a notification under Clause 14.2 had to be accompanied by the reasons for the termination of the contract. The notice, in this case, was to take effect three days later and that means that the termination of the contract was not in keeping with Clause 14.1 of the agreement. I therefore find that there is merit in the decision of the arbitrator that there was breach of the contract.

43. The Sponsor argued, both before the arbitrator and before this court, that force majure through actions of government agencies in increasing taxes precipitated its decision to terminate the contract. My finding is that the issue of whether force majure precipitated the termination of the contract was extensively dealt with and conclusively determined by the arbitrator. I have already found that the Arbitrator reached the correct verdict that there was breach of contract and I do not need to belabor the issue force majure as the reason for the termination.

44. The respondent's argument was that since no valid reasons were advanced by the Sponsor for terminating the contract and since the termination notice was invalid for non-compliance with the 30 days' notice period, it was entitled to the payment of the sum of Kshs. 417,019,439 being the balance of the Contract Amount for the unexpired term of the contract.

45. On its part, the Sponsor argued that if any damages were to be paid to the Claimant, then such damages would only be to the extent of failure to issue a 30 days' notice which it tabulated to be the equivalent of one months' pay, under the contract, in lieu of notice being Kshs. 9,625,000. According to the Sponsor, granting the Claimant's prayer for Kshs. 417,019,439 constituted an order for specific performance which could only be granted if there was no other alternative remedy. For this argument, the Sponsor cited the decision in the case of *Solomon Ndegwa Kuria vs Peter Nditu Gitau [2019] eKLR* where the Court stated that: -

> " The granting of the equitable remedy of specific performance is discretionary and as such the court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the case of *Reliable Electrical Engineers Ltd----Vs .... Mantrac Kenya Limited* (2006) e KLR, wherein Justice Maraga (as he then was) stated that: -
>
> > "Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles" "The jurisdiction of specific

> performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced where it will cause severe hardship to the defendant.
>
> However, in deciding whether or not to grant the order of specific performance the court should be careful not to order the grant of specific performance where it will cause severe hardship to the defendant."

46. The arbitrator held as follows on the consequences of the breach following the failure to give the requisite notice of termination: -"Having found that the breach was fundamental, consequences must follow. The Claimant demonstrated that it relied almost entirely on the Sponsorship Agreement for its operations and programmes. The Claimant has exhibited contracts with players and other members of staff in an effort to prove its case. The Claimant has also demonstrated the impact of the termination on its operations and performance of its teams. To date, the Claimant has not been able to secure alternative sponsorship and is saddled with debts, industrial action from players, employees and suits from suppliers. In essence, the ripple effect of the termination, that I have already found to be unlawful, has had the Claimant in multiple breach of contracts with third parties with whom it has also contracted on the strength of the Sponsorship Agreement the subject hereof. I am, therefore, persuaded that the Claimant has made out a case for damages for breach of contract.As to the quantum of damages the Claimant is entitled to, I am guided by three principles. Firstly, that general damages are not ordinarily awarded in cases of breach of contract. Only special damages may be awarded. Such Special damages must not only be pleaded but specifically proved. Secondly, that damages awarded should be so closely related in proximity to the fact of breach. This is essentially the doctrine of remoteness of damages as underscored in the Hedley v Baxaddale case. Thirdly, that damages serve a compensatory role. They are not supposed to enrich or constitute a windfall but are supposed to put the aggrieved party, as much as money can, in the same position as it would have been had the breach not occurred.Applying the afore-stated principles to the current case I find the Claimant's claim for the balance of the contract sum justified. I do not agree with the respondent that the award of the balance of the contract sum amounts to an order of specific performance. While it may seem like a command some kin to requiring performance on the part of the respondent, it is monetary award that seeks to put the Claimant in the same position as it would have had the contract been performed. In my view that constitutes damages.I also reject the respondent's view that the only compensation in favour of the Claimant would be a pro-rated sum of Kshs 9,625,000.00, the equivalent to one month's payment under the Sponsorship Agreement. I reject this view for two reasons. Firstly, that the contract speaks for itself. Although creative, I do not see the contractual basis for the respondent's computation of the monthly pro-rated sum. The contract does not provide for monthly payment or proration. Periodic payments do not necessarily pro-rate into monthly payments. There are good reasons why the parties did not peg payments to monthly bases. To delve into the reasons, just as to prorate the payments, would be an act in hopeless speculation.Secondly, the Respondent seems to opine that the contract could be terminated without reason and consequence by giving a one-month notice. A reading of the entire Clause 14 of the contract indicates that proper and justified grounds(fault) must be demonstrated for termination to take effect. In these entire proceedings I have not heard evidence of

any wrong doing or allegations of breach against the Claimant. The respondent acknowledges that the Claimant continued promoting its brand for at least three months after the termination of the contract. The respondent does not acknowledge that its brand's presence associated with the Claimant's teams was already prominently established in the market. While it solely focuses on jerseys and playing kit, the respondent does not appreciate that the Claimant was required to promote the Respondent's brand through its other avenues including tickets and other promotional materials. There is nothing to show that the Claimant was not ready and willing to perform its part of the bargain to the end of the term of the contract.It is, therefore, not just about the notice period but also the grounds upon which a valid termination is predicated that matters. For the reasons forgoing, I hereby award the claimant the sum of Kshs 417,019,439.00 being the balance of the contractual sum due under the Sponsorship Agreement."

47. Upon making the finding that the termination notice was invalid, the arbitrator made a further finding that the Claimant was entitled to the full contract amount of Kshs. 417,019,439 so that it could be in the same position as it would have been had the breach not occurred. The Sponsor, on the other hand, argued that the arbitral Award amounted to unjust enrichment to the respondent as it went against the agreed contractual entitlement submitted for arbitration.

48. My understanding of the arbitrator's finding is that the Sponsor could only terminate the contract if proper grounds (fault) were demonstrated. This is to say that according to the arbitrator, the Sponsor had no option but to continue with the contract for the entire 5-year period and not terminate it as long as the Claimant was not at fault. With all due respect to the arbitrator, I find that this is not the correct legal position or a provision in the parties' agreement. I say so because Clause 14.1 of the contract allowed parties the liberty to exit from the contract without having to demonstrate any fault on the other party. My take is that tying down a party to a contract they no longer wish to continue with is not only oppressive but also goes against the law and the very essence or nature of the contract in question which was in the form of a sponsorship. Needless to say, the sponsorship agreement had an exit/termination clause which specifically allowed either party to terminate the contract as long as it issued the requisite 30-days' notice to the other party.

49. *Black's Law Dictionary (10th Edition)* defines the word 'sponsor' as follows: -

> " 1. Someone who acts as a surety for another. 2. A legislator who proposes a bill. 3. Civil law. Someone who voluntarily intervenes for another without being requested to do so. 4. Godparent." [Emphasis added]

50. Going by the above definition of the word sponsor, it is clear that the relationship between the parties herein was voluntary in nature thus fortifying my finding that parties were at liberty to exit from the contract as long as long as they issued the requisite notice. My humble view is that it would go against public policy to tie down a party to a voluntary engagement that they no longer wish to participate in. In other words, parties should be able to exit a contract in the same way that they willingly agree to enter into it as long as they comply with the terms of the exit.

51. Having found that there is merit in the arbitrator's decision that proper notice was not given prior to the termination, the next issue for consideration is whether the award of Kshs. 417,019,439, being the balance of the contractual sum due under the sponsorship was payable for the breach.

52. It is trite that the proper remedy where breach of contract is established is an award of special of damages and that the same are awardable only where they are specifically pleaded and specifically proved. (See *Provincial Insurance Co. EA Ltd vs. Mordekai Mwanga Nandwa KSM CACA No. 179 of 1995 (UR)*, *Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited Nairobi*

[*CACA No. 189 of 2014*](), [*Kenya Tourist Development Corporation vs. Sundowner Lodge Limited [2018] eKLR*](), [*Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd [2015] eKLR*]() and [*Peter Umbuku Muyaka vs. Henry Sitati Mmbasu [2018] eKLR*]().

53. In the instant case, the Claimant's claim was for the immediate payment of the sum of Kshs. 417,019,439. This is a specific claim which the Claimant needed to specifically plead and prove before it could be granted. I have gone through the proceedings of the arbitral tribunal with a fine tooth comb and I find that apart from the Claimant's allegation that it suffered loss and damage due to the disruption of its activities which were premised on the Sponsorship Agreement, no material was placed before the Tribunal to specifically prove such losses.

54. From the Arbitrator's summary of the evidence tendered by the Claimant's witnesses it is clear that both witnesses stated that: -

> " .... the net result of the termination of the contract by the Respondent was the occasioning of huge losses and reputational damage to the claimant as has been more particularly set out in the Statement of Claim and Reply to the Respondent's Statement of Defence."

55. From the above summary it is evident that apart from stating that the Claimant suffered huge losses and reputational damage, no material was placed before the tribunal to specifically prove the alleged loss. Furthermore, no evidence was led to show that the respondent continued to perform its part of the contract by promoting the Sponsor's brand for the entire five-year contract period, after the termination of the contract. Indeed, the respondent's witness, Mr. Aroni, was categorical that the respondent continued with the promotion for only 3 months after the termination of the contract. The arbitrator stated as follows regarding the respondent's promotion of the Sponsor's brand after the termination: -

> " Mr. Aroni testified that in January 2018 and beyond, after the termination, the Claimant's teams continued to use jerseys with the Respondent's 'Sportpesa' brand for a period of at least three (3) months following the termination of the Agreement."

56. It is also noteworthy that under Clauses 5.1 and 5.3 of the Sponsorship Agreement, payment to the Claimant, was not an automatic right but was to be made in consideration of rights and obligations under the contract and subject to receipt of a satisfactory invoice 30 days prior to the required payment from the KRU. I note that no invoices for the Award sum of Kshs. 417,019,439 were presented before the arbitrator as was envisaged in the agreement so as to warrant the making of the award for the said sum. I have also observed that it was not disputed that the Claimant did not perform its obligations under the contract beyond 3 months after the termination of the contract.

57. I further find that there is no provision in the Agreement to the effect that payment of the entire Consideration Amount was available to the Claimant in the event of a breach. As I have already noted in this ruling, Clause 14.4 of the Agreement provides for the consequences of termination and I find that the consequences do not include the payment of the full Consideration Amount. One has to wonder if the Arbitrator would have reached the same finding if the termination of the contract was by the Claimant. Could the arbitrator have found that the Claimant was still expected to continue promoting the Sponsor's brand when they had already informed the Sponsor of their decision to exit from the deal? The answer to the above question is negative.

58. From the foregoing findings and observations, this court does not find any justification whatsoever for the blanket award of Kshs. 417,019,439 by the arbitrator as the amount in question was neither a debt nor the Claimant's automatic right/entitlement. Furthermore, the Arbitrator did not indicate if

the award was in respect to specific performance, general damages or special damages. Assuming that the Award sum was for special damages, then I have already found that there was no specific proof tendered to support such payment. Specific performance does not arise in this case as the Claimant did not continue with the promotion of the Sponsor's brand beyond 3 months after the termination of the contract.

59. If, on the other hand and for argument's sake, the payment was in respect of general damages, I find that the law is settled that general damages are not available for breach of contract. (See *National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another Nairobi CACA No. 54 of 2007*, *Kenya Power & Lighting Company Ltd vs. Abel Momanyi Birundu (2015) eKLR*, and *Kenya Tourism Development Corporation vs Sundowner Lodge Ltd 2018 eKLR)*. The reason for such a position was explained in the case of *Consolata Anyango Ouma vs South Nyanza Sugar Co. Ltd* (2015) eKLR where the court observed that it was wrong to award of Kshs. 50,000 that were neither pleaded, quantified nor proved. The court further expressed itself as follows: -

> " The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd vs Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others,* NRB CA Civil Appeal No. 192 of 92 (UR) and */Charles C. Sande v Kenya Co-operative Creameries Ltd,* NRB CA Civil Appeal No. 154 of 1992 (UR))".

60. Courts have however held that a claimant for damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the *Anson's Law of Contract,* 28th Edition at pages 589 and 590 the law is stated to be that: -

> " Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".

61. The *Halsbury's Laws of England, Third Edition vol. II*, defines nominal damages as follows: -

> " 388. Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss , but brings his action simply

with the view of establishing his right, the damages which he is entitled to receive are called nominal... Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved".

62. *Black's Law Dictionary (10th Edition)* defines nominal damages as follows: -

> " 1. A trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated. 2. A small amount fixed as damages for breach of contract without regard to the amount of harm. Also termed as contemptuous damages; diminutive damages."

63. In *Kinakie Co-operative Society vs Green Hotel (1988) KLR 242*, the court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages – See *Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya Limited (2015) eKLR*.

64. The facts of the instant case are on all fours and resonate perfectly with scenarios described in the above cited authorities and texts. I say so because it was not disputed that the Sponsor breached the contract by failing to give the requisite termination notice. The Claimant was under the circumstances entitled to compensation for the specific damage, loss or injury that it suffered through such breach. The Claimant had the chance to prove the loss before the arbitrator. I have already found that such proof was not forthcoming thus bringing this claim to the realm of nominal damages. In my humble view, the award of the full contract sum cannot by any stretch of imagination be said to be an award for nominal damages.

65. I find that the Sponsor established that the Award made to the Claimant is inordinately high, contravenes the law on award of damages for breach of contract, does not constitute compensation but is punitive as it amounts to unjust enrichment. I also find that such an Award is against public policy to the extent that its enforcement would be unconscionable as it would have the effect of tying down a party to specifically perform an agreement that it has for all intents and purposes terminated. I find guidance in the decision in *Evangelical Mission for Africa & Another vs Kimani Gachuhi & Another* (Supra) where the court cited with approval the case of *Murlidhar Agarwal and Another vs State of U.P. and Others [1974] 2 SCC 473* in which the Supreme Court of India held inter alia that: -

> " While accepting the Court of Appeal on the issues of finality of decisions as an overriding objective on public policy, I am satisfied that public policy concept will keep on changing, and as it does, we shall be guided by the values contained in our legal instruments being the Constitution and our laws, and also various policy documents emanating from various ministries in the country. Our Constitution at Article 10 thereof sets out national values which all decision makers in the country are obligated to observe while performing a public duty. Those values, when it comes to judicial officers and arbitrators must necessarily import the duty to do justice in deciding disputes. A decision which, on the face of the record, is so devoid of justice, and cannot be explained in any rational manner, can only be set aside on account of failure to satisfy public policy consideration." [Emphasis added].

66. Having regard to the observations and findings that I have made in this ruling, I find that the setting aside application is merited and it therefore succeeds but only to the extent that I have found that the award of the entire Consideration Amount for the unexpired period of the contract amounts to

unjust enrichment, is a substantial diversion from the law governing the award of damages for breach of contract and is therefore contrary to public policy of Kenya.

67. The next issue that this court has to grapple with is whether it should set aside the entire award. This court is alive to the fact that it is not, in this application, sitting on appeal from the arbitrator's decision. The court's mandate, is limited by the provisions set out under Section 35 of the Act. The overriding objective of the court, however, is to dispense substantive justice to the parties. Unlike Section 35(2)(a)(iv) of the Act which is clear that the court may separate the offensive part of the award that is against public policy if it is possible, Section 35(2)(b) does not have such a provision.

68. Sections 35(2)(b) and 37(1) (b) of the Act stipulate as follows: -

> " Section 35(2)(b)
>
> (b) the High Court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
>
> (ii) the award is in conflict with the public policy of Kenya.
>
> Section 37(1)(b)
>
> (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."

69. The above provisions do not expressly refer to separation of the part of the award that is found to be against public policy in the event of setting aside or enforcement, this however does not necessarily imply that that the separation is excluded by the Act. In *JJ Agro Industries (P) Ltd (a firm) vs Texuna International Ltd [1992] HKF1* the court in Hong Kong considered the issue of separation of part of the award and held that: -

> " The policy of the courts in modern time has been supportive of the arbitral process. Legislation has been introduced to limit court interference on the merits in domestic cases without leave. In international cases there is now the Model Law which does not permit any court interference on the merits. Arbitration is the preferred method of dispute resolution in many areas both internationally-and domestically. <u>If an award contained an objectionable part, it would be absurd if the remainder of the award was to fail as well. This would be elevating form over substance which the courts have for some time been concerned to prevent where possible</u>." [Emphasis added]

70. The High Court in Singapore adopted the above reasoning in *BAZ vs BBA and others [2018] SGHC 275* when setting aside part of an award it found to be contrary to public policy as the offensive part violated the law of Singapore that protected the minors. The Court expressed the view that; -

> " Although there is no express reference to severability under Art 34(2)(b)(ii) of the Model Law, unlike that in Art 34(2)(a)(iii), I find that the Award is severable, because the successful public policy challenge only pertains to the Minors. I agree with the Hong Kong court in *JJ Agro Industries (P) Ltd (A firm) v Texuna International Ltd* [1992] HKCFI 182 at [39]

(a case on enforcement based on the New York Convention) in holding that the doctrine of severability applies where only part of an award is tainted by a challenge on a public policy ground."

71. Guided by the above cited cases I find that the Act does not preclude the court from separating the offensive part of the award and for that purpose, award includes part of the award that may be set aside.

72. In observing the overriding objective to dispense substantive justice to all the parties herein, and noting that it is trite that there is no wrong without a remedy, I find that, in the circumstances of this case, the Claimant's just entitlement/remedy for the breach of contract ought to have been in respect to nominal damages for breach of contract that should in all fairness include the payment of its dues for one month in lieu of notice. In addition to the nominal damages, I also find that since it was not disputed that the Claimant continued to promote the Sponsor's brand for three months after the irregular termination notice, the Claimant is entitled to payment for the 3 months' dues under the contract.

Disposition

73. The consequence of the findings and observations that I have made in this ruling is that the application dated 21st April 2021 is merited and is therefore allowed on terms that the Award dated 20th November 2020 is hereby set aside, for violating of public policy on unjust enrichment, but only to the extent that the award was made for the payment of the full consideration amount for the unexpired term of the contract as opposed to an award of nominal damages for breach of contract. In *Kenya Research Foundation vs Kenchuan Architect Ltd [2013] eKLR* the court stated as follows regarding awards that cause real injustice or are substantial diversion from the law.

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

74. Guided by the above cited authority, I find that it will be in the interest of justice to remit the portion of the award that concerns the payment of damages to the arbitral tribunal for re-consideration in line with the findings and observations that I have made in this ruling and in compliance with the law governing the award of damages for breach of contract.

75. In conclusion, I make the following final orders: -

   a. The application by the Respondent/Applicant of 21st April 2021 to have the final award of 20th November 2020 set aside is hereby allowed, albeit, in part and subject to the arbitral tribunals re-consideration of the Award Amount.

   b. The award is hereby remitted to the arbitral tribunal for reconsideration.

   c. The application by the Claimant/Applicant of 19th April 2021 to have the Final award of 20th November 2020 executed as a decree is hereby deferred to await the outcome of the orders issued in (a) and (b) hereinabove with a rider that the Claimant will be at liberty to amend the application for the enforcement when the need arises.

d. Each party shall bear its own costs.

The Joinder Application

Application dated 2nd June 2021

76. The applicant, Pevans East Africa Limited, filed the application dated 2nd June 2021 seeking to enjoin the Attorney-General in these proceedings as the 2nd Respondent.

77. The application is brought under Articles 156(4), (6) and 159 (2)(d) (e) of the Constitution of Kenya, Order 1 Rules 3, 11, 14 and 25 of the Civil Procedure Rules, Section 12 of the *Government Proceedings Act* and Section 7 of the Office of the Attorney General Act.

78. The application is supported by the affidavit of Robert Macharia and is based on the following grounds: -

a) THAT the introduction of the betting tax by the National Government was intended to, among other items, fund the promotion of and development of sports, including rugby through the established Sports, Arts and Social Development Fund.

b) THAT it was the intention of Parliament to raise the betting tax to 35% so as to, among other items, fund the Sports, Arts and Social Development Fund for development of sports and recreation in Kenya including rugby.

c) THAT the Applicant has directly contributed to the Sports, Arts and Social Development Fund by paying over Kes 3 billion in betting tax in the year 2018 and 2019.

d) THAT the Respondent herein, being a registered national sports organization, stood to benefit directly from the Sports, Arts and Social Development Fund.

e) THAT since the introduction of the betting tax by the National Government, which was beyond the control of the Applicant, resulted in the incidence of force majeure, the National Government should be held wholly or jointly liable for the consequent termination of the Agreement.

f) THAT the National Government is responsible for the allocation and distribution of public funds to identified beneficiaries including national sports organizations like the Respondent under the Sports, Arts and Social Development Fund.

g) THAT the National Government by dint of the introduction of the 35% betting tax, is responsible for accommodating the economic effects of the same tax and account for the distribution of the collected taxes from affected institutions like the Applicant and the distribution of the funds through the Sports, Arts and Social Development Fund

h) THAT the Attorney-General (hereinafter referred to as "the Intended 2nd Respondent") has the mandate by dint of Article 156(4)(b) of the Constitution of Kenya, 2010 of representing the National Government in court or in any other legal proceedings.

i) THAT by dint of Section 7 of the Office of the Attorney General Act, the Intended 2nd Respondent has a right of audience in proceedings that involve public interest or public policy as well as matters involving the legislature, the judiciary or an independent department or agency of the Government.

j) THAT the proceedings before this Honourable Court involve matters that have a direct bearing on the interpretation and implementation of the Finance Act, 2017.

k) THAT the National Government is responsible for formulation of taxation policy and its administration in Kenya.

l) THAT the Intended 2nd Respondent is therefore a proper and necessary party to these proceedings.

m) THAT the joinder of the Intended 2nd Respondent is necessary to enable this Honourable Court to determine the real issues in controversy between the parties and effectually and completely adjudicate upon and settle all questions involved in these proceedings.

n) THAT the issues raised in these proceedings cannot be fully adjudicated upon without the presence of the Intended 2nd Respondent.

o) THAT no prejudice will be occasioned to the parties if the orders sought herein are granted.

p) THAT it is in the best interests of justice that the prayers sought be granted.

79. The respondent opposed the application through the replying affidavit of its Chief Executive Officer Mr. Thomas Odundo who states that there is no provision in the *Arbitration Act* for the joinder of a third party to the proceedings. He further states that the issues raised in the application had already been canvassed before the arbitrator and cannot be re -litigated.

80. At the hearing of the application, the applicant submitted that the issues raised in the proceedings could not be adjudicated upon in the absence of the intended 2nd respondent. It was submitted that the joinder of the intended 2nd respondent is necessary so that the court can determine the real issues in controversy between the parties and effectually and completely adjudicate upon and settle all the questions involved in the proceedings. It was further submitted that under part VI and VII of the Act, a party can be joined in proceedings having not been a party to the initial arbitration where an award has already been delivered.

81. The Applicant argued that the fact that the award had been issued did not fetter the power and jurisdiction of the court to hear and determine the application.

82. The interested party, on the other hand, submitted that the Act does not vest the court with the jurisdiction to enjoin parties to proceedings after the delivery of an arbitral award. It was submitted Section 10 of the Act discourages court's intervention in matters relating to arbitration and limits the court's role to setting aside or enforcing the award pursuant to Section 35 and 36 of the Act respectively. It was further submitted that the application offends the doctrine of privity of contract as the intended second respondent was not a party to the Sponsorship Agreement nor was it a participant in the resultant arbitral proceedings.

83. I have considered the joinder together with the parties' submissions. The main issue for determination is whether the Honourable Attorney General should be enjoined to these proceedings as the 2nd respondent. In *County Assembly of Vihiga vs Kenchuan Architects Limited [2020] eKLR* the court held that: -

> "The arbitration proceedings involved the applicant and the respondent. The Commission was not party to the arbitral proceedings. Consequently, there can be no place for it at this point, when the only question before the court is enforcement of the award. Only the parties who participated in the arbitral proceedings have standing to litigate at this stage. The joinder of the Commission to these proceedings is not going to assist the court or add value to the matter in anyway. It would have been more profitable if it had joined the proceedings at the arbitration stage. The arguments that it proposes to place before the court can competently be presented and articulated by the applicant."

84. In *Pesa Print Limited vs Atticon Limited & Another; Symphony Technologies Ltd & 2 others (Interested Parties); Barons Estates Limited (Intended Respondent) [2019] eKLR* the court held that: -

> "From the above excerpts, it emerges that the parties the Applicant and Respondents chose their forum and process of dispute resolution as outlined in the Arbitration Clause/Agreement housed in the 2 Loan Agreements. They attended and participated in Arbitration proceedings. They did not raise any issue of joinder of parties to arbitration proceedings. The same cannot successfully be raised at this stage. This Court's mandate is limited to application of Sections 35, 36 and/or 37 *Arbitration Act*. The original jurisdiction to hear and determine allegations of fraud, bribery and/or corruption is not invoked as the pleadings do not/did not disclose reasonable basis/grounds for such an inquiry. No evidence of fraud bribery and/or corruption was pleaded against the Arbitrator, the Respondents and/or Counsel to parties to the Arbitration Proceedings to warrant such an enquiry by this Court. What is disclosed is possibility of unjust enrichment by the 1st interested party by virtue of the called up irrevocable bank guarantee proceeds and payments made by the Applicant."

85. Section 10 of the *Arbitration Act* limits the courts intervention in matters relating to arbitration. The said section stipulates as follows: -

> "10. Extent of court intervention
>
> Except as provided in this Act, no court shall intervene in matters governed by this Act"

86. The matters pending before this court are with respect to the applications for the enforcement or the setting aside the award. I note that at this stage of the proceedings, the jurisdiction of the court is limited to sections 35, 36 and 37 of the *Arbitration Act*. My finding is that, in the circumstances of this case, the issue of joinder ought to have been raised and dealt with before the arbitral tribunal and not at the tail end of the proceedings when the court's mandate is restricted to either adopting and enforcing the award or setting it aside.

87. I therefore find that the application dated 2nd June 2021 is not merited and I hereby dismiss it with costs to the intended 2nd respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Wena and Mr. Orare for the Kenya Rugby Union

Mr. Kariuki for Respondents.

Court Assistant: Margaret.