



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**MILIMANI LAW COURTS**  
**MISC. APPL. NO. 171 OF 2019 CONSOLIDATED WITH**  
**MISC. APPL. NO. E156 OF 2019**

**KAY CONSTRUCTION COMPANY LIMITED.....APPLICANT**

**-VERSUS-**

**KENYA RURAL TOADS AUTHORITY.....RESPONDENT**

**RULING**

This Ruling relates to a chamber summons application dated 9<sup>th</sup> May 2019, pursuant to **section 36(1) of the Arbitration Act, No. 4 of 1995; Rules 3 (2), 9 and 11 of the Arbitration Rules, 1997** and all other enabling provisions of the law. The Applicant sought orders;

- a) That this application be heard together with the application filed by the Respondent on 1<sup>st</sup> March 2019 vide ***Miscellaneous Application No. 171 of 2019 – Kenya Rural roads Authority –vs- Kay Construction Company Limited***, seeking to set aside the Arbitral Award made by Honourable Engineer Lucas A. N. Ochieng on 27<sup>th</sup> November 2018, as both application are in respect to the same Arbitral Award.
- b) That Arbitral Award published by Honourable Engineer Lucas A. N. Ochieng on 27<sup>th</sup> November 2018 be adopted as a judgment of this Court.
- c) That the Applicant be granted leave to enforce the said Arbitral Award as a Decree of this Honourable Court.

The Application was based on grounds;

- a) That in an arbitration between the parties herein, the honourable Arbitrator, Engineer Lucas A. N. Ochieng issued a final Arbitral Award on 27<sup>th</sup> November 2018, which was in favour of the Applicant,
- b) That the Applicant is desirous of enforcing the Arbitral Award pursuant to **Section 36(1) of the Arbitration Act, No. 4 of 1995** and thus prays for its adoption as a judgment of this Court.

**SUPPORTING AFFIDAVIT**

The application was supported by an affidavit dated 9<sup>th</sup> May 2019, sworn by Hasmita Patel the Managing Director of the Applicant. He deponed that following a competitive tender process that culminated into a contract, the Government of Kenya (hereinafter called the “GoK”), through the then Ministry of Roads and Public Works, entered into a contract **No. RD 0462** dated 30<sup>th</sup> May 2016(hereinafter the “contract”) with the Applicant for the Construction of St. Mary’s Nyakahura – Kiamara- Muringato- Irima -Gitugu Road, also referenced as **E540/E538/E539/D428**. The construction of the said road was to cost the **GoK** Ksh 889,936,236.16 and was to be concluded within 24 months.

That following the enactment of the **Kenya Roads Act in 2007**, a new entity called the Kenya Rural Roads Authority (which is the “Respondent”) was established. The construction of St. Mary’s – Nyakahura –Kiamara- Muringato- Irima –Gitugu Road, also referenced as E540/E538/D428 was vested upon it by the Government, through an addendum to the Contract dated 1<sup>st</sup> July 2010. This meant that the Respondent was bound by all the terms of the contract dated 30<sup>th</sup> May 2006.

That through an addendum No. 1 to the Contract, signed on 7<sup>th</sup> April 2009, the Applicant and the Respondent sought to review the terms of the Contract by inter alia extending the scope, cost, and time for completion of the project.

That through Addendum No. 2 to the Contract, dated 7<sup>th</sup> June 2014, the contract sum was varied to **Ksh 1,098,738,671.55**.

That the works were completed and handed over in two phases as shown in the takeover Certificates dated 30<sup>th</sup> October 2009 and 16<sup>th</sup> April 2010. The Defects Liability Certificate was issued on 27<sup>th</sup> July 2012.

The Applicant stated that during the execution of the works, events occurred that caused delay to the works and in respect of which the Applicant sought extension of time for completion. Four (4) extensions of time claims were made by the Applicant between May 2008 and March 2010. The one relevant to this application was submitted on 22<sup>nd</sup> October 2009, in respect of delays caused by the delayed relocation of power lines and poles. After due consideration of the applications for extension of time, the Respondent granted an extension of time of 184 days for the delayed relocation of power lines and poles vide a letter dated 8<sup>th</sup> March 2012.

### **NOTICE OF MOTION DATED 1<sup>ST</sup> MARCH 2019**

By a Notice of Motion Application dated 1<sup>st</sup> March 2019, the Applicant (Kenya Rural Roads Authority) sought orders;

a) That the Arbitral Award made on 27<sup>th</sup> November 2018 by Honourable Engineer Lukas A. N. Ochieng (**Sole Arbitrator**) be set aside on such terms as this honourable court deems fit.

The Application was based on the following grounds;

a) That vide a Contract dated 30<sup>th</sup> May 2016 the Government of Kenya through the then Ministry of Roads and Public Works entered into agreement with KAY Construction Company Limited for the construction of St. Mary's –Nyakahura- Kiamara-Muringato – Irima- Gitugu Road (**E540/E538/D428**) at a cost of **Ksh 889,936,236.16** within a period of 24 months.

b) That by an addendum to the Contract dated 7<sup>th</sup> April 2009 executed by the parties herein the scope of works was changed and the contract price increased to **Ksh 1,023,403,480.21** and the contract period increased by a period of 11 months thus the completion date was changed to 20<sup>th</sup> June 2009.

c) That a dispute arose as between the parties since the Respondent was claiming additional payments and since the Contract contained an adjustment clause the Respondent referred the matter to adjudication and then later the Applicant being dissatisfied with the decision on adjudication referred the matter for Arbitration to a single Arbitrator Engineer Lucas A. N. Ochieng.

d) That upon hearing the parties the Arbitrator made an award on 27<sup>th</sup> November 2018 in favour of the Respondent directing the Applicant to pay the Claimant Ksh 119,314,450.55 inclusive of VAT and Ksh 95,714,062.15 in respect of pre-award interest within 21 days from the date of the Award. The amounts were to attract a further interest of 17 % per annum from the date of the Award.

e) That the Applicant was aggrieved with the Award since the award contains decisions and matters beyond the scope of reference to the Arbitrator.

f) That the Arbitrator denied the Applicant equality of arms and opportunity as required under **Section 19 of the Arbitration Act, 1995** as amended which includes denying the Applicant an opportunity to question and test the veracity of the recalculated claims on interest which changed the quantum of the claim; the comparison of plant ownership hourly costs which were introduced through the Claimant's written submissions.

g) That the Honourable Arbitrator allowed an alleged claim of **Ksh 119,314,450.55** without any evidence.

h) That the applicant also challenged the award on the basis that the Honourable Arbitrator awarded outrageous sums of money including interest **Ksh 95,714,062.15** and further interest at the rate of 17.0%

i) That the Arbitral Award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration and contains decisions on matters beyond the scope of the reference to arbitration.

### **SUPPORTING AFFIDAVIT**

The Application was supported by an affidavit dated 1<sup>st</sup> March 2019, sworn by Engineer Peter Gichohi the Director of the Kenya Rural Roads Authority, the Applicant Company. He stated that after the Kenya Roads Act was passed in 2007, the Kenya Rural Roads Authority was established and St. Mary's Nyakahura- Kiamara- Muringato – Irima – Gitugu Road (**E540/E538/D428**) was vested in the Authority and it effectively took over the Contract dated 30<sup>th</sup> May 2006 from the Government.

That during the execution of the works, the Respondent herein sought and was granted an extension by the project engineer of 23 days to 24<sup>th</sup> July, 2009. The Respondent however did not complete the works until 16<sup>th</sup> April 2010 when the certificates of completion were issued and the handing over done.

That after the completion of the works, the Respondent herein on 5<sup>th</sup> April 2012 submitted a financial claim for recovery of costs associated with the extension of the contract period from 24<sup>th</sup> July 2009 to 15<sup>th</sup> March 2010 for payment of Ksh 185,343,909.06; stating that the delay in completion was occasioned by a delayed relocation of power lines by the Kenya Power and Lighting Company Limited.

**That vide a letter 28<sup>th</sup> November 2013 made by the Employer on a without prejudice basis made an offer of Ksh 119,314,450.55 to the Claimant as the full and final settlement of the claim by the Respondent.**

**That the employer discovered that the initial offer had some mistakes and in the letter of 31<sup>st</sup> July 2015 made a reduced offer of Ksh 20,935,523.55. The Claimant was dissatisfied and declared a dispute and gave notice to commence adjudication pursuant to Clause 67 of the conditions of contract.**

That the parties appointed Engineer Paul Kerekezi as a sole member of the Dispute Adjudication Board pursuant to **Clause 67.2** of the Contract conditions. Upon hearing the parties the adjudicator gave his decision dated 9<sup>th</sup> February 2018 on 4<sup>th</sup> April 2018 in which the Adjudicator upheld the proposal of 28<sup>th</sup> November 2013 by the Engineer as accepted by the Respondent herein to be a binding and enforceable contract as between the parties, that the Respondent was entitled to additional payments of Ksh 119,314,450.55

That dissatisfied with the Adjudicator's decision the Applicant herein issued a notice of dissatisfaction with the decision and requested the matter be referred to Arbitration.

That upon hearing the parties the Arbitrator made an award on 27<sup>th</sup> November 2018 in favour of the Respondent directing the Applicant to pay the claimant Ksh 119,314,450.55 inclusive of VAT and Ksh 95,714,062.15 in respect of pre-award interest within 21 days from the date of the Award. The amounts were to attract a further interest of 17% per annum from the date of the Award.

That the Arbitrator was called upon to review the decision of the Adjudicator in upholding the offer of Ksh 119,314,450.55 that was made to the Respondent and accepted by the Respondent and find that there were mistakes in the offer in line with what is itemized and stated in paragraphs 13, 14, and 15 herein above but he decided to deal with issues that were not within the scope of the said dispute and ignoring the mistakes as highlighted .

That in total the Arbitral Tribunal did not decide the reference in accordance with the terms of contract of 30<sup>th</sup> May 2006 between the parties and the Addendum to the Contract dated 7<sup>th</sup> April 2009, but decided it based on an offer and acceptance by the Engineer which offer had obvious mistakes.

That the Arbitrator further denied the Applicant equality of arms and opportunity as required under **Section 19 of the Arbitration Act 1995** as amended by denying the Applicant an opportunity to question and test the veracity of the recalculated claims on interest which changed the quantum of the claim from Ksh 287,306,552.86 to Ksh 303,480,511.82.

That the Arbitrator similarly allowed the introduction of the Comparison of Plant Ownership hourly costs through the Claimants written submissions and yet this was prejudicial to the Applicant.

That the Honourable Arbitrator allowed an alleged claim of Ksh 119,314,450.55 without any evidence and deviating from the actual dispute of the additional costs.

That the award should similarly be set aside on the basis that the Honourable Arbitrator awarded outrageous sums of money including interest of Ksh 95,714,062.15 and further interest at the rate of 17.0%.

#### **APPLICANT'S SUBMISSIONS ON THE APPLICATION DATED 1<sup>st</sup> MARCH 2019**

It was the Applicant submission that its main contention and ground for setting aside the Award is that the Award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration and contains decisions on matters beyond the scope of the reference to Arbitration.

At paragraph 34 of the Award the Arbitrator outlines that claim filed before him by the Claimant as:-

i) Prolongation expense comprising

Loss of revenue from plant and equipment Ksh 97,330,560.00

Cost of labour for the extended period

and Cost of extended supervision Ksh 21,003,560.00

Cost of extended site overhead Ksh 209,947.77

Loss of profit due to prolongation of

Contract period Ksh 2,097,353.81

ii) Extended performance Bond	Ksh 1,136,192.56
iii) Extended insurance	Ksh 3,344,525.63
iv) Extended Advance payment guarantee	Ksh 2,799,032.33
v) Compensation for Laboratory	Ksh 1,200,000.00
	Sub Total <b><u>Ksh 139,103,361.00</u></b>
	VAT at 16% Ksh 24,748,957.27
vi) Interest on the Claim	Ksh 123,454,233.69
<b>TOTAL</b>	<b><u>Kshs.287,306,551.86</u></b>

The Applicant submitted that whereas the Arbitrator captured the contract as between the parties in paragraph 5 and reproduces the Arbitral clause in paragraph 6 of the Award he nonetheless proceeds to create another contract as between the parties in his findings in paragraph 87.

The Applicant gave a breakdown of the proposal under the Respondent's "without prejudice" communication (offer) 28<sup>th</sup> November 2013 is as hereunder;

i) Prolongation expense comprising the following

Loss of revenue from plant and equipment	Ksh 98,738,928.00
Cost of labour for the extended period and	Ksh 5,553,686.45
Cost of extended supervision	Ksh 9,922,363.00
Cost of extended site overhead	Ksh 209,947.77
Loss of profit due to prolongation of	
Contract period	Ksh NIL
ii) Extended performance Bond	Ksh NIL
iii) Extended insurance	Ksh 3,344,525.63
iv) Extended Advance payment guarantee	Ksh NIL
v) Compensation for Laboratory	<u>Ksh 1,545,000.00</u>
Sub Total	Ksh 119,314,450.55
VAT at 16%	Ksh 24,748,957.27
vi) Interest on the Claim	Ksh NIL
<b>TOTAL</b>	<b><u>Ksh 119,314,450.66</u></b>

That in the process of dealing with a dispute that was not contemplated by the parties, the Honourable Arbitrator awarded the Respondent Ksh 98,738,928.00 for loss of Revenue from Plant and equipment and yet the Respondent herein had claimed Ksh 97,330 560.00. The Arbitrator further awarded ksh 18,119,030.72 as loss of profit due to extended contract period and yet the Respondent herein had claimed Ksh 12,079,353.81. Similarly, the award made as compensation for laboratory is Ksh 1,545,000.00 yet the amount claimed was Ksh 1,200,000.00.

The Applicant submitted that without going into the merits of the award and taking into account the provisions of **Section 35 (2)(a)(iv)** the Arbitrator created a new contract as between the parties and proceeded to make an award on the basis of the contract and not within the reference in accordance with the terms of contract of 30<sup>th</sup> May 2006 between the parties and the Addendum to the contract dated 7<sup>th</sup> April 2009, but decided it based on an offer and acceptance by the Engineer which offer had obvious mistakes.

That the Applicant became aware of the Award on 4<sup>th</sup> December 2018 when it received a copy of the Arbitrator. Filing of the Application to set aside the arbitral award was thus filed within 3 months period as stipulated by the law.

**DETERMINATION**

After consideration of the pleadings, submissions of the matter before Court the issues for determination are;

- a) Is there a competent application to set aside the Final Award before Court?
- b) Whether the award is enforceable?
- c) Whether the Respondent is entitled to set aside the Arbitral award by virtue of Section 35 of Arbitration Act?

**ANALYSIS**

The Arbitrator on 27<sup>th</sup> November 2018 awarded as follows;

- a) The Respondent shall within 21 days from date of award pay the Claimant Ksh 119,314,450.55
- b) The Respondent shall within 21 days from date of award pay Claimant Ksh 95,714,062.15 in respect of pre-award interest.
- c) The amount awarded in (1) above shall attract simple interest at 17% per annum from that date of the award until payment.
- d) The Respondent shall pay the Claimant reasonable costs reasonably incurred by Claimant in the Arbitration, the amount of such costs if not agreed shall be determined by Arbitrator on the standard basis.
- e) The Arbitrator’s recoverable Fees and Expenses at Ksh 2,855,746.65 shall be paid by Respondent with interest of 14% per annum.
- f) The Arbitrator reserved Further to final award and determination, if not agreed, of the amount recoverable costs, to give further directions upon application of either Party.

Kay Construction Company Limited Claimant/Applicant sought vide the application filed on 9<sup>th</sup> May 2019 to enforce the Arbitral Final Award of 27<sup>th</sup> November 2018.

Kenya Rural Roads Authority Respondent/Applicant sought vide

The application filed on 1<sup>st</sup> March 2019 to set aside the Arbitral Final Award of 27<sup>th</sup> November 2018.

As the 2 applications relate to the same/identical Arbitral Final award it is expedient and prudent to hear and determine both in the same proceedings.

The Claimant/Applicant sought recognition and enforcement of the Final award on grounds that the Application to set aside the award was filed out of time. The Applicant relied on Supporting Affidavit of Engineer Peter Gichohi of 1<sup>st</sup> March 2019 at paragraph10 and acknowledged the award was on 27<sup>th</sup> November 2018. The Respondent submitted that they became aware of the Final Award on 4<sup>th</sup> December 2018 and hence filing the instant application on 1<sup>st</sup> March 2019 was within the statutory timelines provided by **Section 35 (3) Arbitration Act 1995** that an application to set aside the award cannot be made after 3 months from delivery of Final Award. This Court lacks any other evidence from either party to determine whether the award was released and the parties notified on 27<sup>th</sup> November 2018 or later on 4<sup>th</sup> December 2018. Therefore, the Respondent is taken in the absence of cogent evidence to the contrary to have been made aware of the Final Award on 4<sup>th</sup> December 2018 and filed the instant application within the statutory timelines.

**Whether the Respondent is entitled to setting aside of the Arbitral award by virtue of Section 35 of Arbitration Act?**

***35. Application for setting aside 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)***

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

***a) The party making the application furnishes proof –***

.....

***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.....

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.

.....

**37. Grounds for refusal of recognition or enforcement**

(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—

.....

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

.....

a) If he High Court finds that-

i) The recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

.....

The Respondent/Applicant contests Final Award on grounds provided by **Section 35(1) ,(2) (iv) & 3 of the Arbitration Act.**

The import of the above cited provisions is that the Arbitrator made decisions by delving into matters beyond the scope of the reference to Arbitration. The Arbitrator did not determine the reference in accordance to the terms of the contract of 30<sup>th</sup> May 2006 and the Addendum to the Contract of 7<sup>th</sup> April 2009.

**The Arbitration Agreement/Clause 67.4 provides;**

**1) Any dispute in respect of which has not become final shall be settled under the Arbitration Act 1995, by one Arbitrator appointed by the Institution stated in the Form of Appendix to Form to Tender;**

**The decision if any of the Board has not become final and binding pursuant to Sub Clause 67.3;**

**2) Neither Party shall be entitled in the proceedings before such Arbitration to the evidence or arguments previously put before the Board to obtain its decision.**

The Arbitrator in the Final Award at Pg 4-6 outlined the Full Arbitration Clause particularly Clause 67.1 that conferred jurisdiction to arbitrate any dispute of any kind between the Employer and Contractor after adjudication as follows;

**Section 67.1 of Conditions of Contract Part II provides;**

**“If a dispute of any kind whatsoever arises between the Employer and the Contractor in any connection with , or arising out of the contract or the execution of works...., the matter in dispute shall, in the first place be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this clause....”**

**Section 67.5 of Conditions of Contract provides;**

**“where neither party has given notice of dissatisfaction within the period in sub-clause 67.3 and the Board’s related decision, if any, has become final and binding either party may, if the other party fails to comply with such decision and without prejudice to any other rights it may have, refer the failure itself to arbitration under sub-clause 67.4. The provisions of sub-clause 67.1 shall not apply to any such reference.”**

At Pg 6 the Arbitrator outlined the Procedural History which *inter alia* included;

***“The parties agreed that the dispute before me remained as previously referred to adjudication plus any other matter brought before me and that the status of the parties therefore remained as they were in adjudication.”***

The Arbitration Agreement and Final Award record confirms wide discretion for the Arbitrator to hear and determine any and all disputes arising from the Employer and Contractor by virtue of **Arbitration Clause 67 1-6** in the Contract executed by parties to the Contract and are therefore bound by all terms of the contract.

The Respondent/Claimant contended that the Arbitrator was to consider through the Replying Affidavit by Engineer Luka .K. Kimeli of 12<sup>th</sup> June 2019; the Claimant’s claim of Ksh 287,306,552.86 as outlined above and not the proposed **“without prejudice”** offer of Ksh 119,314,450.55 which was not contemplated by the parties as falling within the terms of the reference.

The Respondent also raised the issue regarding the itemised claims which in their view were not verified; whereas in the Claimant’s claim for Loss of revenue from Plant and Equipment it sought Ksh 97,330,560/- the Arbitrator awarded Ksh 98,738,928/-in the Final Award. The Claimant claimed under Loss of Profit due to extended contract period Ksh 12,079,353.81, the Arbitrator awarded Ksh 18,119,030.72 in the Final Award. Whereas the Claimant sought for compensation for Laboratory Ksh 1,200,000/-, the Arbitrator awarded Ksh 1,545,000/- in the Final award.

To these claims, this Court read through the Final Award and found as follows;

The contested itemised claims are at Pg13 of Final award the Claimant’s claim and the increased figures are contained at Pg 11 of the award where the Arbitrator outlined the Respondent’s offer to the Claimant on without prejudice basis, which offer was accepted. The itemised claims are picked out in isolation of the rest of the claims that comprise the offer sum. Yet the increased claims total to Ksh 119,314,450.55 the subject offer made to the Claimant by the Respondent vide the letter of 28<sup>th</sup> November 2013 and accepted by the Respondent. This offer was contested on the basis that there were alleged mistakes as intimated by letter of 31<sup>st</sup> July 2015 from the Respondent which reduced the amount now to Ksh 20,935,523.55. The Claimant was aggrieved by the turn of events and pursued Arbitration. It was/is a live issue to be determined at the parties’ forum of choice-Arbitration; whether the letter of 28<sup>th</sup> November 2013 constituted admission of liability and proposed quantum as a binding contract after acceptance or not.

At paragraph 37 of Final Award the Arbitrator outlined the issue of Ksh 119,314,450.55/- offer by Respondent on without prejudice basis which was accepted by the Claimant as an issue to be determined. Whether the offer was valid or acceptance of the offer was vitiated by mistake. The 2<sup>nd</sup> issue to be considered by the Arbitrator was if/whether to award the Claimant sought payment of Ksh 287,036,556.86/- in the Arbitration proceedings rather than the original initial offer in full and final settlement of the claim made on 28<sup>th</sup> November 2013 of Ksh 119,314,450.55/-by the Respondent and was accepted by the Claimant.

The Arbitrator considered in detail each of the itemised claims by parties; **Clause 61-71 at pg 20-21** are the Claimants reasons justifying the itemised claims. **Clause 72-81 at pg 22-23** the Arbitrator considered in detail the Respondent’s reasons to refuse or reduce the itemised claims by the Claimant.

In consideration of the rival submissions on award of the itemised claims; the Arbitrator analysed the import of the Letter from the Respondent to the Claimant of 28<sup>th</sup> November 2013 on without prejudice basis and whether it was/is void for mistake; and found it to be a valid contract the offer having been accepted by the Claimant thereby condensing all itemised claims that were/are contested into the now valid contract.

It is not disputed that the Respondent awarded tender to Claimant that resulted in commencement of works in accordance with the contract of 20<sup>th</sup> July, 2006. On 7<sup>th</sup> April 2009, there was an addendum agreed by the parties. On 7<sup>th</sup> June 2014 was another Addendum agreed on by parties. It is the payment costs of the extension period that are the subject of the dispute before the Arbitrator after the Adjudication Board on 9<sup>th</sup> February 2018.

Of interest was/is the letter of 28<sup>th</sup> November, 2013 by General Manager (Design & Contraction ) From the Respondent Authority; that pursuant to consultations with Employer under **Clause 53.5** of the Conditions of Contract, they communicated Employer’s offer of Ksh 119,314,450 as outlined in the Table contained in the letter. The Claimant gave unconditional acceptance as requested. Thereafter, 1 year later the Respondent rescinded the offer due to mistake.

The Arbitrator found at **Pg 26 Clause 86**;

***“Based on authorities that I have cited above, I am satisfied that such a mistake did not vitiate the Agreement/Contract. Accordingly, I find that the respondent’s offer and Claimant’s acceptance were not vitiated by mistake.”***

The Respondent/Applicant claimed that it was not allowed to consider the itemised claim based on the records and that the Arbitrator instead formed a new contract and enforced it.

This Court is guided by **Section 17 of Arbitration Act** which provides;

#### **17. Competence of arbitral tribunal to rule on its jurisdiction**

***(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—***

*(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*

*(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.*

*(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.*

*(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

The Court finds that the allegation that the Arbitrator went beyond the scope of reference to arbitration is covered by the Arbitration Agreement/Clause and the directions that the Parties took and agreed before the Arbitrator. If there was any issue raised beyond the scope of arbitration it ought to have been raised during the Arbitration proceedings and a verdict made or it was not.

Therefore, the issue of consideration of the Adjudication Board award and/or offer by the Respondent if raised to have it hived off; during Arbitration proceedings and was not envisaged for inclusion, consideration and determination, the same out to have been raised as issues were agreed upon or at any stage in the proceedings. What was/is not raised before the Arbitrator for determination under the Arbitration Act cannot be raised herein for the 1<sup>st</sup> time as the Court's jurisdiction is limited by **Section 10 of Arbitration Act**. This court associates itself with the sentiments in the case of Kenya Bureau of Standards –vs- Geo-chem Middle East – Misc. Cause No. 455 of 2017 eKLR; where the court stated;

*“Regrettably, this court does not have authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to section 35 of the Arbitration Act.”*

The Respondent was/is aggrieved by the award of VAT and Preward interest of Ksh 95,714,062. At pg 31 **Clause 96** the Arbitrator considered Records submitted by the Claimant and the Respondent; Site meeting minutes, daily equipment and labour records which supported its claim for equipment ownership costs and labour costs for the extended period. The Respondent contended that the records did not show additional costs were incurred. The Arbitrator considered the records to the extent only whether these records/documents they supported the claim or not.

For VAT, **Clause 98-100** of the award; the Arbitrator found VAT Act requires payment of tax in respect of taxable supplies and VAT was /is included in the award sum of Ksh 119,314,450.55 and the Claimant was/is not entitled to any further VAT claim. This is a statutory duty by law that cannot be waived.

**Paragraph 99 of the Final Arbitral Award states;**

*“In accordance with the VAT Act, VAT is chargeable in respect of taxable supplies. And the Bills of Quantities forming part of the contract between the parties, which is in evidence before me, show that he original contract price was made up of the value of works plus 16% VAT; meaning that the overall contract price was inclusive of 16% VAT. Based on these, I am satisfied that the Claimant's claims were subject to VAT.*

With regard to Interest, Clause 101-109 of the Award the issue of interest was considered at length and the Arbitrator relied on **Section 32C of Arbitration Act 1995; Clause 60.5 of the Conditions of Contract** and the calculation and award of interest is at **Clause 106 of the Award**.

**Paragraph 101 of Final Arbitral Award;**

*“The claimant claimed interest; and submitted that the interest should be calculated based on the interest rates according to clause 60.5 and from the date his claim should have been approved by the Engineer after submission on 5<sup>th</sup> April 2012 until payment.”*

**Clause 60.5**

*In the event of the failure of the Employer to make payment within the times stated, the Employer shall make payment to the Contractor of simple interest at a rate equal to two percentage points above the average base lending obtained from the Central bank of Kenya from time to time....”*

Therefore, taking into account the content of Final Award, the submissions by Respondent; this Court has not been furnished with proof that the Arbitrator considered matters beyond the scope of reference of Arbitration. The claim that the sums awarded were not considered by the Arbitrator is not borne out by evidence on record.

The Respondent stated that in reliance of **Section 19 of Arbitration Act 1995**

**19. Equal treatment of parties;**

***“The parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present his case.”***

This Court has gone through the content of the award and found the Arbitration proceedings were conducted *interpartes* as shown by **Clause 9-14** of the Award that contains parties attendance, directions on participation and timelines of filing documents, framing issues, preliminary issues and conduct of proceedings.

In the Response of 28<sup>th</sup> September 2018, the Respondent raised an objection which was considered by Ruling at pg 16-19 of the award. The objection was partly upheld and partly quashed.

***“Based on the above reasons, my ruling on the objection is as follows;***

***i) The objection is overruled with respect to items(a) and (b) regarding recalculated of interest and comparison of plant ownership costs respectively.***

***ii) The objection is sustained with respect to item (c) and I determine that Appedix C of the Claimant’s further submissions filed on 17<sup>th</sup> September 2018 together with the claim based on it are expunged from these proceedings.”***

This Court found no evidence of lack of fair hearing as required by **Article 50 COK 2010 and Section 19 Arbitration Act**. Again, any unfairness in treatment was not raised or brought to the attention of the Arbitrator, during proceedings. For these reasons the Court finds the Application to enforce the Arbitral award is upheld and that of setting aside the arbitral award dismissed with costs.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 4<sup>TH</sup> MARCH 2020**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**OMONDI H/B FOR MS ARWA FOR THE APPLICANT**

**N/A FOR THE RESPONDENT**

**COURT ASSSITANT - TUPET**