REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 349 OF 2019

KENYA PIPELINE COMPANY LIMITED .....APPLICANT

-versus-

TERRA CRAFT (K) LIMITED .....RESPONDENT

RULING

Background

1. By an Arbitration Agreement contained in Clause 45 of the Standard Form Contract in the Joint Building Council (JBC) CONDITIONS OF CONTRACT FOR BUILDING WORKS; APRIL 1999 EDITION – entered into on the 12th November, 2001- (hereinafter **"the Agreement"**), the Applicant and the Respondent herein, agreed to submit to arbitration, any disputes that may arise between them under the Agreement. It was agreed that the arbitrator would be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya or the Chartered Institute of Arbitrators on the request of the applying party.

2. The Respondent/Claimant declared a dispute under the Agreement on 26th January, 2005 and instituted Arbitral proceedings. Pursuant to the Agreement and following the failure of the parties to agree on an Arbitrator and an application being made by the Claimant for the appointment of an Arbitrator to the CIArb Chairman, **F. Kairu Bachia** (Quantity Surveyor) was appointed as the sole Arbitrator on the 24th September 2014.

3. The Arbitration proceeded before the said sole Arbitrator, **F. Kairu Bachia** after which a Final Arbitral Award was published by the Arbitrator on the 17th August 2018 wherein the Claimant (hereinafter referred to as **"Terra Craft")** was awarded as against Kenya Pipeline Company Ltd (hereinafter **"KPC"**) as follows:

i. Principal sum of Kshs 149,181,884.98

ii. Half of the Arbitrator's fees and expenses paid by the Claimant (Kshs 2,030,000).

iii. Claimant's costs and expenses of the Arbitration Kshs 85,436,556.64.

iv. Compound interest at the rate of 14% per annum with monthly rests, on the amounts upaid from the date of collection of the Award (16th May 2019)-

a. Now standing at Kshs 22,279,125,43 on the Principal.

b. *Now standing at Kshs 12,759,268.79 on the Claimants costs and Expenses of the Arbitration.*

Application

4. Through the application dated 8th August 2019, the applicant herein Kenya Pipeline Company Limited (**KPC**) seeks orders to set aside the said Arbitral Award by **Kairu Bachia.** KPC also seeks orders to stay the enforcement and/or execution of the said Award together with the costs of the application.

5. The application is supported by the affidavit of KPC's Ag. Company Secretary **Jane Joram** and is premised on the grounds that:

a. The Arbitrator acted arbitrarily, irrationally and capriciously by insisting on deciding on matters clearly not contemplated by the contract between the parties thereby rendering decisions on matters beyond the scope of the reference to arbitration.

b. The impugned Award granted the Respondent purported compensation in relation to a Contract that was indisputably not in existence and which the Arbitrator himself agreed '…had never been formalized by signing' and yet the Arbitrator proceeded on the flawed premise that the arbitration clause could be inferred from another distinct and separate contract between the parties.

c. The Award was designed to confer an undue and undeserved benefit and thereby unjustly enrich the Respondent in flagrant disregard/ contravention of the public policy of Kenya.

d. The Award is contrary to established principles of law and justice and offends the constitutionally anchored principles in relation to the standard of conduct required of a person interpreting and/or applying the law and on the requirement for prudent management of public resources.

e. The effect of the Award is to legitimize an illegality and to aid the Respondent in deriving benefit from a non-existent contract whilst clearly circumventing the applicable legal framework on public procurement as set out in the Exchequer and Audit Act and the Regulations made thereunder being the applicable law on public procurement at the material time.

f. The effect of the Award is to allow the Respondent to unjustly profit from its own wrongs and to unfairly punish a hapless public body that invested substantial resources to a project that was never satisfactorily completed by the Respondent. The Award is, in the circumstances an oppressive instrument that clearly thwarts the basic tenets of justice and offends public policy.

g. Any payments of the amounts sought by the Respondent in furtherance of the Award would amount to an illegality on the part of the Applicant and would be contrary to the public interest.

h. There is imminent and great danger that unless the Award is set aside, enforcement will unfairly ensue as against the Applicant, with debilitating effects on the Applicant's ability to continue delivering on its public mandate.

6. On 10th September 2019, Terra Craft filed a Notice of Preliminary Objection to the application in which it set out the following grounds:

1. That the application is bad in law, irregular, and incompetent for want of compliance with the mandatory provisions of Section 36(3) of the Arbitration Act 1995 (as amended) and Rule 4(2) of the Arbitration Rules, 1997 which are couched in obligatory terms. and require any person relying on the award of Arbitration agreement to file the Original of certified copies thereof as well as the Original Arbitration Agreement of Duly certified copy of it, a condition precedent to the bringing any action in challenge thereof.

2. That this court lacks jurisdiction to entertain this application as the same offends Section 35(3) of the Arbitration Act which stipulates that an application for setting aside an arbitral award may not be made after 3 months have lapsed from the date on which the party making that application had received the arbitral award.

3. That the Honourable court has no jurisdiction to expand or extend statutory timelines legislated by parliament under Section 35(3) of the Arbitration Act, and whereas powers to extend statutory timelines must be expressly conferred and cannot be a matter of implication, the said Act of Parliament does not expressly confer this court with the power to extend the same.

4. That the application is incompetent as it runs afoul of the rules of natural justice and more so Rule 7 of the Arbitration Rules, 1997 which requires in mandatory terms that the Arbitrator must be impleaded as a party and should be served with such an application arising under Section 35 of the Arbitration Act 1995, hence the Arbitrator has not been accorded an opportunity to be heard or correct the award or give any additional award if necessary.

5. That the application is totally devoid of merit and is merely inviting this court to exceed its mandate under the Arbitration Act, as the grounds cited in support of the application do not demonstrate or indicate any facts which fall within the strict and narrow confines of the grounds of challenge set out under Section 35(2) of the Arbitration Act, and is therefore unsustainable.

7. Terra Craft opposed the application through the replying affidavit of its Director **Mr. Henry Kinuthia** who reiterates the Grounds of Opposition stated hereinabove.

8. Before the dust settled on Kenya Pipeline Company's application, Terra Craft filed the application dated 29th January 2020 seeking orders to ***recognize, adopt and enforce the said Final Arbitral Award published by the sole Arbitrator of 17th August, 2018*** and for leave to execute the said Award.

9. The application is supported by the affidavit of Terra Craft's Director **Mr. Henry Kinuthia** and is premised on the ground that KPC had refused, neglected and/or failed to pay the sum awarded to Terra Craft in the Final Arbitral Award.

10. KPC opposed the application for the enforcement of the Award through the following Grounds of Opposition:

i. The Application is fatally defective and bad in law to the extent that it seeks to enforce a "Final Arbitral Award published by the Sole Arbitrator, F. Kairu Bachia on the 17th August 2018 and signed on 16th May 2019." The Applicant is essentially seeking to enforce an Award which is invalid for the following reasons:

ii. No valid Award was in existence on the 17th August, 2018 which is indicated as the purported date of publication. A non-existent Award is legally incapable of recognition and enforcement in the manner sought by the Applicant.

iii. The Award that is sought to be enforced offends the mandatory requirements underpinning the validity of an Award as set out in section 32 of the Arbitration Act, No. 4 of 1995 (as amended).

iv. The Application is manifestly in contravention of the mandatory provisions of section 36 (3) of the Arbitration Act which provides thus:

v. (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—

(a) the original arbitral award or a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

vi. The Arbitral Award deals with disputes not contemplated by the contract on which the arbitration is anchored, and in particular:

vii. It deals with a controversy outside the purview of the Agreement dated 12th November, 2001.

viii. The Arbitrator proceeded on the flawed premise that an arbitration clause could be inferred from another distinct and separate contract between the parties, and as a result rendered an Award on a controversy that was manifestly outside his jurisdiction.

ix. The Award contains decisions on matters clearly beyond the scope of the reference to arbitration and therefore made without jurisdiction. In particular:

x. The Award granted the Applicant purported compensation in relation to a second "contract" that was indisputably not in existence and which the Arbitrator himself agreed '…had never been formalized by signing.'

xi. The Award dealt with matters for which there was no contract between the parties and therefore no Arbitration Agreement in writing as required under section 4 of the Arbitration Act.

xii. Recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya, including for the following reasons:

xiii. The Award is designed to confer an undue and undeserved benefit and thereby unjustly enrich the Applicant in flagrant disregard of the public policy of Kenya.

xiv. The effect of the Award is to legitimize an illegality and circumvent the applicable legal framework on public procurement as set out in the Exchequer and Audit Act, being the applicable law on public procurement at the material time.

xv. The effect of the Award is additionally to allow the Applicant to unjustly profit from its own wrongs and to unfairly punish a hapless public body.

xvi.The Award offends the constitutionally anchored principles regarding (i) the standard of irreproachable conduct that is required of a person interpreting or applying the law; and (ii) the requirement for prudent management of public funds.

xvii. The Application is premised on a misapprehension of the applicable provisions of the law, and in particular the interplay between sections 35, 36 and 37 of the Arbitration Act, No. 4 of 1995. The effect of the prayers sought in the application is to undermine and/or take away crucial protections that exist for the protection of due process rights of applicants seeking the setting aside of awards under section 35 of the Arbitration Act.

xviii. The Application as presented seeks to circumvent the opportunity for exhaustion of substantive grounds and due process safeguards available in relation to setting aside of awards under section 35 of the Arbitration Act. The effect of the approach taken by the Applicant during the pendency of the Respondent's application for setting aside the Award is to subvert judicial process to the Respondent's great and unjust detriment.

xix. The amounts claimed in the Application are in any event without basis to the extent that there is no evidence by way of a Certificate of Costs assessed by the Arbitrator or a consent by parties to support claims for the purported Applicant's costs and Arbitration expenses.

11. Parties canvassed both applications by way of written submissions. I will however first consider the application and submissions in respect to the application to set aside the Arbitral Award as the determination of the said application will have a bearing on the application for the adoption and enforcement of the award. This is to say that if the application to set aside the Award is successful, then it follows that the enforcement application falls on the wayside. However, if on the other hand the setting aside application fails, then the court must move to determine the application for enforcement of the Award.

KPC's Submissions.

12. M/s Gumbo & Associates Advocates for Kenya Pipeline Company Limited submitted that the grounds for resisting the enforcement of the award are the same grounds for seeking its setting aside. Counsel submitted that the enforcement application is premature as it contravenes section 36(3) of the Arbitration Act in view of the fact that Terra Craft had not filed the Original Arbitration Agreement or the Arbitral Award in this court. For this argument, counsel cited the decision in ***Glencore Grain Ltd v TSS Grain Millers Ltd*** [2002] 1 KLR wherein Onyancha J, held that; -

> ***Along with the arbitration award is the mandatory requirement to file with it an original copy of the arbitral agreement or certified or authenticated copy thereof under Section 36(2)(b) of the Arbitration Act. There is no doubt or dispute that the arbitral agreement or contract filed by Glencore Ltd herein was a photocopy…. Since the court was not approached to nor did it otherwise make any other orders before the filing of or in relation thereto, it is my ruling that failure to comply with the said Section 36(1) and (2) of the Arbitration Act by Glencore Ltd was fatal. This in my view, and I so hold, renders the arbitral award and the arbitral agreement jointly and severally inadmissible in evidence in accordance with S.2(1), 64, 66, 67 and 68(1)(e) and (f) of the evidence Act."***

13. Counsel also relied on the decision in ***Safaricom Limited v Ocean view Beach Hotel Limited and 2 others [2015] eKLR*** wherein Kasango J, struck out a Chamber Summons application because the Applicant did not supply the original or certified copies of the award and arbitration agreement. The Learned judge held that:

> ***"The Defendants raised an objection relating to the provisions under Section 36 that the Plaintiff had failed to file, the original or certified copy of the arbitral award and the original or certified copy of the arbitration agreement. That objection in my view is well taken. I have perused the Court file and I was unable to trace the original award or arbitration agreement. Both Section 36(3) of Cap 49 and Rule 4 of The Arbitration Rules require that the original or certified copies of the award and arbitration agreement be filed first before the application for adoption of the award is filed. The Plaintiff failed to so file. That in my view is a breach which cannot lead to the dismissal of the application. It is a failure that only attracts the striking of the Plaintiff's application. It is a procedural breach."***

14. It was also submitted that the Application for Enforcement is premature as costs in relation to the Award have not been assessed by the Arbitrator. Counsel referred to the provisions of section 32(B)(2) of the Arbitration Act and argued that since the amounts sought by the Applicant as costs and interests had not been assessed by the Arbitrator and a Certificate of Costs issued, the computation of the amounts on costs by the Applicant is without any legal basis. Counsel relied on the case of ***Golden Homes (Management) Limited v Mohammed Fakhreddin Abdullai & another; Golden Homes Limited (Interested Party)*** [2019] eKLR wherein it was held that: -

> ***"The provisions of Section 32 B (1), of the Arbitration Act No. 11 of 2009 requires that, the issue of costs be determined and apportioned by the arbitral tribunal in its award under this section or addition award under section 13 4(5). Therefore, while the losing party is expected to bear the costs of the other party,…. there is generally no separate award relating to this matter and no taxation process. Instead, the tribunal assesses the legal costs incurred by the prevailing party and makes a provision for these costs in the final award."***

15. Counsel argued that the Application for Enforcement is not merited and ought to be rejected under the grounds that the Arbitrator acted beyond the scope of his jurisdiction and that the Award is contrary to public policy. It was Kenya Pipeline Company's case that the Arbitral Award deals with disputes not contemplated by the contract on the basis of which the arbitration was undertaken. Counsel particularly emphasized that the Award deals with a controversy outside the purview of the Agreement dated 12th November, 2001 ("the subject Contract") underlying the Arbitration proceedings. He added that the Arbitrator proceeded on the flawed premise that an arbitration clause could be inferred from another distinct and separate contract between the parties, and as a result rendered an Award on a controversy that was manifestly outside his jurisdiction. For this argument counsel pointed out that clause 45 of the Subject Contract conferred the Arbitrator with jurisdiction to hear and determine such disputes arising from the Subject Contract for Phase 1 of the project only.

16. Counsel maintained that the arbitrators finding that Clause 45 on Settlement of Disputes in the signed phase 1 contract was applicable to Phase 2 was erroneous because the Agreement in relation to Phase 2 was never concluded and there was no contract in place under Phase 2. It was submitted that to the extent that the amount sought in the Enforcement Application are in relation to both phase 1 and phase 2, recognition of the Award in its current form would amount to sanctioning of an Award made without jurisdiction. For this argument counsel cited the decision in ***Rural Housing Estates Limited Ltd v Eldoret Municipal Council*** **[2009] eKLR wherein the court held that**:

> ***"In my view, the basis of the agreement between the Plaintiff and the Defendant was the joint venture agreement and any subsequent negotiations that did not result in further agreement being entered into, cannot, by any stretch of imagination, be considered as a basis of contractual relationship between the Plaintiff and the Defendant."***

17. Counsel submitted that the Award offends public policy of Kenya as the Arbitrator awarded the Applicants sums/compensation in relation to Phase 2 of the project, based on a purported contract which was never in existence. It was submitted that Kenya Pipeline Company Limited is a public body which is by law required to comply with the applicable provisions of the procurement law in relation to all its contracts with third parties and that the Award sought to be enforced by the Applicant is manifestly illegal because; -

> ***a) Phase 2 contract, is a non - existence contract; it was never concluded by parties in writing as there was no procurement process undertaken under this Phase. The purported contract was illegal.***
>
> ***b) As there was non-compliance with the law, no rights and obligations could arise in respect to this purported contract for phase II; the purported contract was void ab initio.***

18. Reference was made to the decision in ***Glencore Grain Ltd*** case (supra) wherein it was held that an award would be contrary to public policy of Kenya if,

> ***"it is immoral or illegal or that it would violate in clearly unacceptable manner, basic legal and/or moral principles or values in the Kenyan society." the word "illegal" … would hold a wider meaning than just "against the law". It would include contracts or acts that are void."***

19. Reliance was also placed in ***Root Capital Incorporated v Tekangu Farmers Co-operative Society Ltd & another*** [2016] eKLR wherein 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."***

20. Counsel argued that since there was no contract in respect of phase 2 of the project, there was no basis for the Arbitrator to anchor its jurisdiction on a separate Contract being phase I. It was Kenya Pipeline Company's position that as a result of transplanting the terms of phase I of the contract to the dispute under phase 2 of the Contract any consequential award made devoid of jurisdiction is invalid and is of no legal consequence.

Terra Craft's Submissions

21. M/S Lubulela & Associates advocates for Terra Craft submitted that the KPC's contention that the arbitrator decided matters not contemplated by the contract between the parties is utterly without merit as the arbitrators wide jurisdiction was conferred by Clauses 45.1, 45.2 and 45.9 of the Standard Form contract.

22. Counsel submitted that even if the arbitrator erred in law or fact, such findings, however wrong they may be, do not qualify for the setting aside of the Arbitral Award. For this argument counsel cited the decision in ***Mahican Investments Limited & 3 Others v Giovanni Gaida & Others*** [2005] e KLR wherein it was held: -

> ***"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".***

23. Counsel emphasized that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot be said to be inconsistent with the public policy of Kenya. Counsel added that, on the contrary, Public Policy of Kenya leans towards finality of arbitral awards. For this argument, counsel referred to the decision in ***Christ for all Nations v Apollo Insurance Company Ltd*** [2002] EA 366.

24. It was submitted that the applicant's contention that the Arbitrator could not infer the arbitration clause from another distinct and separate contract between the parties is without merit and is defeated by Section 4(4) of the Arbitration Act No. 4 of 1995 which espouses the long standing doctrine of *arbitral clause incorporation by reference.*

25. It was submitted that the applicant is estopped or barred from denying the Arbitrator's jurisdiction over the matter in light of the fact that the applicant lodged a counter-claim with the Arbitrator against the respondent alleging negligence and breach of contract and further seeking liquidated damages for Kshs 12,676,556,00 in Phase 1 of the project and Kshs 9,815,425.70 in Phase 2. Counsel added that the applicant is precluded from holding this objection at this stage and is deemed to have waived it by dint of Section 17(2) & (3) of the Arbitration Act as read with Section 5 of the same Act.

26. It was submitted that the application fails to disclose or indicate with any precision, which public policy the Arbitral Award has contravened so as to warrant its being set aside either wholly or in part and that an award may only 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. Counsel contended/maintained the applicant has failed to plead or demonstrate precisely which of these heads applies to the case.

27. Counsel submitted that the applicant's allegation that the agreement was flawed or invalid for not being signed in accordance with the prevailing law on Public Procurement is without merit as the applicant cannot be allowed to benefit from its own illegality by its refusal to sign the further agreement for Phase 2 despite deriving benefit therefrom and making part payments thereto. It was Terra Craft's position as this would lead to unjust enrichment if the respondent were to be allowed to keep the benefit and user of the refurbished premises without paying for their value. Counsel relied on the decision in ***Kenyatta International Conventional Centre(KICC) v Greenstar Systems Limited*** [2018] eKLR and submitted that the Arbitrator rightfully restituted the parties by making a monetary award, upon establishing that work was indeed done and benefit conferred upon the other party, and that it was immaterial whether the contract was valid or not.

Analysis and Determination

28. I have considered the applications filed herein, the parties' responses and respective submissions. The main issues for determination are as follows:

> ***1. Whether KPC has made out a case for the setting aside of the Arbitral Award; and depending on the finding on this issue,***

2. Whether the Terra Craft's application for the recognition and enforcement of the award is merited.

Setting Aside of the Award

29. Before delving into the issue of whether the award ought to be set aside or not, I find it necessary to point out that arbitration, as an alternative dispute resolution mechanism, is a unique procedure in which parties to an agreement, as was the position in the instant case, voluntarily choose to subject any dispute arising from their agreement to arbitration instead of litigating before the ordinary courts. In this regard, this court will not lose sight of the fact that the parties herein opted, as at the time they entered into the agreement in question up to the point that they appeared before the arbitrator, that they shall be subjecting their dispute to arbitration and will abide by the outcome of the arbitral process. Needless to say, arbitration as a dispute resolution mechanism is governed by its own rules under the Act. This position was aptly captured by Mwongo J. in ***Gooodison Sixty-One School Limited v Symbion Kenya Limited*** [2017] eKLR as follows:

> ***"…….the primeval and enduring fundamental principles of arbitration, accepted and practiced worldwide over numerous centuries, hold that non mandatory arbitration is, firstly, an inherently complete mechanism of dispute resolution alternative to the state court litigation system; therefore, secondly, that intervention by courts in the arbitral process is extremely limited except where parties agree or the law so stipulates; thirdly, that its essence involves party autonomy, namely, that parties in appropriate cases can choose or ask someone to choose an independent third person or persons to arbitrate or adjudicate over their dispute using a process they mutually agree to; fourthly, that the parties agree that the decision of the third person(s) is binding on them; and finally, that the arbitrator is not bound by complex court litigation procedures and processes or the strict laws of evidence." [Emphasis added]***

30. The contextual framework of arbitration in Kenya was stated by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **Civil Appeal (Nairobi) No 57 of 2006** where the court said:

> ***"Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the Arbitration Act, No. 4 1995 (the Act) would apply and the courts take a back seat."***

31. In the present case, as I have already stated in this ruling, the arbitration process was wholly consensual from its inception as it emanated from an arbitration clause contained in the agreement by the parties. This signifies that the clear intention of the parties was to resolve their dispute through arbitration in which case the matter is governed by the **Arbitration Act that** provides for both the substantive and procedural law for the arbitration.

32. Counsel for KPC submitted that the arbitrator acted beyond the scope of his jurisdiction as the Award deals with a controversy outside the purview of the Agreement dated 12th November, 2001 ("the subject Contract") underlying the Arbitration proceedings. He argued that the Arbitrator proceeded on the flawed premise that an arbitration clause could be inferred from another distinct and separate contract between the parties, and as a result rendered an Award on a controversy that was manifestly outside his jurisdiction. According to KPC, clause 45 of the Subject Contract conferred the Arbitrator with jurisdiction to hear and determine such disputes arising from the Subject Contract for Phase 1 of the project only.

33. On its part, Terra Craft maintained that the Applicant's contention that the arbitrator could not infer an arbitration clause from another distinct and separate contract between the parties is without merit and is defeated by section 4(4) of the Arbitration Act which espouses the long standing doctrine of *arbitral clause incorporation by reference*. Terra Craft further argued that the Applicant is estopped from denying the arbitrator's jurisdiction over the matter in light of the fact that the Applicant lodged a counterclaim with the said arbitrator wherein it sought liquidated damages against Terra Craft in respect of both Phase I and Phase 2 of their contract.

34. The power granted to this Court to set aside an arbitral award is contained in **section 35(1)** and **(2)** of the ***Act*** which states as follows:

> ***(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).***
>
> ***(2) An arbitral award may be set aside by the High Court only if-***
>
> ***(a) the party making the application furnishes proof-***
>
> ***(i) that a party to the arbitration agreement was under some incapacity; or***
>
> ***(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or***
>
> ***(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or***
>
> ***(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or***

(v) 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 conflict with the public policy of Kenya:

35. The above provisions empower the court to set aside an award if it deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration. The Applicant also relied on the ground of public policy under **section 35(2)(b)(ii)** of the ***Act***.

36. The subject and scope of public policy as a ground of setting aside an arbitral award has been a subject of various decisions some of which were cited by the parties. In ***Christ for all Nations v Apollo Insurance Co. Ltd*** **[2002] EA 366**, which was quoted with approval by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR**, Ringera, J., (as he then was) elucidated the meaning of public policy under **section 35** of the ***Act*** as follows:

"An award could be set aside under page 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."

37. Courts have however warned that Public policy, as defined above, is a broad, infinite and malleable concept that must be considered alongside the principle that parties who enter into an arbitration agreement expect a level of finality. This is the caution that was given by Burrough J., in ***Richardson v. Mellish*** [1824] 2 Bing 228 when he held that, ***"Public policy is a very unruly horse, and when you get astride, you never know where it will carry you".*** Similarly, Ringera J., in ***Christ for All Nations*** case (Supra) 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."

38. The same principle of finality of arbitral awards was also upheld by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **(Supra)** as follows:

"We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy."

39. The principle that arises from the above cited cases is that the when parties agree to have an arbitrator determined a dispute within the arbitration clause, they must take the consequences that the arbitrators decision may be for or against one of the parties and that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award. The court, under **section 35** of the Act, does not exercise appellate jurisdiction as the parties are entitled to reserve the same if they wish. In ***Mahan Limited v Villa Care*** ML HC Misc. Civil App. No. 216 of 2018 [2019] eKLR it was held:

"It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that the decision of the Arbitrator would be final and binding on them. It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they happy to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act."

40. With the above principles in mind, I will now proceed to consider the grounds put forward by the applicants to set aside the award. The applicants laid a lot of emphasis on the fact that the arbitrator went beyond his mandate and made an Award that offends public policy of Kenya as he awarded Terra Craft compensation in relation to Phase 2 of the project, based on a purported contract which was never in existence and which the Arbitrator acknowledged '*…had never been formalized by signing'*. In other words, the Applicant argued that the arbitrator went on a frolic of his own to determine a dispute that was not covered by the subject contract.

41. It was not in dispute that the parties entered into the subject contract (Phase 1) that transitioned/overlapped to Phase 2. This overlap in the two phases of the contract was captured by the arbitrator in the final Award as follows:

"2.6. On August 20, 2002, the respondent awarded the claimant Phase II of the project at a sum of Kshs 72,793,320/=, to commence on October 8, 2002, and attain Practical Completion by September 23, 2003. It was the terms of the award that the parties would sign another contract agreement for Phase II.

2.7. That contract for the Phase II, which was to be supervised by the same consultants, has never been formalized by signing but that notwithstanding, the respondent advanced the Claimant Kshs 18,193,330/= at the same terms and conditions for Phase I contract.

2.8. ***During execution of both Phase 1 and Phase II of the project the Claimant was issued with various payments certificates but many of them were not honoured (paid) on time as provided in the contract.*****"**

42. It was also not in dispute that a disagreement arose in the course of the execution of Phase 2 that necessitated the reference of the dispute to arbitration. Terra Craft's claim was for an award of Kshs 99,407,262/74 on Phase 1 and Kshs 67,374,602/78 on phase 2.

43. It was further not in dispute that the Applicant/Kenya Pipeline Company filed a counterclaim to Terra Craft's claim before the arbitrator which counter claim was captured as follows in the final Award:

"The respondent through a counterclaim prays for Kshs 32,229,619/= and 17,895,425/70 for loss and expenses suffered in Phase 1 and Phase 2 respectively".

44. From the above foregoing undisputed facts, I find that the Applicant was all along aware that the dispute before the arbitrator also related to Phase 2 of the Contract. I note that not only did the applicant voluntarily submit itself to the jurisdiction of the arbitrator in respect to Phase 2 of the contract but also went ahead to lodge a counterclaim in respect to the said phase. My finding is that having voluntarily submitted itself to the arbitrator's jurisdiction including filing a complaint under Phase 2, the Applicant cannot be seen to turn around, after the award of the arbitrator whose jurisdiction it all along acknowledged is delivered, and claim that the arbitrator lacked the jurisdiction to determine the dispute.

45. I note that the arbitrator rendered himself as follows on his jurisdiction to determine the dispute relating to Phase 2:

"The respondent having admitted that the terms and conditions of Phase II were similar to those of Phase I, as argued by the Claimant, I find that Clause 45 on Settlement of Disputes in the signed Phase 1 contract is applicable to Phase 11. Consequently, I find no justifiable grounds to restrict the jurisdiction of the tribunal to only two items."

46. My finding is that the doctrine of estoppel is applicable in this case as the Applicant had every opportunity to challenge the reference of issues revolving around Phase 2 of their contract to the arbitrator when the matter was still pending before the arbitrator. It is noteworthy that the Applicant did not challenge the arbitrator's jurisdiction in respect to Phase 2 and instead acknowledged the arbitrator's jurisdiction by filing its counterclaim before the arbitrator. I find that by filing a counterclaim under Phase 2 of the contract, the Applicant, by conduct, invoked the jurisdiction of the arbitrator and cannot be seen to turn around and claim that the arbitrator lacked the jurisdiction to determine the dispute under the said Phase. I am guided by the words of Lord Denning in ***D & C Builders vs Sidney Rees*** (1966) 2 QB 617 wherein he stated as follows: -

'It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties."

47. I reiterate the sentiments made ***Mahan Limited v Villa Care*** case (supra) that having covenanted and subjected their dispute to arbitration, it must have been within the contemplation of the parties that they will be bound by the decision of the arbitrator whether favors them or not absent the grounds in Section 35 of the Act. This court cannot help but wonder if the Applicant would have held the position that the arbitrator lacked the jurisdiction had its counterclaim been successful. I am of the view that this is a case where the saying that *'what is good for the goose is good for the gander'* is applicable.

48. For the above reasons I am not persuaded that the Applicant has made out a case for the setting aside of the Arbitral Award and the order that commends itself to me is the order to dismiss the setting aside application.

Recognition and Enforcement of the Award

49. Having found that the application to set aside the Award is not merited, the next issue for determination is whether this court should proceed and allow the Respondent's application for the recognition and enforcement of the Award. As I have already stated in this ruling, the Applicant opposed the said application on the basis that it was premature owing to the fact that Terra Craft had not filed the Original Arbitration Agreement or the Arbitral Award as envisaged under section 36 (3) of the Arbitration Act. It was also submitted that the Application for Enforcement is premature as costs in relation to the Award have not been assessed by the Arbitrator as contemplated under section 32(B)(2) of the Arbitration Act. It was the KPC's case that since the costs and interests had not been assessed by the Arbitrator and a Certificate of Costs issued, the computation of the amounts on costs by the Applicant is without any legal basis.

50. Section 32(B)(2) and 36(3) of the Arbitration Act stipulates as follows:

32(B)(2) Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration."

> ***"36(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish— (a) the original arbitral award or a duly certified copy of it; and (b) the original arbitration agreement or a duly certified copy of it.***

51. I have perused the court record and the application for recognition and enforcement. I note that indeed the Respondent did not file the original arbitration agreement and Award with the application for recognition and enforcement. The question which then arises is whether the Respondent's application should be dismissed and/or struck out for the reasons that have been advanced by the Applicant. I note that it was not disputed by the Applicant/KPC that both the Arbitration Agreement and Award actually exist and this explains why the Applicant sought the setting aside of the Arbitral Award. My finding therefore is that the omission by the Respondent to file the original/certified copy of Arbitration Agreement and Award with the Application for Recognition and Enforcement is not fatal and is curable under Article 159 of the Constitution that advocates for the dispensation of substantive justice rather than focusing on procedural technicalities.

52. For the reasons that I have stated in this ruling I dismiss the application for the setting aside of the award with no orders as to costs. In respect to the application for the enforcement of the award, I find that the same is indeed premature and direct the Respondent to regularize its position by filing the original Arbitration Agreement and the Award before fixing the said application for this court's consideration.

Dated, signed and delivered via Skype at Nairobi this 16th day of July 2020 in view of the declaration of measures restricting court operations due to Coved -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. Mutubwa for the respondent.

Mr. Melly for the applicant in the application dated 8th August 2019

Court Assistant: Silvia