REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC APPLICATION E132 OF 2019

IN THE MATTER OF ARBITRATION ACT 1995 TO ADOPT/SET ASIDE ARBITRAL AWARD

MANYOTA LIMITED.....APPLICANT

VERSUS

MURANGA UNIVERSITY COLLEGE.....RESPONDENT

RULING

BACKGROUND

On 1st November 2013, the Applicant, Manyora Limited and Respondent, Muranga University College entered into an Agreement/Contract; for the Applicant to construct Hostel Block at Muranga University College for contract sum of **Ksh 144,481,516/-** and over a period of 78 weeks. The Applicant's claim is that the Practical Completion Certificate was issued in 2015, yet there were instances upon presentation of certificates, the Respondent delayed in remittance of payments. The Respondent's Counterclaim is that the construction commenced on 8th November 2013 and the expected completion date was 8th May 2015. On 7th May 2015, the Claimant applied for extension of time to complete the Project which was completed on 5th July 2015. The Respondent contested the inclusion of retention period, extension of time and that the Claimant had not included payments made in advance in the Claim.

1st APPLICATION

The 1st application was/is by the Applicant filed on 24th April 2019 under **Section 36 of Arbitration Act & Rule 9 of the Arbitration Rules 1997** seeking that the arbitral award of 13th February 2019 of the Arbitral tribunal presided over by Ms Sylvia Mueni Kasanga and filed in Court to be recognised and enforced as the judgment of the Court. The Applicant prays to be granted leave to enforce the Final Award as a decree and order of this Court.

The Applicant relied on the following grounds;

a. The Final Award entered as judgment in favour of the Claimant for Ksh 1,858,183.24/-

b. The amount to be paid by the Respondent within 60 days after which it shall be awarded interest at Court rates.

c. The Respondent shall pay costs of the claim and counterclaim.

d. The Respondent has not complied with the terms of Final award

e. The applicant is denied fruits of its judgment

f. The Respondent has not filed any application under **Section 35 of Arbitration Act 1995 to set aside the Arbitral award.**

g. Pursuant to the Arbitration Agreements, the award was conclusive and final and there is no avenue for any party to appeal.

h. In the interest of justice, the final award should be recognized and enforced as a decree of the Court.

James N. Ihura, Chief Executive Officer of the Applicant Company swore a Supporting Affidavit and alluded to the fact that both parties entered into a building contract to have the Applicant construct/erect hostels and other buildings and the Respondent to pay as per the building contract annexed and marked **JNI-1**

A dispute arose and in line with the Arbitration Clause/Agreement, the Applicant submitted the dispute for determination by the Arbitrator appointed by Chairman, Chartered Institute of Arbitrators on 12th September 2017 vide letter annexed and marked **JNI – 2a & 2f** and was accepted by parties.

During Arbitration proceedings, the Claimant lodged a claim and Respondent lodged counterclaim and both were concurrently heard by the Arbitral Tribunal and Final Award published on 13th February 2019.

The Applicant filed original Final Award, the Building Contract and the Arbitration Clause/Agreement as provided by **Section 36 (3) of Arbitration Act 1995.**

2nd APPLICATION

The Respondent filed Notice of Motion on 27th May 2019 brought under **Rule 11 of the Arbitration Rules 1997, Sections 1A,1B, 3,3A & 63 (e) of Civil Procedure Act** and all other enabling provisions of the law.

The Respondent sought orders of stay of proceedings herein until the [instant] application is heard and determined and until the Originating Summons application of 20th May 2019, filed in the High Court of Kenya at Nairobi is heard and determined.

The application was/is supported by affidavit of the Respondent through Prof. Beatrice Mugendi; Deputy Vice Chancellor in charge of Finance & Development of the Respondent institution and also filed Replying Affidavit of 11th July 2019. In both affidavits the Respondent deponed the grounds as follows;

a. That there was a building contract between parties and in performance of the contract, a dispute arose with regard to payment(s) and the same was referred to Arbitration vide the Arbitration Clause in the Contract.

b. The Final Award was published on 13th February 2019 which allowed the Claimant's claim and dismissed the Applicant's counterclaim.

c. The Respondent was/is aggrieved by the Arbitral award and filed Originating Summons Application at ***Nairobi Civil Case No 110 of 2019 Muranga University of Technology vs Manyota Limited*** and annexed a copy of the OS application dated 27th May 2019 marked **EXH1**

In reliance on **Section 35(2) (a) of Arbitration Act 1995** which provides for circumstances that warrant challenging of an arbitral award and also with reference to **Section 37(1) (a) of the Arbitration Act 1995** which provides for grounds for refusal of recognition or enforcement of an arbitral award at the request of the party against whom it is invoked, if that party furnishes proof, the Applicant lodged the application seeking to set aside the Final Award in **Nairobi HCCC 110 of 2019**.

d. The Respondent considered the Arbitral award was/is irregular and unenforceable as the award omitted issues that had been referred to Arbitrator for determination to wit, a determination on the Applicant's counterclaim as well as an explanation as to why the same was dismissed and for which reasons.

e. The Respondent contests the recognition and enforcement of the Arbitral award as the enforcement of the award would be contrary to public policy. The Respondent alleged that the Arbitrator failed to be fair and just in her adjudication between the parties, but rather went ahead to make a finding that is in contravention of the principles of justice and fairness.

f. The Respondent asserted that the Arbitral Tribunal condemned the Applicant herein to pay interest at rates of between 11.5%-14.5% per annum on alleged delayed payments which were erroneously computed and based on an erroneously calculated period of delay in making payments, yet this finding was/is neither supported by the contract nor any reasonable application of discretion.

g. The Respondent further contested the Arbitrator's decision to cap the limit of retention at 5% instead of 10% as provided in the contract between the parties and it was in violation of Clause 26.1 of the Contract and the finding was neither premised on any reasonable application of Arbitrator's discretion.

h. The Respondent also raised the issue with regard to the alleged fact that the award contains decisions on matters beyond the scope of the reference to arbitration.

SUBMISSIONS

The Court directed parties to exchange and file written submissions on both applications to be canvassed in the new term on 19th September 2019. The Applicant relied on the following;

APPLICANT'S SUBMISSIONS

The Applicant contended that the Arbitral award was made/published on 13th February 2019 and served on both parties on 14th February 2019. The 90 days within which an arbitral award could be challenged lapsed on 14th May 2019.

In the case of ***Mareco limited vs Mellech Engineering & Construction Limited (2019) eKLR*** relying on C.A. case of ***Anne Mumbi Hinga vs Victoria Gathora (2009)*** confirm that there exists no power under the Arbitration Act to extend time within which an award can be challenged.

The Applicant submitted that the Respondent's Application lacks merit since it is premised on a prayer for stay [of proceedings] pending on uncertainty of a decision to be delivered in a file /suit not before this Court and the issue of the extension of time may not be determined in this Court. The Court cannot consider stay of proceedings of the 1st Application.

On the claim by the Respondent that the Arbitral award is against public policy its construed to mean that the same is inconsistent with the Constitution or any Kenyan Law or contrary to justice and morality. It is upon the party alleging the claim that should tender proof of such a claim as was considered in the case of ***Eagle Vet, Tech Company Ltd vs Anthony Obidulu Misc App No 14 of 2018 eKLR*.**

RESPONDENT'S SUBMISSIONS:

The Respondent submitted that the effect of ***High Court Civil Suit No 110 of 2019 (OS)*** on current proceedings seeking orders *interalia*, that the Arbitral award be set aside is that a stay of proceedings herein be granted. The said proceedings are ongoing before the High Court and have been referred to mandatory court annexed mediation. For this reason the Respondent challenges the enforcement of the award and/or continuance of the proceedings herein as the Arbitral award will be rendered void if the Respondent's application is successful.

The Respondent relied on the case ***Invesco Assurance Ltd vs Charles Muturi Mwangi [2012] eKLR*** which indicated that where stay of Arbitration proceedings was sought [before the Arbitrator] and the Arbitrator proceeded as scheduled, and later these proceedings are finally overturned, the parties would have incurred unnecessary costs which could be avoided. There would be prejudice suffered which would be irreversible as the costs would not be recoverable and would have been incurred in an exercise in futility.

In the case of ***County Government of Nyeri vs Eaustace Gakui Gitonga [2018] eKLR*** the Court held it was only fair that there be a stay of Arbitration proceedings pending the hearing of the Originating Summons within 90 days in which period the parties would endeavour to prosecute the OS to its finality.

In the case of ***Cape Holdings Ltd vs Synergy Industrial Credit Ltd [2016] eKLR;*** the court was of the view that when applications under **Section 35 & 37 of the Arbitration Act** are presented together, the Court shall determine the one for setting aside first, and then determine the one of recognition and enforcement of the award afterwards.

DETERMINATION

After consideration of the pleadings and submissions by parties through Counsel, the issues that commend themselves for determination are;

a. Whether the proceedings in the instant matter are stayed pending hearing of this application and/or until the Respondent's O.S. application dated 20th May 2019 and filed in the High Court of Kenya at Nairobi is heard and determined.

b. Whether the Court may set aside the Final Award of 13th February ,2019 or the Court issues further orders including remitting the Final Award for corrective action on the impugned portion of the award, the award of Ksh 1,858,183.24 and the dismissal of the Counterclaim.

c. Whether the Court may adopt and recognize the Arbitral award of 13th February 2019 as judgment of the Court to be executed as an order of the Court.

ANALYSIS

Whether the proceedings in the instant matter are stayed pending hearing of this application and/or until the Respondent's O.S. application dated 20th May 2019 and filed in the high Court of Kenya at Nairobi is heard and determined.

The Respondent submitted that ***High Court Civil Suit No 110 of 2019 (OS)*** is ongoing before the High Court and parties have been referred to mandatory court annexed mediation. The enforcement of the award and/or continuance of the proceedings herein should be stayed as the Arbitral award will be rendered void if the Respondent's application is successful.

Sections 6, 12, 15, 16A, 17 & 39 (b) of Arbitration Act 1995 provides possible instances that may warrant stay of proceedings in Arbitration processes pending outcome of the High Court decision. Also, the law provides for stay of proceedings where an appeal is preferred to the High Court and/or Court of Appeal on the process and outcome of Arbitration proceedings and enforcing or setting aside the Final Award. See ***Yooshin Engineering Corporation vs AIA Architects Limited C.A. 89 of 2019; KiKenni Properties Limited & Takaungu Spice Ltd vs Vipingo Ridge LTd HCC 8 of 2019 & Nguruman Ltd vs Shampole Group Ranch & Anor [2014} e KLR*** on instances of grant of stay of proceedings in Arbitration Disputes.

Article 165 (1) (b) of CoK 2010 and Section 11 of High Court (Organization & Administration) Act prescribe the hierarchy of the High Court in the Justice System, the Divisions of the High Court and jurisdiction of the High Court. The Act outlines the establishment of Divisions of the High Court for purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance.

The Commercial & Tax Division and Civil Division are both part and parcel of the High Court and have similar, equal and competent jurisdiction. Either of the Courts have jurisdiction to hear and determine High Court matters filed in their respective Divisions.

With regard to the instant matter, the Applicant filed the application for recognition and enforcement of Final award under **Section 36 of Arbitration Act 1995 & Rule 9 of Arbitration Rules 1997 on 24th April 2019 in Commercial and Tax Division.** The Respondent filed the application to set aside the Arbitral award under **Sections 35(2) & 39 (2) of the Arbitration Act; Article 48 & 50 CoK 2010; Rules 3 & 11 of Arbitration Rules, 1997, Sections 1A, 1B, 3 & 3A of CPA & Order 50 Rule 6 of CPR 2010 on 27th May 2019** in the Civil Division High Court. The Respondent annexed a copy to the application for stay of proceedings in the instant matter.

Section 4 of Arbitration Rules 1997 prescribes as follows;

4. ***(1) Any party may file an award in the High Court.***

> **(2) <u>All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date.</u>**
>
> **(3) <u>If an application in respect of the arbitration has been made under rule 3(1) the award shall be filed in the same cause;</u> otherwise the award shall be given its own serial number in the civil register.**

The Applicant filed the Final Award, the Contract and the Arbitration Agreement in the instant matter. It follows as per the Arbitration Rules that all applications subsequent to filing this application ought to be filed in the instant matter. Reference is also made to all the case-law/ authorities the Respondent annexed, they all confirm that both applications of setting aside and recognition and enforcement of the Final Awards were filed in the same matter and/or consolidated in one file/Cause.

The Respondent indicated that the matter was referred to mandatory court annexed mediation. **Order 11Rule 1& 2 (h) CPR 2010** on Pre-trial Directions and Conferences prescribes that the Order shall apply to all suits except small claims or such other suits as the Court may by order be exempted from this requirement. The provisions allow in addition to any other general power the Court may at the Case Conference make a referral order for alternative dispute resolution.

Applying these provisions to the instant matter, the alternative dispute resolutions mechanisms are not mandatory, the Court may during Case Management refer the matter for mediation if applicable. **Section 35, 36, 37 of Arbitration Act 1995** which deal with setting aside and/or recognition and enforcement of awards are not subject to mediation processes but hearing and determination by the High Court. Secondly, if that was/is the case, the Applicant herein for the enforcement of the Final Award would be part and parcel of the mediation proceedings and would have informed/confirmed mediation process to this court. There was no evidence of the Screening process, appointment of Mediator or any proceedings before the Mediator. If that were the case, either of the parties would have informed this Court at the earliest opportunity when they sought directions and failed to disclose the matter until it was disclosed in Written Submissions.

From the totality of the above considerations, this Court finds that the circumstances set out do not warrant stay of proceedings. The Applicant of the application for stay of these proceedings contrary to the Arbitration Act & Rules 1995 demonstrably sought to benefit from the outlined irregularity which amounts to abuse of the Court Process. The application for stay of proceedings is hereby dismissed with costs.

Whether the Court may set aside the Final Award of 13th February ,2019 or the Court issues further orders including remitting the Final Award for corrective action on the impugned portion of the award, the award of Ksh 1,858,183.24 and the dismissal of the Counterclaim.

Whether the Court may adopt and recognize the Arbitral award of 13th February 2019 as judgment of the Court to be executed as an order of the Court.

The Preliminary issue raised by the Applicant is whether the Application to set aside the Arbitral Award was filed within statutory timelines.

The Final Arbitral award was published on 13th February 2019. The Arbitrator's Notice of the Final Award to both parties through their respective Counsel is attached to the Application with the Final Award. The Notice contains the Applicant's stamp and Respondent's Advocates' stamp both marked received on 14th February 2019.

Section 35 (3) Arbitration Act 1995 provides;

> **(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.**

The Final Award was served and received by both parties as evidenced by the Arbitrator's Notice of Final Award on 14th February 2019. This fact is not contested, the 3 months elapsed on 14th May 2019. The jurisprudence on the extension of time for filing application set aside

Final Award is settled in the following cases;

a. Kenyatta International Convention Centre(KICC) vs Greenstar Systems Ltd [2018] eKLR ***which provides;***

> **Thus, there being no Provision in the Arbitration Act for extension of time , it is to be understood that strict compliance with the timeline set out in Section 35 (3) of the Act is imperative, and comports well with the principle of finality in arbitration. In deed in the Ann Mumbi Hinga case, the Court of Appeal proceeded to hold, in no uncertain terms, that Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from delivery of the award.**

b. Anne Mumbi Hinga vs Victoria Kariuki Gathara [2009] eKLR where Court of Appeal stated;

> **I do not agree that was the intention of Parliament in drafting Arbitration Act, if that was so, it should have expressly stated so and such Rule cannot override Statute, the Arbitration Act. The provisions of Arbitration Act make it clear that it is a complete Code except as regards the enforcement of the award /decree where Arbitration Rules 1997 apply Civil Procedure Rules where appropriate….**
>
> **It is also clear that CPR would not be regarded as appropriate if its effect would be to deny an award finality and expeditious enforcement, both of which are objectives of Arbitration. It follows that all provisions invoked except Sections 35 & 37 of Arbitration Act do not give jurisdiction to the superior Court to intervene and any application filed in the Superior Court other than provided does not give the superior Court jurisdiction. Without jurisdiction Courts should strike out such applications, for want of prosecution.**

See also **Mareco Ltd vs Mellech Engineering & Construction Ltd Misc Cause 59 of 2017 & Talewa Road Contractors Ltd vs Kenya National Highway Authority HCCA 001of 2018 on the same issue.**

From the authorities it is clear that the Court can only deal with Arbitration matters as encapsulated by the Arbitration Act. The Court's jurisdiction is limited by **Section 10 of Arbitration Act** that prescribes that the Court's intervention is/can only be to the extent provided by the Act. **Section 35(3) Arbitration Act** does not employ an opportunity for the Court to exercise discretion and extend the period to file an application to set aside the Arbitral award beyond the statutory 3 months from the date of receipt of the Award. The cited authority of ***Anne Hinga case supra*** ousts the application of **Civil Procedure Act & Rules 2010** as the **Arbitration Act** is a complete Code. **Rule 11 of Arbitration Rules 1997 provides that;**

> **"So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules"**

Therefore, the Civil Procedure Act and Rules cannot supersede the Arbitration Act. Therefore provisions of **CPR 2010** are not applicable where the **Arbitration Act 1995** has explicit provisions on the issue(s).

With regard to **Sections 1A, 1B, 3 & 3A of CPA** in ***Hunker Trading Co Ltd vs Elf Oil Kenya Ltd HCCA 6 of 2010*** the C.A. held;

> **"It seems to us that the exercise of our powers under the 'O2' principle, what we need to guard against any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are O2 compliant so as to maintain consistency and certainty. We think that the exercise of power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, O2 principle could easily become an unruly horse**."

The provisions of **the Arbitration Act 1995** impose statutory period of 3 months to file the application to set aside the Arbitral award. The Respondent received the Final Award on 14th February 2019. The Application to set aside the Final award was filed in **High Court Civil Suit No 110 of 2019 (OS) on 27th May 2019** and copied to this Court. Clearly, the period exceeded the statutory timelines and there is no competent application to set aside the Arbitral award for determination.

Taking for a moment that there was a competent application for consideration, the Respondent raised the following issues;

a. The Award omitted reasons /determination on the Respondent's Counterclaim;

b. The award contains decisions on matters beyond the scope of reference to Arbitration.

c. The award was against public policy.

The Respondent relied on **Section 35 2(a) & Section 37 1(a) of Arbitration Act** which provide;

> **(2) An arbitral award may be set aside by the High Court only if—**
>
> **(a) the party making the application furnishes proof—**
>
> > **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

Section 35 (2) (b) (ii) of Arbitration Act provides

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.

a. The Respondent contends that the Arbitrator failed to consider and determine the Counterclaim and dismissed the same without reasons in the Final Award. I perused contents of the Final Award on this issue I found as follows;

i. Pg 21 of Final Award Clause 8:4 deals with whether the Respondent is entitled to the Prayers sought in the Counterclaim outlined as liquidated damages of Ksh 400,000/-, a refund of Ksh 802,000/- and interest at 14.5%. At Clause 8.4.2 on the issue of delay of completion, the Respondent failed to prove delay 4 weeks after 5th July 2015 and the claim failed.

ii. This Court noted with concern that in the written Submissions filed on 18th September 2019, the Respondent deponed that the completion date was extended to 5th July, 2015 and the actual completion date was however 3rd July 2015. In the submissions filed on 19th September 2019, the Respondent deponed the Claimant handed over the Project on 3rd August 2015. Therefore, even in the submissions, the chronology of events as to extension of completion date and actual handing over the Project is not clear or consistent.

b. With regard to the issue of Project Management Kitty amount Ksh 802,000/- At Clause 8.4.8 the Arbitrator considered the following documents ;

1. Annexture 013, letter dated 12th October 2015 from Project Manager to Claimant,

2. Annexture 014, undated cheque No 1852,

3. Annexture 015, letter dated 14th October 2015 from Claimant to Project Manager

4. Annexture 016, letter dated 21st October 2015 from Project Manager to Claimant

5. furnishing account details

6. Annexture 017, letter dated 27th February 2016 from Project Manager to Claimant on end of Project defect liability period

7. Annexture 018, letter of 2nd March 2016 from Project Manager to Claimant acknowledging receipt of Ksh 802,000 vide cheque no 1852

The Arbitrator also considered the testimony of Project Manager during Arbitration proceedings and found at Clause 8.4.12 that the Counterclaim of Ksh 802,000/- was disallowed as it was a matter that the Project Manager dealt with and confirmed that a blank cheque was issued by the Applicant. The Arbitrator disallowed the claim of Ksh 802,000/- based on the Project Manager's testimony, he had resolved the matter.

The Respondent is aggrieved by the results of the Arbitration proceedings and not that the issue(s) of the Counterclaim was/were not addressed as demonstrated above.

c. On the Arbitral Final Award being contrary to public policy, the Respondent stated the Arbitrator failed to be fair and just in adjudication between parties and made findings in contravention of principles of justice and fairness. The Arbitrator misapprehended the applicable law and reached a wrong conclusion.

In the case of Christ for All Nations vs Apollo Insurance Co. Ltd (2002) EA 366; **the court defined public policy as;**

"although public policy is a most broad concept incapable of precise definition….. 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 was shown that either it was:

***a*) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten or**

b) Inimical to the national interest of Kenya or

c) Contrary to justice and morality."

The Respondent in proving the award was contrary to public policy, he relied on the following grounds;

The award was/is unsupported quantum and in contravention of the applicable statute on Procurement and Constitution of Kenya. The Respondent contented that the Arbitrator agreed with Claimant and capped retention at 5% instead of 10% as provided in the contract between parties at Clause 26.1 of the Contract. Secondly, the Respondent indicated that the finding was contrary to **Section 139 of Public Procurement & Disposal Act** which takes precedence over all other legislation by virtue of **Section 5 of the Act**.

This Court read through the contents of the Final Award and found the following;

The Arbitrator considered the Claimant's and Respondent's Claims on retention monies. At Pg 19 of Final award, the Arbitrator outlined at **Clause 8.3.24, Clause 26.1** of the Contract titled Retention.

Clause 8.3.25 of the Award, the Arbitrator perused letter dated 26th August 2015 by Project Manager to the Respondent that the client was to retain upto a maximum of 5% half (2.5%) of which ought to be released upon project's practical completion.

Clause8.3.26 the Arbitrator found, **"That this Position was confirmed by Project Manager during cross examination in the 2nd hearing. I therefore agree with Claimant's proposition that the limit for retention was to be 5% and not 10% as stated by Respondent."**

From the above outline the Arbitrator considered the Claimant's proposition of 5% retention, the Respondent's Proposition of 10% as per the contract and the Project Manager's position of 5% retention confirmed by the Project Manager's testimony during arbitration proceedings and letter of 26th August 2015 that the retention was 5%.

Surely, if anyone contravened **Section 5 & 139 of Public Procurement & Asset Disposal Act** it is the Project Manager and not Claimant, Respondent or Arbitrator. In fact, the Arbitrator relied on Project Manager's testimony and confirms it was subjected to cross examination for its veracity and credibility of the witness and/or expert. The Arbitrator also considered the Project manager's letter to the Respondent of 26th August 2015. The contravention of public policy if at all may be visited on the Project Manager who lent out his expert opinion on the issue.

The Court considered that parties contracted their choice of dispute resolution as shown in the Arbitration Agreement **Clause 37 of the Contract**. The parties participated in the Arbitration proceedings that culminated with the Final Award of 13th February 2019. **Clause 37.9 of the Contract,** the parties agreed that the award of such Arbitrator shall be final and binding upon the parties in conformity with **Section 32 of Arbitration Act**. There is no provision in the contract that provides for an appeal to this Court. The **Arbitration Act 1995** provides for an appeal in **Section 39** upon agreement/consent by parties which is not the case here.

The case-law below illuminates on the narrow jurisdiction the Court may exercise in **Sections 35 & 37 of the Arbitration Act 1995.**

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."**

Continental Homes Ltd vs Suncoast Investments Ltd [2018]eKLR where the court held that;

> **"In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator."**

DISPOSITION

The Court finds as follows;

1. The Application for stay of proceedings of 27th May 2019 is dismissed with Costs.

2. The Application for setting aside the Arbitral Award in compliance with Rule 4 of Arbitration Rules 1997 ought to have been consolidated in this Cause.

3. The Application for setting aside the Arbitral Award annexed to the Application for stay of proceedings was/is filed contrary to statutory period prescribed Section 35(3) Arbitration Act.

4. The Respondent failed to furnish proof that the Arbitrator acted/Final Award was/is contrary to public policy; that the award omitted reasons for dismissal of Counterclaim and that the award contains decisions on matters that went beyond the scope of reference to Arbitration.

5. The Application to recognize and enforce the Final Award of 13th February 2019 and adopt it as an order of the Court is granted.

DELIVERED DATED & SIGNED IN OPEN COURT ON 15TH APRIL 2010

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MS. KIMATHI WANJOHI MULI ADVOCATES FOR THE APPLICANT

MS PATRICK LAW ASSOCIATES ADVOCATES FOR THE RESPONDENT