REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO.E431 OF 2019.

SET AND SIT CONTRACTORS.....APPLICANT

-VERSUS-

MARE NOSTRUM LIMITED.....RESPONDENT

RULING

1. This ruling is in respect to two applications namely;

a) The application dated 26th September 2019 in Miscellaneous Application No. 431 of 2019 (hereinafter **"the 1st application"**) wherein Set and Sit Contractors (hereinafter **"the Contractor"**), seeks orders that the Final Award made on the 5th August 2019 be recognized and enforced as the judgment of this court .

1. The application dated 4th November 2019 (hereinafter **"the 2nd application"**) wherein the respondent Mare Nostrum Limited (hereinafter **"the Owner"**), seeks orders to set aside the said Award under Section 35 of the Arbitration Act. In the alternative the respondents seeks orders that ***the court be pleased to make such further or other order(s) as it may deem appropriate including remitting the Final Arbitral Award for corrective ac0tion on the impugned portion of the award namely, the award of USD 1,258,231.67 as the total amount due to the respondent so as to eliminate the grounds for setting aside the arbitral award;***

2. When the matter came up for mention on 19th December 2019, parties agreed to canvass the two applications concurrently by way of written submissions.

3. I will however consider the 2nd application first because its determination will have a bearing on whether the impugned Award should be recognized or adopted as sought in the 1st application.

4. A brief background of the dispute is that the respondent/Owner (Mare Nostrum Ltd) contracted the applicant/Contractor (Set and Sit Contractors Ltd) to construct a tourist resort at a cost of USD 1,600,000. In order to finance the construction of the tourist resort, the applicant took a loan of approximately USD 2,000,000 from I & M Bank Limited (the bank) and an overdraft of USD 300,000 to facilitate completion of the works.

5. A dispute arose in relation to the timelines for the completion and workmanship of the works. The dispute was subsequently referred to arbitration as provided for in the Building Agreement dated 12th August, 2013. (the agreement). **Mr. Simon Saili Malonza,** FCIARB (the arbitrator) was the sole arbitrator appointed to resolve the dispute.

6. The Arbitrator rendered his Final Award on 5th August 2019 in which he awarded the respondent the sum of USD 1,258,231.67 with simple interest at 14% per annum from 28th August 2015. Aggrieved by the Award, the applicant filed the 2nd application to set it aside in its entirety on the grounds that it is contrary to the public policy of Kenya as outlined in Section 35(2) (b) (ii) of the Arbitration Act (hereinafter **"the Act"**) and that it contains decisions on matters beyond the scope of the reference to arbitration as outlined under Section 35(2) (a) (i) and (iii) of the Act.

7. The application is supported by the affidavit of the respondents' officer **Wamuyu Nduhiu** and is premised on the main grounds that:-

1. Mr. Simon Saili Malonza was appointed as the sole arbitrator (the arbitrator) to arbitrate a dispute between the parties on 5th May 2015 and delivered the Final Arbitral Award on 5th August 2019 (the Award). In the Award, the Arbitrator awarded the respondent the sum of USD 1, 258, 231, 67 and simple interest at 14% per annum from 28th August 2015, as the total amount due to the respondent (the sum).

2. The Arbitrator ignored the applicant's fundamental constitutional right to be heard by basing his decision to arrive at the sum due to the respondent on his own observations at a site visit where he had expressly directed that no evidence would be received; without sharing or disclosing to the parties what these observations were and how they were arrived at.

3. Neither the applicant nor the respondent were furnished with the Arbitrator's observations made during the site visit or allowed to make any submissions of fact or law in relation to the observations before the arbitrator delivered his Award. In doing so, the Arbitrator violated the applicant's right to be heard as guaranteed under Article 50(1) of the Constitution of Kenya, 2010.

4. The Arbitrator erred in law by disregarding the expert evidence submitted by both the applicant and the respondent; and instead based his entire decision regarding the level of completion achieved by the respondent on a site visit during which he expressly directed that no evidence would be received.

5. Before arriving at a decision to disregard the quantities and values apportioned by the experts of the parties, the Arbitrator ought to have afforded the parties a chance to make submissions and present evidence regarding the level of completion achieved by the respondent.

6. The Arbitrator erred in law by failing to determine the dispute while applying and interpreting the building agreement dated 12th August 2013 entered into between the parties (the Building Agreement).

7. The Arbitrator erred in law by disregarding the evidence and pleadings tendered by the parties; which demonstrated that the respondent had issued payment certificates after valuations for work done under the Building Agreement. In failing to consider that the works were valued and payment certificates raised after the valuation, the Arbitrator went beyond the scope of reference to arbitration.

8. The Arbitrator erred in law by failing to determine the matter in a fair manner by applying an arbitrary standard to the valuation of works which unjustly favoured the respondent.

9. The Arbitrator erred in law by materially altering the Building Agreement and thus affectively imposing a new contract between the parties.

10. The errors in law set out above materially affected the assessment of damages awarded on a quantum meruit basis to the respondent.

11. As a result of the grounds set out above, and importantly the ground of failure to accord a party a non-derogable constitutional right to be heard, the Award is in flagrant contravention of Kenya Public policy as the policy and anchor of the law in dispute resolution is that no party should be condemned unheard.

12. The Award should therefore be set aside based on the grounds set out in Section 35(2) (a) (i),(iii) and (b) (ii) of the Arbitration Act, 1995.

8. At the hearing of the application, **Mr. Ismael,** learned counsel for the respondent submitted that the manner in which the arbitrator arrived at his award disregarded the respondent's right to be heard and is therefore contrary to public policy as the respondent was prevented from fully presenting its case. On public policy, counsel cited the decision in ***Christ for All Nations V Apollo Insurance Company Ltd*** [2002] 2EA366 wherein it was held:

"I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that, as a the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you, an award to be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the policy of Kenya if it was shown that it was either; (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 the justice or morality."

9. Reference was also made to the decision in ***Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd*** [2012] eKLR wherein it was held:-

" ….these terms ("contrary to public policy", "against public policy", "opposed to public policy") do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."

10. Counsel submitted that the Arbitrator violated the respondent's right to a fair hearing when he based his finding on quantum of works carried out by the applicant on the observations that he made at the site when the said observations were not disclosed to the parties so that the respondent could challenge them.

11. The respondent highlighted the errors made by the Arbitrator in assessing the value of work done by the applicant to be as follows:-

a) despite the parties agreeing, by consent, to appoint quantity surveyors, conduct a joint inspection and re-measurement of the site, the Arbitrator disregarded reports of both the applicant's experts and the respondent's expert.

b) The Arbitrator shifted from his seat as an independent arbiter of the dispute to that of an expert, without invitation by either of the parties. The Arbitrator imposed a methodology of "percentage of completion of works" to assess the value of work done.

c) The arbitrator imposed this element of assessing the respondent's claim without the respondent pleading it or making any submissions on this point. The applicant did not have an opportunity to present any evidence in relation to specifically addressing the percentage of completion of the works carried out by the respondent.

d) ***In determining the percentage of completion of works, the Arbitrator relied on undisclosed observations he made during the site visit.***

12. Counsel reiterated that the respondent's right to be heard was ignored when the arbitrator relied on his own undisclosed observations during the site visit when he had expressly directed that no evidence would be received at the site. He maintained that in arbitration, any evidence that forms the basis of the ultimate decision ought to be subjected to the rigours of testing and challenge by way of cross–examination and presentation of counter-evidence. Reference was made to Seminal Arbitration text, Mustil and Boyd; The Law and Practice of Commercial Arbitration in England, 1989 Lexis Nexis (page 312) which states that:-

"Again, parties are entitled to assume that the award will be bases solely on the evidence and arguments deployed up to the moment when the hearing is concluded. Any departure from this general approach is likely to give rise to injustice. If the arbitrator decides the case on a point he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the base (sic) which they have to answer. Similarly, if he receives evidence outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him."

13. It was submitted that the arbitrator's decision to impose a methodology of assessing the percentage of completion of works in order to determine the value of works done fell at odds with his mandate as an independent arbiter of the dispute as none of the parties presented the methodology through their pleadings or evidence.

14. It was submitted that having dismissed the applicant's expert report, it was not open for the arbitrator to impose methodology that was not disclosed to the parties during the conduct of the arbitration or which the parties had no opportunity to provide any input on in relation to its correctness.

15. For this argument, the respondent cited the decision in ***Kenya Breweries Ltd & Another v Alex Ephraim Induswe Civil Appeal No. 215 of 1997*** wherein it was held:-

"……The learned judge seems to have turned himself into an expert in driving skills and came to the conclusion he did as to the negligence on the part of the second appellant, based solely on his theory as to what one can do when driving below or above 50kph……..

In the appeal before us the learned judge had held himself out as a technical expert……The learned judge erred in doing this……."

16. It was submitted that nowhere in the arbitrator's appointment letter was it indicated that he would determine the dispute as an expert.

17. The respondent maintained that the arbitrator erred in law in ruling that the methodology adopted by the parties' experts was unacceptable and proposing an alternative methodology which led the arbitrator to rely on his own observations at a site visit during which he expressly directed that no evidence would be received. It was argued that failure to afford the parties a chance to present arguments on the preferred level of completion amounts to violation of the respondent's right to be heard.

18. It was submitted that the award of USD 1,258,231.67 is an arbitrary sum awarded by the arbitrator without affording the respondent the right to be heard in relation to the methodology used in arriving at the conclusion. It was further submitted that the arbitrator ignored the evidence and pleadings presented by the parties.

19. It was submitted that the arbitrator failed to give reasons upon which his decision/award is based as required under Section 32(3) of the Arbitration Act. Reference was made to the decision in ***Kenya Post Office Saving Bank & Another v The Advertising Company Ltd & Another*** [2017] eKLR wherein it was held:-

"Further, it is clear from the above analysis that the Arbitrator was selective in the evidence on which he based his decision. He gave no reasons for discounting or dismissing the evidence incorporated in the Agreement itself and also the correspondence. In the circumstances, the applicant Post Bank has not had a fair trial. That is contrary to public policy."

20. It was submitted that the Award contained decisions on matters beyond the scope of the reference to arbitration

The applicant's response to the application dated 4th November 2019.

The applicant opposed the respondent's application through the replying affidavit of its Director **Mr. Stephen Nzioki** who avers that the Building Agreement of 12th August 2013 contained an Arbitration Clause that stipulated that the arbitrator's award would be a final and binding dispute resolution mechanism.

21. He avers that the dispute between the parties was referred to the Arbitrator who delivered the Final Award on 5th August 2019 wherein he clearly set out the issues he considered in arriving at his decision on the level of completion by the applicant. He states that the site visit of 19th November 2019 was for the purpose of visually appreciating the subject matter of the proceedings after which an award was made based on the evidence presented to the tribunal.

22. He further states that the arbitrator analyzed, compared and then disregarded the evidence of the expert witnesses because of the methodology that they had used. He adds that the final award of USD 1,258, 231.67 is well within the amount claimed contrary to the respondent's claim that the arbitrator went beyond the scope of the dispute.

23. He further avers that one of the issues in the List of Agreed Issues was the value of the work performed by the applicant and that it was therefore unfair for the respondent to claim that the Arbitrator ought to have given the parties a chance to interrogate his analysis of the testimonies presented before him. He further states that all the matters considered by the arbitrator were within his scope and that the award conclusively resolves the dispute between the parties.

24. At the hearing of the application **Miss Wanjiru,** learned counsel for the applicant submitted that even though the application is framed as seeking to set aside the Award under the ground of "**Public Policy"**, the respondent's application is essentially an appeal against the Final Award yet the parties did not reserve a right of appeal as stated under Section 39 of the Act. Counsel maintained that the respondent is bound by the Final Award by virtue of Section 32A of the Act.

25. Counsel argued that the application is predicated on matters of law and/or facts and errors of law and/or fact on the part of the Arbitrator which are not grounds for challenging the Award as being contrary to public policy. It was submitted that this court lacks the jurisdiction to deal with the grounds of the application bordering on errors of law and fact that amount to an appeal. For this argument, counsel relied on the decision in ***Continental Homes Ltd v Suncoast Investments Ltd*** [2018] eKLR wherein a contested site visit was conducted and the court held:-

> ***"[Citing the case of Anne Mumbi Hinga V Victoria Njoki Gathaara [2009] eKLR]***
>
> ***"….We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the Award except in situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right to appeal to the High Court or the Court of Appeal against an Award except in the circumstances set out in Section 39 of the Arbitration Act….***
>
> ***This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a difference conclusion from that reached by the arbitrator."***

26. It was submitted that the owner did not furnish proof of some incapacity as required by law or that it did not have notice of the appointment of the arbitrator or the arbitral proceedings so as to justify the application to set aside the award. It was argued that the owner was given reasonable opportunity to present its case as shown by the fact that it called six witnesses and filed written submissions.

27. It was submitted that the owner's complaint on the site visit is unfounded as Section 20 of the Act avails parties the right to agree on the procedure to be followed by the arbitral tribunal in the conduct of proceedings and that the site visit was agreed upon by the parties in accordance with the principle of party autonomy in arbitration. Counsel added that having agreed to the procedure governing site visit, the owner is stopped from turning around and stating that it was deprived of a right to be heard.

28. On the owner's challenge that it did not get an opportunity to comment on the arbitrator's observations, counsel submitted that the owner was not entitled to do so and that the owner has not demonstrated how the arbitrator used his own observations to reach a conclusion that did not flow from evidence, testimony and submissions already presented before him.

29. Counsel emphasized that the Arbitrator applied his reasoning and observation to the evidence already placed before him. It was submitted that the Arbitrator was not a lay person as he is a qualified Quantity Surveyor and a lawyer and further; that the mere fact that he preferred the evidence of one expert over the other did not mean that the owner's right to fair trial was breached. Counsel argued that the fact that the Arbitrator ignored both parties' experts' evidence is proof of the fairness in the Arbitrators approach. Counsel contended that the recognition of the Final Award would not be in conflict with public policy in Kenya.

Analysis and determination.

30. I have carefully examined the owner's application for the setting aside of the Final Award, the contractor's response and the parties' rival submissions together with the authorities that they cited. The main issue for determination is whether the owner has made out a case for the setting aside of the Arbitral Award.

31. It was not in dispute that the parties herein entered into Building Agreement that had an arbitration clause at Clause 6.1.1 thereof which stipulates as follows:-

> "***Disputes between the owner and the contractor will be settled by mutual agreement. If a dispute is not settled within then (10) days, the matter will proceed to binding arbitration according to procedures of the Kenyan Arbitration Association after notice and demand."***

32. Needless to repeat, a dispute arose between the parties that led to the filing of HCCC No. 13 of 2015 which suit was compromised when

the parties agreed to refer the dispute to Arbitration for a final and binding determination. The Final Arbitral Award was made on 5th August 2019 wherein an award of USD 1,258,231.67 was made in favour of the contractor thereby precipitating this application.

33. Section 35 of the Arbitration Act stipulates 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 in conflict with the public policy of Kenya.***
>
> ***(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.***
>
> ***(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.***

34. In the present case, the Owner's ground for seeking the setting aside of the Arbitral Award, as I understand it, is that the Award was made in total disregard to the owner's right to be heard and is thus contrary to public policy. The owner also maintained that the arbitrator went beyond the scope of the reference.

Scope of the Reference

35. The Owner argued that by disregarding the evidence and the pleadings tendered by the parties; which demonstrated that the respondent had issued payment certificates after valuation for work done under the building agreement, the arbitrator went beyond the scope of the reference to arbitration.

36. In ***Mahican Investment Limited v Giovani Gaid & 80 Others*** it was held:

> "***In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute."***

37. The Owner's statement of claim before the tribunal shows that the cause of action was for breach of various terms of the Building Agreement that caused it loss and damage amounting to Kshs. 124,551,940.97 and USD 2,230,297.57. On its part, the Contractor denied the Owner's claim and maintained that it dutifully complied with the agreement. The Contractor claimed that the Owner failed to pay it for the services amounting to USD 1,807,435.23 and a further sum of kshs. 7,895,710.19 being the expenses it allegedly incurred on behalf of the plaintiff. The contractor sought to recover the said amounts by way of a counterclaim against the owner.

38. In his Final Award dated **5th August March 2019**, the Arbitrator highlighted the history of the dispute through the Building Agreement and the Arbitration Clause. The arbitral proceedings commenced with a preliminary meeting when the issue of who between the parties was the rightful claimant and in a ruling delivered on 23rd June 2015, it was held that the Owner was the rightful claimant in the reference. The tribunal thereafter directed the parties to file 2 copies of their expert's report and a reply to the opposing party's report.

39. The Award shows that the tribunal rejected the parties' application for security for costs and the Contractor's preliminary objection to the tribunal's jurisdiction.

40. The Award further shows that the arbitrator heard the testimonies of the Owner's 6 witnesses while the Contactor called a total of 3 witnesses. The arbitrator also looked at the documents filed as indicated at page 697 and 701 of the Award. The parties highlighted their submissions after which the Arbitrator stated as follows in connection with the issues for determination:

> ***"Parties provided the Tribunal with an agreed list of issues on 22nd June 2017. The issues are as replicated below:***
>
> - ***What was the scope of the Building Agreement signed on 12th August 2013 (the Building Agreement") between the parties?***
> - ***Were there variations to the Building Agreement?***
> - ***Whether the Building Agreement was breached and by which party?***
> - ***What is the value of the work performed by the Respondent under the Building Agreement?***
> - ***Are the parties entitled to the prayers sought?***
> - ***Damages.***
> - ***Costs. "***

41. The Arbitrator then proceeded to determine each of the issues listed in the said list of agreed issues in light of the evidence adduced by the parties and the applicable law, and made his findings whose summary is at pages 875-876 of the Final Award. His findings were, *inter alia* that, the Claimant/Owner shall pay the Contractor a total sum of USD 1,258,231.67 which sum shall carry simple interest at the rate of 14% per annum from 28th August 2015 till payment in full.

42. Looking at the issues presented by the parties in the list of agreed issues and the determination made by the arbitrator on each of the said issues, I find that the arbitrator cannot be said to have gone on a frolic of his own or beyond the scope of his reference. My further finding is that the arbitrator restricted himself to determining only those issues that were raises in the pleadings and related to the dispute that was before him.

Public Policy

43. Black's law Dictionary defines public Policy as follows:

> "***Policy: The general principles by which a government is guided in its management of public affairs.***
>
> ***Public Policy: Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy"***

44. Public policy has been stated to be an indeterminate and fluid principle which fluctuates with time and circumstances. There is nevertheless a beaten path in terms of precedents which show the key factors to take into consideration in determining whether or not an award is in conflict with public policy. A case in point is the oft cited case of ***Christ for all Nations v Apollo Insurance Co. Ltd.*** **(2002) EA 366 where Ringera, J**, (as he then was) had occasion to consider the concept of public policy from the prism of **Section 35 (2)(b)(ii)** and had the following to say:

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

45. In ***Glencore Grain Ltd v TSS Grain Millers Ltd*** [2002] IKLR 606, it was held:

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

46. While advancing the argument that the award was contrary to public policy, the Owner argued that its right to a fair hearing was violated when the Arbitrator based his findings on quantum of works carried out by the Contractor on the observations that he (the arbitrator) made at the site when the said observations were not disclosed to the parties so that the owner could challenge them. The Owner further accused the Arbitrator of imposing is own methodology of assessing the percentage of completion of works thus stepping out of his shoes as an independent arbiter.

47. The gist of the Owner's case is that the failure by the Arbitrator to inform it of the observations he made during the site visit, which observations subsequently formed the basis of his determination of the sum to be awarded to the contractor, violated the owners constitutional right to a fair hearing as the applicant was condemned unheard. In other words, the owner expected that after the site visit, the Arbitrator would make known his observations to the parties and, according to the owner have the said observations subjected to cross-examination and presentation of counter evidence.

48.**The constitutional precept and a requirement of natural justice that no one should be condemned unheard was well articulated in *Grace Keung & Another v NSSF* HCCC No. 703 of 2010 thus:**

> ***"The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be provided with the opportunity to make submissions to the case."***

49. In the present case, it is not in dispute that the owner received notice of the case before the arbitrator where it was accorded a chance to present its evidence and submissions. Indeed, the court record clearly shows that the Owner presented witnesses before the Tribunal besides the final submissions that it tendered before the Final Award. This court notes that besides the owner's general statement that the arbitrator disregarded the expert's evidence and relied on his own untested observations in making the award, the owner did not specify or pin point the portions of the award that contain the Arbitrator's said observations. It was common ground that the dispute between was in respect to the ascertainment of the value of the work done by the contractor, in which case, the purpose of the site visit was to enable the Arbitrator to appreciate the value of such work.

50. To my mind, the moment the parties agreed on the site visit, the site became part of the evidence, just like any other evidence documentary, photographic, oral or material exhibit that may be submitted before the court of law/Tribunal for the arbitrator's consideration. It is for this reason that I find the owner's argument that the Arbitrator should have presented his observations for scrutiny through cross examination to be quite baffling, if not absurd, as it is akin to suggesting that an arbitrator/judge should subject his thoughts or views on any piece of evidence presented before him for scrutiny by the parties.

51. In my humble view, such a suggestion is not tenable as it would mean that the Arbitrator then becomes a witness to be cross examined in the case. I am guided by the decision in ***EPCO Builders v Kenya Bureau of Standards*** [2017] eKLR where it was held;-

> ***"In the face of these express provisions, EPCO does not begrudge the Arbitrator for taking into account the Trade usage but assails him for failing to afford the parties the opportunity of addressing him on the trade usage.***
>
> ***There is undoubtedly great force in the submission by counsel for EPCO that whilst an Arbitral Tribunal (I would add courts of law) does not have to consult parties on its thinking process in reaching a decision, it must do so if it would reach a decision which does not reasonably flow from any of the arguments already presented to it (Re Ahmani (supra). But this submission is not available to EPCO in instance because it had already made arguments on the profit margin to be applied but the Arbitrator found it unacceptable and instead applied what he found to be the margin that accorded with the trade usage of the industry".***

52. Guided by the decision in the above cited case, I find that it was not necessary that the observations of the arbitrator at the site be subjected to cross examination by the parties as has been suggested by the owner. This court notes that contrary to the owner's assertion that the Arbitrator dismissed/disregarded the experts' evidence and imposed his own methodology in assessing the percentage of completion of the works done, the Arbitrator, in his well considered determination, gave his reasons for rejecting the experts' reports and went ahead to determine the dispute based on the evidence presented by the parties. In this respect, I note that the arbitrator rendered himself as follows:

> ***"None of the experts provided the tribunal with a scientific methodology on how they arrived at the perceived completion percentages. The construction industry has ways and means by which architects, engineers or quantity surveyors scientifically measure the level of completion of construction works.***
>
> ***Even where alleged joint measurements for elements of work done were done, the resultant quantities measured were different for the same items. The experts in this case, failed to present a scientific or an industry acceptable method of valuing completion of works and the tribunal cannot therefore rely on their respective subjective opinions in this regard.***
>
> ***The tribunal will now therefore rely on the other evidence submitted by the parties and the contract to ascertain the level of completion of works achieved by the respondent."***

53. Having regard to the above extract of the Final Award, I find that the owner's claim that the Arbitrator relied on his own observation and did not consider parties' pleadings and evidence is incorrect and misleading. I also find the Owner's argument that the Arbitrator's appointment did not indicate that he would determine the dispute as an expert to be off the mark and equally misleading as this court is of the humble view that the parties agreed on the appointment of the arbitrator based on his expertise as an advocate and Quantity Surveyor who is best suited to deliberate on the subject dispute which was the value of the works done. Under the above circumstances, it would beat logic if the arbitrator was to fail to apply his own expertise/knowledge of the law and Quantity Survey to the dispute at hand.

54. My further finding is that contrary to the Owner's claim that the Arbitrator relied on his own undisclosed observations at the site in

determining the value of the work done, the findings in Final Award show that the observations at the site were not the only considerations in determining the extent of the work as the Tribunal also took other variables such as the evidence presented by the parties and the terms of the contract into account. The Arbitrator expressed himself, in part, as follows on this issue :

> ***"The courts have laid down no rules limiting the way in which a reasonable sum is to be assessed. Different consideration can arise depending on whether the claim is for a quantum meruit in the absence of a contract or a reasonable price payable within a contractual framework.***
>
> ***Where quantum meruit is recoverable for work done within an existing contract, the work is generally considered as having been performed to a certain extent under the contract and the contractor should be paid at a fair commercial rate for the work done. This principle was established in the case of ERDC Group Limited V Brunel University [2006]***
>
> ***The approach the tribunal will adopt in reaching a reasonable value for the level of works in respect of the suspended works is to apply a percentage completion to the lump sum values given to those elements in the contract bills of quantities, to arrive at their reasonable value.***
>
> ***The works that have reached substantial completion will be valued at 100% and the items that were completely omitted will be valued at 0%.***
>
> ***The tribunal will rely on the photographic evidence given on account of the suspended elements of work, and from its observations while on the site visit, to determine the extent of works completed on those elements of the project.***
>
> ***Having established the principles to be adopted to value the works done by the respondent, the Tribunal's determination is as follows:***

DESCRIPTION	***LUPSUM VALUES***		***AS BUILT VALUES***	
	KSHS	***USD***	***KSHS***	***USD***
VILLA O1 (5)	***41,420,263.39***	***487,297.22***	***41,420,263.39***	***487,297.22***
VILLA 02(2)	***31,875,594.00***	***375, 00.99***		
– Complete Villa 02			***31,875,594***	***375,006.99***
–Partially done villa 02(substructure work & walling				
– VILLA 03	***79,238,764.75***	***932,220.76***	***0***	
RESTAURANT	***49,524,227.97***	***582,637.98***	***49,524,227.97***	***582,637.98***
THALASSOTH ERAPY	***6,002,936.72***	***70,622.78***	***1,500,734.18***	***17,655.70***
MAIN POOL AND POOL	***15,990,196***	***188,119.95***	***15,990,196***	
BAR STAFF VILLAGE				***188,199.95***
	15,007,341.81	***176, 56.96***	***15,007,341.81***	***176,556.96***
Villa 01 PLUNGE POOLS, external	***12,420,000 146,117.65***	***0***	***-***	***-***
Terraces & paths, landscaping and fencing RESTAURANT	***2,250,000***	***-***		

external	*26,470.59*	*0*	*-*	*-*	
terraces &paths, and planters				*-*	
main pool &	*509,500*			*-*	
pool bar and	*5,994.12*	*0*	*-*		
changing rooms external terraces & paths, planters, pergola & fencing.					
thalassotherap	*2,352.833*				
y external	*27,680.39*	*0*			
landscaping and fencing					
villa 02 plunge	*3,799,875*	*-*			
Pools, external	*44,704.41*	*0*			
terraces & PATHS, planters, landscaping and fencing					
staff village	*591,500*			*-*	
terraces & PATHS, planters, garden soil and fencing					
gatehouse &	*4,787,800*	*-*	*-*		
DRiveway	*56,327.06*	*100*			
				4,787,800	*56,327.06*
Boundary WALL	*1,211,962*	*14,258.38*	*100*	*1,211,962*	*14,258.38*
Stairways	*15,000,000*	*176,470.59*	*100*	*15,000,000*	*176,470.59*
walk/drive	*10,000,000*	*117,647.60*	*100*	*10,000,000*	*117,647.60*
ways					
landscaping	*1,020,000*	*12,000*	*5*	*51,000*	*600*
waste management equipment					
(community COOKER)	*-*	*-*	*-*	*-*	*-*
mep works	*59,126,705.84*	*695,608.30*	*100*	*59,126,705.84*	*695,608.30*
total		*245,099,417.7*	*3,075,690.3*		
			0	*3*	
VAT@16%		*39,215,906.83*	*492,110.44*		
GRAND TOTAL		*284,315,324.5*	*3,567,800.6*		
3	*7*				

55. As shown herein above, the conclusions made by the Arbitrator were not solely based on the observations made during the site visit but were also based on veritable legal principles and an analysis thereof by the Arbitrator vis-a-vis the evidence and submissions made by the parties.

56. In his Award, the Arbitrator provided reasons as for his findings on the value of the works done. I therefore find that any challenge thereto, under Section 35 of the Arbitration Act, would be untenable, given that the Arbitrator is undoubtedly the master of the facts. To my

mind therefore, the impugned findings are neither an affront to the Constitution or the laws of Kenya, nor are they inimical to justice and morality. To the contrary, what would be contra-public policy would be to allow a party who admittedly did not pay its contractor for the value of the work done to be allowed to retain the benefits of such work at the expense of the contractor. The Arbitrator noted that the Applicant had conceded that the works were done at its premises; and that this was not in issue. I find that the Arbitrator was perfectly in order to consider and make a determination that would serve the ends of justice in the matter.

57. For the above reasons, I find that it cannot be said that the Award was contrary to public policy of Kenya. Besides, it is trite that public policy can be an "unruly horse," such that the words of **Ringera, J**. in the ***Christ for All Nations Case*** (supra) will be applicable. He expressed the view that:

> *"**Justice is a double edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust…in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly 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 by any stretch of legal 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 arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."***

58. In the result, it is my finding that the Owner's application has failed to satisfy the Court that there are justifiable grounds for setting aside the Final Award dated 5th August 2019.Consequently, I dismiss the application dated 4th November 2019 with costs to the contractor.

59. Having already noted in this ruling that a determination of the Owner's application will have a bearing on the determination of the Contractor's application and having deemed the Owner's application to be a response the contractor's application dated 26th September 2019, I find that a dismissal of the Owner's application connotes the success of the Contractor's application.

60. This is to say that the dismissal of the application dated 4th November 2019 now paves the way for the granting of the orders sought in the application for the recognition and enforcement of the Final Award.

61. The upshot is that I hereby allow the application dated 26th September 2019 with costs to the Contractor.

Dated, signed and delivered via Microsoft Teams at Nairobi this 21st day of May 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. Angwenyi for the contractor

No appearance for owner

C/A & DR – Hon. Wanyama