REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 671 OF 2019

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

IN THE MATTER OF THE ARBITRATION RULES 1998

AND

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE OF AND ARBITRATION AWARD DATED 2ND OCTOBER, 2019

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

VISHNU BUILDERS &

DEVELOPERS LIMITED.....CLAIMANT/RESPONDENT

-VERSUS-

MAOW HOLDINGS LIMITED.....RESPONDENT/APPLICANT

RULING

Before me are two applications; One dated the 17th day of October, 2019 and another one dated the 24th day of June, 2019. The court directed that both applications be heard together.

The application dated 17th October, 2019 is brought under Section 35 of the Arbitration Act, Rule 7 of the Arbitration Rules 1997, Sections 1A, 1B and 3A of the Civil Procedure Act. It seeks the following orders;

1. Spent

2. Spent

3. That this honourable court be pleased to set aside the arbitration award published on the 2nd October, 2019.

4. That in the alternative to prayer 3 above, the court be pleased to make such further or other order(s) as it may deem appropriate including remitting the final award for corrective action on the impugned portion of the award namely the awards of Kshs. 1,508,750 and Kshs. 29,622,812.50 on unsupported quantum and interest thereon.

5. That in the alternative to prayer (3) above, the court be pleased to make such further or other order(s) as it may deem fit with regard to all or part of the award published on 2nd October, 2019 including remitting the award for corrective action on any aspect the court may deem appropriate and on such conditions as it will impose.

6. That the costs incidental to this application be provided for.

The application is based on the grounds set out on the body of the same and its supported by the affidavit of MUMIN MOHAMMED, Sworn on 17th October, 2019.

The application is opposed.

The respondent filed a replying affidavit sworn by BHIMJI M. RABADIA, on the 8th November, 2019.

In the supporting affidavit, it is deponed that, the applicant and the respondent were parties to a construction agreement for construction and completion of building works (the works) on L. R. No. 11736 and L. R. No. 11737.

That on or about 12th June, 2018 being a date after commencement of the works, the applicant terminated the contract for reasons of breach of various performance terms of the contract by the respondent.

The respondent being aggrieved by the termination of the said contract declared a dispute and referred it to arbitration which commenced sometime in the month of October, 2018 but in the end, the arbitration proceedings yielded an award dated 2nd October, 2019 in the following terms;

1. The applicant was declared to have breached the agreement.

2. The respondent was awarded Kshs. 1,508,750 on account of work done.

3. The respondent was awarded Kshs. 29,622,812.; 50cts. being lost profits.

4. The total amount due from the applicant to the respondent be reduced by Kshs. 2,300,000 being advance payment as mobilization fees.

5. Simple interest was awarded on (b) and (c) above less the Kshs. 2,300,000 computed from the date of filing the claims till payment in full

6. costs.

The applicant has now approached this court vide the application dated 17th October, 2019 seeking to set aside the award on the grounds that the same is unjust, unfair and contrary to public policy in that;

a) The arbitrator relied on manipulated falsified documents and timelines on the contract document in making his decision.

b) The arbitrator erred by failing to consider that the respondent/claimant was also in breach of contract.

c) No evidence was tendered to strictly prove the claim of Kshs. 1, 508, 750 being presented as special damages.

d) The arbitrator erred in awarding the respondent/claimant lost profits.

e) No evidence was tendered to strictly support/prove/justify the award of Kshs. 29,622,812.50cts awarded as lost profits.

f) The arbitrator erred in failing to consider that the claimant/respondent performed only a minute part of the contract and the applicant/respondent fully undertook the project upon taking over from the claimant.

In the replying affidavit, it is deponed that the respondent fundamentally breached the agreement by ejecting the claimant from the site, without just and reasonable cause and without following the due procedure of termination under the contract. That as a consequence of that blatant breach of the agreement, the claimant suffered loss and damages which included loss of profits and costs of work already done and it was forced to vacate the site by the respondent.

The deponent confirmed the events leading to the appointment of the arbitrator and the proceedings that culminated to the award signed on 2nd October, 2019 and the orders made therein. He avers that the respondent's application dated 17 October, 2019 is an abuse of the court process, bad in law and totally defective.

The respondent avers that the application is an affront to a well-established principle of finality of an arbitral award as enshrined in the Constitution and Sections 10 and 32A of the Arbitration Act and for that reason, the court lacks the requisite jurisdiction to entertain the application and interfere with the Arbitral Award.

The deponent asserted that parties willingly submitted their dispute to arbitration; the parties made representations and were represented by advocates during the arbitral proceedings and cannot now be heard to state that the arbitrator relied on manipulated documents in making his decision. He contended that the grounds cited in support of the application do not fall within the strict and narrow ambit of the grounds set out in Section 35(2) of the Arbitration Act, and are therefore not sustainable.

The deponent asserted that the application is without specificity as its not worded within the confines of Section 31 of the Arbitration Act and

that the decision was arrived at following the application of legal principles, facts and evidence including admissions by the respondent's sole witness and expert opinion which the arbitrator considered.

The respondent filed a further affidavit sworn by the same deponent, Mumin Mohammed on 14th November, 2019 in which he reiterated that the termination was due to the claimant's breach of the agreement and stated that the claimant did not incur any loss since no work had been conducted from whose income profits would be derived. The other contents of the further affidavit reiterated those in the supporting affidavit.

The second application which is by way of chamber summons is brought under Section 36 of the Arbitration Act 1995 and Rule 6 of the Arbitration Rules, 1997. It is an exparte application seeking the following orders;

1. The claimant be granted leave to adopt and enforce as a decree, the final award dated the 2nd October, 2019 by the sole Arbitrator herein, Mr. Calvin Nyachoti.

2. The Respondent be ordered to pay the costs of the suit and the application.

3. The respondent be ordered to pay all such costs and expenses as are incidental to the enforcement and exemption of the said award.

The application is premised on the grounds on the face of it and its supported by the affidavit of BHIMJI M. RABADIA, Sworn on the 12th June, 2020.

In the said affidavit, he avers that the dispute between the claimant and the Respondent was referred for Arbitration and the final award was published by the Arbitrator on 2nd October, 2019. That following the said award, the claimant has paid a total of kshs. 1,322,416.64cts towards the arbitrator's costs and other costs attendant to the arbitration, which costs were to be jointly and equally borne with the respondent and which are therefore recoverable from the respondent. That despite demand, the respondent has refused, neglected and/or otherwise failed to pay the same or any part thereof.

He has urged the court to grant the orders sought in the application otherwise, the object of the entire arbitration and final award will be rendered nugatory.

The applications were disposed off by way of written submissions which this court has duly considered together with the affidavits both in support of and in opposition to the applications.

In my considered view, there is only one issue for determination as follows;

a) Whether the application dated 17th October, 2019 satisfies the grounds for setting aside the arbitral award under Section 35 of the Arbitration Act.

The answer to this issue will determine the fate of the chamber summons dated 24th June, 2019.

I will now proceed to consider the issue at hand. The application dated 17th October, 2019 is mainly brought under Section 35 of the Arbitration Act.

The said Section provides for the grounds upon which an Arbitral Award may be set aside. The respondent/applicant has based its application on the grounds that the award is unjust, unfair and contrary to public policy. In the alternative, it has sought that the award be remitted for corrective action on the impugned portion of the award of Kshs. 1,508,750 and Kshs. 29,622,812 on unsupported quantum.

Section 32A of the Arbitration Act provides as follows;

"Except as otherwise agreed upon by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this act".

On the other hand, Section 10 of the Arbitration Act provides as follows;

"Except as provided in this act, no court shall intervene in matters governed by this Act".

However, Section 35 of the Arbitration Act provides for instances in which the High Court can set aside an Arbitral award and one of those instances is if the award is in conflict with the Public Policy of Kenya.

The applicant contends that the award is against public policy for the reasons that he has given and which, I have set out elsewhere in this ruling.

Public policy was canvassed with clarity in the case of ***Set and Sit Contractors V Mare Nostrum Limited [2020] eKLR*** where the court stated;

> ***"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 often cited case of Christ for all Nations vs. Apollo Insurance Company Limited (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;***
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> ***"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.***

In the case of ***Grain Limited vs. TSS Grain Millers Limited (2002) eKLR 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 word "illegal" here would hold a wider meaning than just "against" the law."**
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> ***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.***

The respondent/applicant avers that the arbitrator awarded specific damages devoid of strict proof of the amounts awarded being Kshs. 29,622,812.50 and Kshs. 1,508,750 respectively for loss of profit and on account of work already done. The respondent/applicant submitted that the claimant had the onus of producing authentic report quantifying and particularizing the expected cost of the project so as to arrive at the anticipated profit. It was contended that the award was a pure product of speculation and guesswork which was in blatant contravention of the general rule that special damages must be specifically pleaded and strictly proved. The applicant relied on the case of ***Kenya Tourist Development Corporation vs. Sundowner Lodge Limited (2018) eKLR.***

The other ground of the application is that arbitrator relied on manipulated timelines to make his determination. It insisted that the claimant had been on the site for roughly two weeks as opposed to the 5-day timeline that it alleges.

The respondent/claimant on his part submitted that under Section 35 of the Arbitration Act, only the process of the Arbitration and the conduct of the Arbitrator can be challenged in an application to set aside an award and not the merits of the award citing the case of ***Talewa Road Contractors Limited vs. Kenya National Highway Authority (2019) eKLR*** in which Makau J. quoted High Court in Tanzania in the case of ***DB Shapriya & Company Limited vs. Bish International BV (2003) 2EA 411*** thus;

> ***"Except for ground (1) which imputes bias, all the remaining grounds are against the findings of the arbitrator on the questions of either fact or law. However erroneous these findings may be, they are not subject to court's intervention. These allegations would have been legitimately adjudicated on merit by this court if they involved errors of law apparently exhibited on the award. In the absence of this legal qualification the court declines to interfere with the arbitrator's findings which are the subject matter for grounds (ii) to (XXII) of the petition."***

It was submitted that the respondent/applicant has failed to satisfy any of the grounds outlined in Section 35 of the Arbitration Act and that the orders sought by the applicant/respondent amounts to an appeal against the award. It has been argued that the applicant is inviting the count to exceed its mandate under the Act.

In the case of ***Kenya shell Limited vs. Kobil Petroleum Limited (2006 eKLR*** the court had this to say about public policy.

> ***"Although public policy is a broad concept, incapable of precise definition…… an award could be set aside under Section 35(2)(b)(2) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was."***
>
> i. Inconsistent with the constitution or other laws of Kenya whether written or unwritten or
>
> ii. Inimical to the national interest of Kenya or
>
> iii. Contrary to justice and morality.

The court has considered the arguments mounted by the parties herein and particularly on the issue of the public policy. From the authorities relied on by the parties and particularly that of ***set and sit contractors (supra)*** and that of ***Kenya Shell Limited (supra***), it is clear that public policy is a broadest concept incapable of precise definition and it has been stated to be indeterminate and fluid principle which fluctuates with time and circumstances. However, the courts are in agreement that for an award to be set aside under Section 35(2) (b)(ii) of the Arbitration Act the applicant has to prove one of those three conditions as set out in those two authorities.

The amount awarded by the arbitrator in the sum of Kshs. 29,622,812 for loss of profits is by no means a small amount.

In awarding this amount, the arbitrator considered the claimed amount of Kshs. 35,547,375.

As per the proceedings before the arbitrator and in the award, the figure was capped at that amount guided by QS Report by Davson & Ward. According to the report, that amount is 30% of the total contract value of Kshs. 120,000,000 less work done and the materials on the

site, the value which, he assessed at kshs. 1,508,750/.

The witness explained that from his experience of 35 years the average profit they make ranges between 20-30 % for similar projects that they undertake and therefore, they were expected to gain were it not for the unfair termination. The arbitrator noted that the witness did not produce any documents as evidence of the costs of running such projects and profits made.

On the other hand, the respondent's witness differed with the claimant and stated that he had been in business for about 20 years. According to him, profits are not guaranteed. Certain projects may make profit of different percentages while some make losses but can only be ascertained after completion of a particular project. He indicated that the claim of 20-30% of the project costs as profit is too ambitious noting that the least profit he has ever made was 5% and the highest around 15%.

The arbitrator noted that the claimant and the respondent instructed quantity surveyors who prepared separate valuation reports. He deduced that the respective valuations were intended to measure the works actually performed by the claimant and materials on site.

He nonetheless noted that Davson & Ward Instructed by the claimant undertook a computation of anticipated profits on outstanding works.

Conversely, the valuation report by QS EM Githinji instructed by the respondent solely measured hoarding works as per the QS's testimony.

The arbitrator further noted that in the report by Davson & Ward, the 30% indicated as the anticipated profit does not offer any explanation on why this particular percentage should apply. On the other hand, the report by QS Githinji does not speak to anticipated profit, yet he went ahead and awarded the aforesaid sum without explaining the legal basis for such an award. The same argument would also follow for the award of kshs. 1,508,750.00 on account of work done.

As rightly submitted by the applicant, the award was not supported by evidence or the law and therefore the same was contrary to the law. I would set the same aside for being inconsistent with the laws of Kenya and for being in conflict with the public policy of Kenya as espoused in the two cases that I have quoted hereinabove.

In the end, I find that the application dated 17th October, 2019 has merits and I allow the same.

Having allowed the application dated 17th October, 2019, it follows that the chamber summons dated 24th June, 2020 cannot stand. The same is hereby dismissed

Each party to bear its own costs of the applications.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 15th day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

……. for the Plaintiff

……. for the Defendant