



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION- MILIMANI**

**MISC CAUSE NO. 398 OF 2017**

**IN THE MATTER OF: THE ARBITRATION ACT, 1995 AND THE ARBITRATION RULES 1997**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF AN ARBITRATION AWARD ARISING FROM ARBITRATION**

**BETWEEN**

**ITALBUILD IMPORTS LIMITED.....APPLICANT**

**AND**

**MINISTRY OF LAND, NATIONAL**

**HOUSING AND URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

**APPLICATION**

The Plaintiff/Applicant by way Chamber Summons dated 22<sup>nd</sup> September 2017 brought under **Section 36(1) (3) & 39 of Arbitration Act 1995 & Rules 6 & 9 of Arbitration Rules 1997**, sought leave to be granted by the court to enforce the arbitration tribunal's award dated 30<sup>th</sup> November 2016. The grounds for the application were set out in the affidavit of Vittorio Veneziani, the Managing Director of the Plaintiff as follows;

- a) That the contract by the 1<sup>st</sup> Respondent was for the completion of Government Quarters for the Deputy President in Karen, Nairobi, Contract No. NB801-JOB No. 7937C dated 10<sup>th</sup> August 2009;**
- b) That the matter was referred to arbitration where the Applicant was awarded on 30<sup>th</sup> November 2016;**
- c) That efforts to obtain amount owed from Respondents have borne no fruits;**
- d) That no application was filed to set aside the arbitral award since the day it was issued.**

In a Further affidavit by **Vittorio Veneziani** dated 14<sup>th</sup> June 2018, he stated that;

- a) The total amount of the arbitral award payable was Kshs. 11,134,564.53;**
- b) The amount accrued interest at a contractual rate of 16.96% from 20<sup>th</sup> August 2017 and as at 7<sup>th</sup> February 2018, interest for delayed payments amounted to Kshs. 8,438,401.42;**
- c) On 7<sup>th</sup> February 2018, the Respondent made part payment of Kshs. 9,948,728;**

d) **The Applicant prays for an order for enforcement of the remainder sum of Kshs. 9,624,237.95.**

### **RESPONDENTS WRITTEN SUBMISSIONS**

The Respondent filed their opposition to the application above dated 24<sup>th</sup> January 2019. The Respondent contends that whereas they are not contesting the arbitral award of 30<sup>th</sup> November 2016 of the decretal amounts duly awarded and payable to the Applicant.

The Respondent sought clarification on the following grounds;

a) **The Applicant claims interest at the rate of 16.96% per annum. The Respondent's view is that interest should be computed at CBK Base Lending Rate + 3% as per Clause 23.3 of the Contract.**

b) **The detailed outline of the segments of arbitral award that the Respondent was/is to pay the Claimant is Ksh. 9,948,728/-**

c) **On 7<sup>th</sup> February 2018 the award of Ksh. 9,948,728/- was paid; the outstanding interest payable as at 7<sup>th</sup> February 2018 is Ksh 9,287,626.82**

d) **Interest at the rate of 16.96% in addition to this figure the Respondent claims is manifestly excessive.**

### **APPLICANT'S SUPPLEMENTARY SUBMISSIONS**

The Applicants/Plaintiff relied on submissions filed on 23<sup>rd</sup> July 2018 and the instant submissions. They responded to the Defendant's written submissions by supplementary submissions dated 30<sup>th</sup> January 2019. The Plaintiff states the following according to the arbitral award;

a) **Extra Builders Works – Ksh 750,923.68 inclusive of VAT pg 18-20**

b) **Suspension of site claim- Ksh 6,902,668.16 inclusive of VAT Pg 20**

c) **Damages- Ksh 994,244.43 inclusive of VAT Pg 22**

d) **Pending Vouchers Ksh 2,537,249.10 inclusive of VAT**

The total is Ksh. 11,135,085.27/-

The Claimant stated that the amount attracted interest from the date when the amount became due as per the contract (being the date when the final account became due; i.e 20<sup>th</sup> August 2013) at a contractual rate from the Central Bank plus 3%. The Respondent made part payment on 7<sup>th</sup> February 2018 as follows;  $16.96 \times 11,135,085.27 \times 1631 \text{days} = 8,438,796$  which is from 20<sup>th</sup> August 2013 to 7<sup>th</sup> February 2018.

Therefore, the interest as per 7<sup>th</sup> February 2018 is **Kshs19,578,881.**

After part payment of **Ksh,948,728/=**, the outstanding amount as at 7<sup>th</sup> February 2018 was **Ksh 9,625,153.** The said amount continues to accrue interest at the same rate and as at 7<sup>th</sup> February 2019 the same will stand at Ksh 1,632,426. The Claimant sought the Court allows such an amount.

### **DETERMINATION**

#### **ISSUES**

The issues before Court are;

- a) Whether the arbitral award partially complied with maybe set aside and/or varied by this Court
- b) Whether the issue of interest which is the bone of contention should be heard and determined by this Court?
- c) Whether there are legal grounds against recognizing and enforcing the arbitral award?

#### **LAW**

**Section 36 of the Arbitration Act provides for recognition and enforcement of awards;**

**In determining whether to recognize and enforce an arbitral award, the court is guided by Section 37 of the Act which provides for grounds for refusal of recognition or enforcement as follows;**

***“In capacity of either party, invalidity of Arbitration agreements lack of proper notice, the dispute is not within those for Arbitration, the composition of Arbitral Tribunal and/or Arbitration procedure, Arbitral Award not binding and/or arbitral award initiated by fraud, bribery, corruption or undue influence.”***

In the absence of any of the above grounds being contested by the applicant; case for the question of interest the award is recognized and enforced.

Section 10 of Arbitration Act 1995 sets out the Courts jurisdiction where parties are bound by Arbitration Clause as follows;

***“Except as provided in this Act, no court shall intervene in matters governed by this Act.”***

Section 32A of Arbitration Act 1995 provides;

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

Section 32C of Arbitration Act 1995 prescribes with regard to interest;

***“Unless otherwise agreed by parties, to the extent that the Rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as maybe specified in the award.”***

Section 34 (1) of Arbitration Act 1995 provides;

***Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by parties;***

***a) A party may upon notice in writing to the other party, request the Arbitral Tribunal to correct in the Arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and***

***b) A party may, upon notice in writing to the other party, request the Arbitral Tribunal to clarify or remove any ambiguity concerning specific point or part of the Arbitral award.***

The parties; Claimant and Respondent entered into Contract; in form of **Standard Tender Document** (Public Procurement Oversight Authority) between **Italbuild Limited** and **Ministry of Lands, Housing & Urban Development** and therefore were/are bound by terms of the said contract.

Among the terms was/is **Clause 38.0** of the contract that prescribes Alternative dispute resolution in settling disputes that arise from the contract. That parties shall involve reconciliation, mediation or adjudication before Arbitration.

This Arbitration Clause was/is the basis of arbitration proceedings and arbitral award of 30<sup>th</sup> November 2016.

It is contended by Respondent that on the basis of **Clause 23.3 of the Contract** which gave rise to the instant matter, it prescribes;

***“Payments shall be adjusted for deductions for retention. The Employer shall pay the Contractor the amounts certified by Project Manager within 30 days of the date of issue of each certificate. If the employer makes late payment, the Contractor shall be paid simple interest on the late payment in the next payment. Interest shall be calculated on the basis of number of days delayed at a rate 3% above CBK average rate for base lending prevailing the 1<sup>st</sup> day the payment becomes due.”***

On the other hand the Claimant relied on the **Arbitral award Clause 5.3.8** which provides;

***“That it is evident that the Respondent has delayed to settle payment due to the Claimant for a contract which was completed in 2012. I find for the Claimant that the interest at the prevailing market rate as per the contract be applied to the delayed 2<sup>nd</sup> Moiety of retention and total amounts of this award from the time to claim till fully paid by the Respondent.”***

In this Court’s view there is material issue/interpretation and thereby disparate calculation on the question of interest. Whereas the arbitral award found interest ought to be paid by Respondent to Claimant; whether it should be at prevailing market rate or 3% above **CBK rate** prevailing the 1<sup>st</sup> day the debt became due is a question of law to be determined and/or clarified.

The Award is partially complied as part payment was made by The Respondent to Claimant; but since 7<sup>th</sup> February 2018, despite active exchange of correspondence, there is a stalemate on what interest is due and owing in light of both the Arbitral award of 30<sup>th</sup> September 2016 that is final and binding to parties and contract that is also binding to parties? Although the timelines to enable parties either seek clarification and/or correction from the Arbitration forum; 30 days expired, there is also no formal application to set aside the Arbitral award. It is also conceded that the award is partly complied with and hence this court cannot exercise its jurisdiction to consider the setting aside of the award in the instant case and at this stage.

Be that as it may, the issue of interest is a live issue and continues to adversely impact on parties. The arbitration proceedings are meant to expedite dispute resolution. The Claimant continues to anxiously await fruits of the Award /Judgment; the Respondent continues to accumulate interest. The impasse must end and pave way to settlement of the matter.

The Arbitration clause ousts the Court's jurisdiction to hear and determine disputes herein save as prescribed by the **Arbitration Act 1995** as outlined above by **Section 10 & 32A of the Act**.

In the case of *Rashid Moledina & Co (Mombasa) Limited & Others vs Hoima Ginners Limited (1967) E.A. 645*, it was held that;

*“Courts will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum for the resolution or settlement of their dispute”.*

This was also reiterated in the case of *Anne Mumbi Hinga vs Victoria Njoki Gathara Civil Appeal No. 8[2009]* where the learned Judge held that the court shall not intervene in the arbitration process except as provided in **Section 10 of the Arbitration Act**.

With regard to the contention as to the amount of interest of interest accrued as per the date the arbitral award was made, the court is guided by the case of *Air East Africa Vs – Kenya Airports Authority[2001] eKLR*; the court held that;

*“All matters of costs in the arbitration and interest on any moneys found due are for the arbitrators or umpire.”*

Since the Court is not clothed with jurisdiction to determine the question of interest ,yet in the Court's view remains that there is a legal question to be clarified, interpreted and/or determined by the relevant Arbitration forum, This Court invokes **Section 39 of the Arbitration Act** which outlines the following;

**Questions of law arising in domestic arbitration;**

a) An application by any party may be made to a Court to determine any question of law arising in the course of the arbitration;

b) An appeal by any party may be made to a Court on any question of law arising out of the award.

Such application or appeal as the case maybe, may be made to the High Court.

2) On an application or appeal being made to it under Subsection 1) the High Court shall;

a) determine the question of law arising;

b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re- consideration, or where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

**DISPOSITION**

1. The parties placed appropriately the instant application in court in compliance with Section 39 of the Arbitration Act. Therefore, the issue of interest shall and is hereby remitted to the Arbitral Tribunal to reconsider and/or determine the same in the absence of which/or appointment of Arbitrator by the Chairperson of Arbitration Chartered Institute of Arbitration to determine the question of interest.

2. The Applicant presented to the court a duly certified copy of the arbitral award and the certified copy of the arbitration agreement in compliance with Section 36 of the Arbitration Act. Part Payment was made with regard to the Arbitral Award. The Court recognizes and enforces the arbitral award dated 30<sup>th</sup> November 2016; Subject clarification on the question of interest.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 8<sup>TH</sup> APRIL 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**MR. MUTISYA FOR THE APPLICANT**

**MS MUNYI HOLDING BRIEF MR.KIHARA FOR RESPONDENT**

**JASMINE COURT ASSISTANT**