REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. E.0112 OF 2018

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED.....APPLICANT

VERSUS

QUALITY INSPECTORS LIMITED.....RESPONDENT

RULING

1. By agreement of the parties, the applications of 8th October 2018 and 24th January 2019 were heard back to back. The rationale being that determination of one settles the other.

2. The application of 8th October 2018 is for the following prayers:-

1. Spent

2. THAT pending the hearing and determination of this Application, there be a stay of enforcement and execution of the Final Award made on 24th August 2018 by Mr. John M. Ohaga, FCLArb, in THE MATTER OF AN ARBITRATION BETWEEN QUALITY INSPECTORS LIMITED VERSUS ZAKHEM INTERNATIONAL CONSTRUCITON LIMITED.

3. THAT the final Arbitration Award made on 24th August 2018 by Mr. John M. Ohaga, FCLArb, IN THE MATTER OF AN ARBITRATION BETWEEN QUALITY INSPECTORS LIMITED VERSUS ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED be set aside.

4. THAT costs of this application be provided for.

3. While that of 24th January 2019 is for the following prayers:-

1. THAT this Honourable Court be pleased to recognize and adopt the Final Award prepared by John M. Ohaga dated 24th August, 2018 as a Judgment of this Honourable Court.

2. THAT the Honourable Court be pleased to grant leave to the Applicant to enforce the said Arbitral Award as a decree of this Honourable Court.

3. THAT the costs of this cause be payable by the Respondent herein.

4. Let me start with the earlier application. It is said to be an application under the provisions of Article 10 of the Constitution, Section 1(A) (B) and 59 of the Civil Procedure Act, Order 51 Rule 1 and Order 46 Rule 16 of The Civil Procedure Rules, and Section 35(1) and (2) of The Arbitration Act (1995) and Rule 7 of The Arbitration Rules 1997.

5, On or about 5th January 2015, Zakhem International Construction Limited (Zakhem) through a sub-contract agreement engaged Quality Inspectors Ltd (Quality) as a sub-contractor to carry out “non-destructive tests”. What these tests entail was explained to the Arbitral Tribunal from whose decision this matter involves. For purposes of what is before Court that detail is unnecessary.

6. A dispute between the two arose and the same was submitted to arbitration in which Hon. John M. Ohaga was appointed as the sole

Arbitrator. The Arbitrator made the final Award on 24th August 2018 in which he allowed the claim by Quality as follows:-

> "150. Accordingly, I summarize my award and now Award and direct as follows:-
>
> i. The Claimant is entitled to judgment in the sum of US $ 1,662,109.59;
>
> ii. Interest is awarded at 14% per annum simple interest from the date of this Award until the date of payment in full;
>
> iii. The Claimant shall be entitled to recover 80% of the costs of both the reference and the arbitration".

7. In the application seeking to set aside the award, Zakhem raises the following grounds:-

> 1. The Application is without any merit whatsoever.
>
> 2. The Recognition and/or Enforcement of the Arbitral Award will be contrary to established principles of law and natural justice.
>
> 3. The Award sought to be enforced was granted contrary to established principles and law and natural justice.
>
> 4. The award being sought to be enforced is unconstitutional and contravenes a litany of Constitutional provisions and the provisions of the Evidence Act.
>
> 5. The Award was rendered in total disregard of the substance of the dispute according to consideration of justice, fairness and evidence produced before the Hon. arbitrator.

8. Quality opposed the application on the basis of the following grounds:-

> 1. THAT the application is incompetent, frivolous, misconceived and a gross abuse of the Court process.
>
> 2. THAT the application is brought in bad faith and is merely meant to engage the Respondent in litigation over matters which have determined to finality.
>
> 3. THAT this Application is hopelessly incompetent and has nil chances of success for the following reasons;-
>
> a. The Arbitration Act, 1995 severely limits access to the court on matters of Arbitration and only allow setting aside of an arbitral award within the narrow confines of Section 35 of the Arbitration Act.
>
> b. The Applicant has placed reliance of numerous grounds all of which fall outside the ambit of Section 35 of the Arbitration Act.
>
> c. The Award is not contrary to Public interest, policy or principles of justice and morality.
>
> d. The Arbitrator did not base his decision on matters beyond the scope of the reference to arbitration nor did the arbitrator fail to fully determine issues raised by the parties.
>
> e. The determination by the Arbitrator was made after consideration of all evidence adduced as detailed in the Arbitral Award.
>
> f. Contrary to the Applicant's allegations, the Arbitrator was not bound by the rules or provisions of the Evidence act.
>
> g. The application before this Court is couched as an appeal to the High Court from the findings of the Arbitrator, contrary to the Arbitration Act which disallows appeals against Arbitral Awards.
>
> h. The Applicant cannot rely on the provisions of the Civil Procedure Act and the Civil Procedure Rules as the Arbitration Act is a complete code governing the entire Arbitral process.
>
> i. The arguments advanced in the Application are untenable and are not sufficient to warrant granting of the orders sought.

9. This Court has considered the arguments by both sides and returns the following view of the matter.

10. A party to an arbitration who wishes to set aside an Arbitration Award has recourse vide Section 35 of the Arbitration Act which provides 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".

11. In the application before Court, Zakhem relies on that provision of statute but also purports to call into its aid the provisions of Section 1A, B and 59 of the Civil Procedure Act and Order 51 Rule 1 and Order 46 Rule 16 of the Civil Procedure Rules. Order 46 Rule 16 is of interest and reads:-

"1) The court may set aside an award on the following grounds only—

(a) corruption or misconduct of the arbitrator or umpire; or

(b) that either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.

(2) An Application under this rule shall be served on the arbitrator or umpire.

(3) Where an award is set aside under this rule the court shall supersede the arbitration and shall proceed with the suit.".

12. Order 46 of the Civil Procedure Rules makes provision of an Arbitration under Order of a Court and other alternative Dispute Resolution. Quality takes the view that the Civil Procedure Rules have no place in this matter as the Arbitration herein was not by Order of Court but by choice of the parties under an arbitral agreement.

13. The Arbitration Act is a statute that governs matters of arbitration under an agreement by parties to submit to arbitration all or certain disputes arising in their legal relationship whether contractual or otherwise. Section 40 of the Act then provides as follows:-

"The Chief Justice may make rules of Court for—

(a) the recognition and enforcement of arbitral awards and all proceedings consequent thereon or incidental thereto;

(b) the filing of applications for setting aside arbitral awards;

(c) the staying of any suit or proceedings instituted in contravention of an arbitration agreement;

(d) generally all proceedings in court under this Act".

14. Pursuant to that power, the Arbitration Rules, 1992 have been made. As to the relationship between these Rules and those under the Civil Procedure, Rule 11 provides,

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

15. However, this is not to mean that the provisions of the Civil Procedure Rule will displace those of the Arbitration Rules where the latter make specific provisions of procedure. In addition, the Civil Procedure Rules cannot be applied in matters under the Act where to do so would lead to a conflict with the Act. Rule 11 permits the application of the Civil Procedure Rules in "so far as is appropriate" and it would certainly be inappropriate if the use of the Rules would defeat the overall scheme of the Act.

16. In this regard, the provisions of Section 35(1) circumscribes the only instances when a party can seek the setting aside of an Arbitral Award. The provisions of the Act are deliberately restrictive as an overarching objective of the Arbitration Act is that in as far as possible Arbitral awards should be final. While the grounds for setting aside under Order 46 Rule 16 can be subsumed into those under Section 35 of the Act, it is needless to apply the provisions of the Civil Procedure Rules as the Arbitration Act has specific provisions in that respect.

17. In this regard i identity with the sentiments of the Court of Appeal in Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR in which it held,

> "In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award. In this regard we note that because of the number of the applications filed in the High Court outside the provisions of the Arbitration Act the award has not yet been enforced for a period close to 10 years now. The provisions of the 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 the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1".

18. Turning to the merits of the application, the submissions by Zakhem literally rehashes the grounds on the face of the application. Zakhem seeks to have the Arbitral Award set aside on the basis that the recognition or enforcement of the Arbitral award would be contrary to the public policy of Kenya.

19. It is submitted by Zakhem that part of that policy is ensuring fidelity to the law and this is heightened by the national values and principles codified under Article 10 of the Constitution. Article 10(1) is then cited;

> "(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions".

20. It is argued that by dint of the aforesaid sub-article, any Arbitral Tribunal is enjoined to observe national values and principles of governance when applying or interpreting the law.

21. Zakhem argues that the Arbitrator failed to appreciate the evidence produced by the applicant and misinterpreted the evidence. Further, that the Arbitrator did not consider the evidence on the losses it incurred as a result of the Respondents breach when making his Award.

22. The decision of Ringera J. in Christ for all Nations vs. Apollo Insurance Co. Ltd continues to endure as properly setting out what the concept of Public Policy entails. The Judge held:-

> "Now although decisions of foreign tribunals are not binding on Kenyan courts, they may be persuasive. And although the interpretation of the parametres of the public policy of India has been made in the context of enforcement of foreign awards, the persuasive value is not any the less particularly where it is evident from section 37(1)(b)(ii) of the Arbitration Act that in Kenya foreign awards may be denied recognition and enforcement if such recognition and enforcement would be contrary to the Public Policy of Kenya. In my opinion the same principles of law which apply under section 37(1)(b)(ii) to non recognition and non enforcement of a foreign award would apply to the setting aside of a local award under section 35(2)(b)(ii).

> I am persuaded by the logic of the Supreme of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges or 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 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 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 justice or morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as founded on a contract contrary to public morals".

23. Whilst Zakhem has criticized the Arbitral Award as being contrary to Public Policy, all it has done is to assail the Arbitrator's appreciation of the evidence tendered. What Zakhem is inviting this Court to do is to re-assess or re-evaluate the evidence placed before the Arbitrator with a view to reaching a different outcome. That, typically, is the task that an appellant court is required to undertake in an appeal on issues of fact. It would be inimical to the concept of finality of arbitration if the courts were to routinely interfere with the findings of fact of an arbitral tribunal.

24. On this, the decision in Christ for all Nations vs. Apollo Insurance Co. Ltd *(supra*) has this useful holding:-

> "In my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact of law or mixed fact and law or of construction of a statute or contract on the part of an 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 sections 35 of the Arbitration Act".

25. A *bonafide* misapprehension of facts by an arbitrator is not an act or conduct that defies Public Policy.

26. This Court does not find merit in the Chamber Summons dated 8th October 2014. It is hereby dismissed with costs. The inevitable outcome is to allow the Chamber Summons of 24th January 2019, which I hereby do.

Dated, Signed and Delivered in Court at Nairobi this 12th Day of July, 2019.

F. TUIYOTT

JUDGE

***PRESENT*:**

Ayisi for Applicant

Mugi (Miss) for Respondent

Nixon – Court Assistant