



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**CIVIL CASE 442 OF 2017**

**THE HONOURABLE ATTORNEY GENERAL.....APPLICANT**

**VERSUS**

**BEA INTERNATIONAL LIMITED.....RESPONDENT**

**R U L I N G**

**INTRODUCTION**

This is a ruling on two applications. Application dated 3<sup>rd</sup> November 2018 was filed by the Honorable Attorney General (hereinafter referred to as APPLICANT) seeking to permanently stay execution and set aside final award and orders of KYALO MBOBU Sole Arbitrator published on 5<sup>th</sup> September 2017 set aside.

The second application dated 11th September 2017 was filed by BEA INTERNATIONAL LIMITED (hereinafter referred to as RESPONDENT) seeking Adoption of the said award and for judgment in favour of the claimant against the Respondent in terms of the Sole Arbitrator's award published on 5<sup>th</sup> September 2017.

The parties herein executed an agreement dated 4<sup>th</sup> April 2011 where the Respondent agreed to prepare and submit to the National Environment Management Authority (NEMA) Project Idea Notes (PINS) and Project Design Documents (PDDs) for the Mau Forest Complex, Aberdares Ecosystem and Greening the cities and Riparian Reserves and National Appropriate Mitigation Actions. A dispute arose which was referred for settlement through Arbitration process. Parties herein are not disputing the fact that the agreement had an Arbitrations Clause. After publication of final award, the Applicant herein filed application challenging the award and the Respondent later filed an Application seeking adoption and enforcement of the Award as judgment of this Court.

I will first consider application challenging the final award and upon determination, I will proceed to consider application seeking to adopt and enforce the award.

**HON. ATTORNEY GENERAL'S (APPLICANT'S) APPLICATION**

In the application dated 3<sup>rd</sup> November 2018, the Applicant contend that the award dealt with issues not contemplated by the terms of the reference to the arbitration or contained decisions beyond the scope of reference and is in blatant conflict with public policy of Kenya.

Reasons given for the argument are as follows:-

1. Determination beyond scope of reference;

- That by determining that the claimant was entitled to entire contract amount of Kshs. 379,500,000, the Arbitral Award relied on a finding that the Respondent had substantially fulfilled its obligations under the contract whereas the Respondent failed to demonstrate fulfilment of the obligations as specified at Clause 1(iii) of the contract and its compliance with the provisions at Clause 3 part B of the agreement.
- That obligation to pay only arose upon submission of reports as provided in Clause 3 part B.
- That by departing from the letter of the agreement, the award went beyond scope of enquiry; that the arbitral tribunal formulated and determined a dispute that was not referred to it.

2. Breach of contract

That the determination that the Respondent was not in breach of contract was not substantiated as there was admission and proof in evidence that the Respondent acted in breach of conditions of agreement at Clause 1(ii) as read with Clause 10 by providing a list of personnel in inception report which is different from the list in proposal contrary to the agreement and therefore an illegality entitling the Applicant to repudiate the agreement.

That the Arbitrator relied on mere allegations in arriving a finding that the Applicant was in breach of agreement on account of actions and/or omissions by NEMA and that Applicant was not entitled to repudiate the agreement.

The Applicant contend that its only obligation was to make payments and that performance by the Applicant was not affected or connected to submissions to and approval of the outputs of the Applicant. That the Performance Idea Notes (PINS) and Project Design Documents, which formed the Respondent's performance obligation under the agreement, were to be submitted to NEMA and no responsibility is attributed to the Applicant for performance or lack thereof under the agreement on the account of alleged delays.

The Applicants argument is that by the award attributing liability to the Applicant, it formulated and determined matters not beyond scope of tribunal and went against public policy.

Further, save for inception report, which was submitted but rejected, no progress and final reports were submitted, and as such, no obligation to pay arose on part of the Applicant.

The Hon. Attorney General's application is supported by Affidavit sworn by Dr. Margaret W. Mwakima the Principal Secretary and Accounting Officer in the Ministry of Environment and Natural Resources.

She confirmed the Respondent's participation in the oral proceedings before the Arbitrator and restated grounds in support of the application.

### **BEA INTERNATIONAL LIMITED (RESPONDENT'S) RESPONSE**

In response to the application to set aside Arbitral Award, the Respondent BEA INTERNATIONAL LIMITED filed Replying Affidavit sworn by Patrick Karani on 29<sup>th</sup> November 2017.

He averred that the Respondent bid for tender advertised by Ministry of Environment and Mineral Resources on 27<sup>th</sup> January 2011. On 4<sup>th</sup> April 2011, the Respondent entered into consultancy agreement with the Ministry of Environment and Mineral Resources for PINs and PDDs for Mau forest complex, Abardare Ecosystems, Greening the Cities and Riparian Reserves and National appropriate mitigation Actions.

He averred that contract period was 7 months and that payments were to be done in 3 stages as follows:-

- 40% upon submission of inception report by consultant
- 30% upon receipt of draft progress report acceptable to the client
- 30% upon clients receipt of final report, acceptable to the client

He further averred that, reports on performance of the project were submitted as follows:

- Inception report in April 2011,
- Progress report in May/June, technical report in July 2011,
- Modified copies of progress and final technical reports on 30<sup>th</sup> August 2011,

The Respondent aver that despite fulfilling obligation by submitting reports, the Applicant did not pay the consultancy fee giving rise to the dispute which was referred to arbitration as per Clause 12 of the agreement dated 4<sup>th</sup> April 2011.

He averred that parties agreed to appoint Mr. Kyalo Mbobu as Sole Arbitrator & proceedings commenced on 24<sup>th</sup> November 2015 to 5<sup>th</sup> September 2017 when final award was published.

He averred that the prescribed format, standard forms and/or templates obtained from NEMA and formulated by the international body known as UNFCCC were used for PINS and PDDs respectively. That NEMA never issued any objection letter, which meant it was in support of the project.

The Respondent averred that a keen look at the application to set aside clearly show that it is an appeal from the decision of the Arbitrator contrary to the principle of finality in arbitration proceedings; that issues raised were raised before the Arbitrator and were conclusively dealt with by the Arbitrator. That all the issues framed by the Arbitrator are the same issues that had been framed by the Applicant in its list of issues.

The Respondent averred that the Applicant has not demonstrated how award is in conflict with public policy,

The Respondent further averred that the Applicant The Respondent's performance by failing to give timely feedback to inception report, which was submitted in April 2011; that from July 2011, the Respondent continued performing without the feed due to timelines given.

He averred that the committee which challenged the inception report lacked the requisite expertise; that the report should have been subjected to technical review of Kenya forest service personnel; that the report by committee purporting to challenge inception report was done out of bad faith and malice by the ministry officials.

That the officials failed to appreciate that there is no standard format for inception report

That the tribunal was right in holding that the purported termination of the contract by the Applicant was procedure spelt out in Regulation 32 of the Public Procurement and Asset Disposal Regulations 2006 in terminating the agreement; was illegal and a clear violation of the law and terms of the contract; that instead of declaring a dispute and referring it to arbitration as required by Clause 12 of the agreement, the PS terminated the agreement; That the purported termination notice was therefore invalid. Further, the PS continued to engage the Respondent after the purported termination.

That contrary to allegation that personnel not listed in consultants were brought on board, the Respondent averred that he did that with authorization of the Applicant who called for meeting to submit inception report on short notice.

Respondent averred that all reports were submitted in the course of assignment and obligation to pay on part of the Applicant arose and failure to do so amounted to breach of the agreement.

He finally averred that the final Arbitral Award dealt with a dispute that was contemplated by the parties and within the arbitral Clause as it arose out of performance of contract.

### **ANALYSIS & DETERMINATION**

I have considered rival averments and submissions by parties herein. What I wish to consider is whether the Arbitrator went beyond scope of disputes contemplated for referral to arbitration.

It is not disputed that the parties herein executed an agreement for provision of consultancy services by the Respondent to the Ministry of Environment and Mineral Resources.

A dispute that arose and parties herein referred it to a Sole Arbitrator for settlement as per Clause 12 of the agreement. They agreed on appointment of Kyalo Mboju as Sole Arbitrator. Both parties fully participated in the proceedings before the Arbitrator.

The issue in dispute is whether the Sole Arbitrator made a determination on issues not referred or not contemplated by the agreement between the parties herein.

Parties who agree to submit before an Arbitrator give the Arbitrator jurisdiction to determine their dispute. The Arbitrator therefore has jurisdiction to determine only matters consented by the parties to be settled through arbitration process. The terms of reference or mandate is therefore given to the Arbitrator by the parties. Parties have autonomy to decide which dispute to subject to arbitration process; they also have autonomy in decision the law applicable, nomination of Arbitrator and venue for arbitration.

On perusal of the pleadings (Agreement), I note that Clause 12 of the agreement provide as follows:-

***“Any dispute arising out of the contract which cannot be amicably settled between parties shall be referred by either party to the arbitration and final decision of the person to be agreed between the parties”***

From the averments, arbitral proceedings and final award filed, it is evident that the determination by the Sole Arbitrator was on issues that arose from the contract herein. The Applicant alleges that it was entitled to repudiate the contract due to failure by the Respondent to submit progress reports as agreed. On the other hand, the Respondent aver that reports were submitted as required by the contract and blames the Applicant for failing to pay as per the agreement. These are issues, which arose from the contract and were determined by the Arbitrator. I do not see any issue dealt with by the Arbitrator, which fell outside the agreement.

In respect of award being against public policy of Kenya, the Applicant has not demonstrated any illegality in the award or conduct of proceedings.

From the foregoing, I find that the Applicant has failed to prove the 2 grounds raised in challenging the award. The application to set aside the award is not therefore merited.

### **RESPONDENT IS APPLICATION.**

On perusal of pleadings herein, I note that the Respondent has complied with requirements of section 36 of the Arbitration Act. The dispute between the parties herein was referred to arbitration as per Clause 12 of the agreement dated 11<sup>th</sup> April 2011.

Both parties participated in appointment of the Sole Arbitrator and fully participated in the Arbitration proceedings. The award was published as required by law and has been attached to the application seeking adoption and enforcement.

I see no reason to refuse adoption and enforcement of the final award herein.

**FINAL ORDER**

1. Application dated 3<sup>rd</sup> November 2018 is hereby dismissed with costs to the Respondent.
2. Application dated 11th September 2017 is hereby allowed. The Final Award delivered by Sole Arbitrator KYALO MBOBU and published on 5<sup>th</sup> September 2017 is hereby adopted and enforced as the Judgment of this Court.
3. Costs to the Respondent/BEA International LTD.

**Ruling Delivered, Dated and Signed at Nairobi this 6<sup>th</sup> day of December, 2018**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:**

SAKINA: COURT ASSISTANT

KIHARA: COUNSEL FOR THE APPLICANT/AG

NGUGI: COUNSEL FOR THE RESPONDENT