REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC APPLICATION NO. 2 OF 2017

NAROK COUNTY GOVERNMENT……APPLICANT

-VERSUS-

PRIME TECH ENGINEERING LTD……....RESPONDENT

JUDGEMENT

INTRODUCTION

1. By its Notice of Motion dated 29th March 2016 the County Government of Narok (hereinafter referred to as Government) has applied to set aside the arbitral award in the sum of kshs.35, 288, 5300/- made in favour of Prime Tech Engineering Ltd [hereafter referred to as the contractor] by the arbitrator 0n 23/3/16. Additionally, the Government seeks to be awarded the costs of this application, amongst other reliefs.

THE CASE FOR THE GOVERNMENT

2. The Application is supported by the grounds set out on the face of the notice of motion. It is also supported by the following major grounds. First, the dispute concerns a procurement contract dated 3/7/2014 between the parties for the improvement and gravelling works on Salabwek-Sachangwani-Mwangaza road. The contract sum was Ksh.11,750,000 and the contract was to be completed within 16 weeks. Second, the contractor unilaterally and without the authority of the Government started works of improving and gravelling of Motonyi-Pimbiniet road. Third, it was discovered by the Government that the contractor was improving and gravelling a road which was different from the one that had been contracted for. As a result a meeting was convened on 27/8/2014 between the representatives of the Government and the contractor. It was resolved that the contractor was to stop any further works on Motonyi-Pimbiniet road. Additionally, it was resolved that the works done were to be assessed and the contractor paid off for the amount of work already done. It was also resolved that the contractor was to vacate the site. Furthermore, the parties never agreed that the contractor was to continue with the improvement and gravelling works on Motonyi- Pimbiniet road, since the contractual obligations had been terminated mutually.

3. In ground 5, the Government has stated that there existed no contract between the parties to do any works on Motonyi-Pimbiniet road, neither was there any contract between the parties to submit before the arbitrator concerning improvement and gravelling works on Motonyi-Pimbiniet road. In ground 6, the Government has stated that the arbitrator exceeded his jurisdiction by determining a dispute not contemplated or not falling within the terms of reference to arbitration. The Government further states that the decisions contained in the final award related to the matter that were beyond the scope of reference to arbitration.

4. Furthermore, the Government states that the final award offends the mandatory provisions of section 47 of Procurement Procedure and Disposal Act, (2005), which direct that any variation of any contract involving a public entity like in the instant application, must be approved in writing by the tendering committee. It further states that there was no such variation to the contract dated 3/7/2014 between the parties. The Government also states that the final award also offends the mandatory provisions of rule 31 of the Procurement Procedure and Disposal Rules, (2006), which caps any variation for such a contract for works to not more than 15% of the original contract quantity. The Government also states that the contract dated 3/7/2014 for the improvement and gravelling works on Salabwek-Sachangwani – Mwangaza road, which formed the basis of arbitration was valued Ksh.11,750,000/= and the same was never varied and even if it was to be varied, it could not be more than 15% of the original contract quantity which would make a maximum Ksh.13,512,500. The Government has also stated that the sole arbitrator affirmed the sum of Ksh.35,288,253/= with interest at the rate of 12% and costs which were assessed at Ksh.4,806,000/= , which it asserts is excessive, unreasonable, illegal and against public policy. The sole arbitrator affirmed also that award on the basis of *quantum meruit,* when there was never any mutual agreement between the parties to perform any extra works following the mutual termination of the contract.

5. In addition to the grounds, the application is anchored in the 33 paragraph supporting affidavit of the County Secretary (Mr. Lenku Kanar Seki) dated 29/3/2016. The County Government Secretary has deponed to the following major matters. First, he has stated that the parties entered into a procurement project dated 3/7/2014 for the improvement and gravelling works on Salabwek-Sachangwani-Mwangaza road, whose contractual sum was Ksh.11,750,000 and was to be completed by 3/11/2014. Additionally, the contractor was also governed by FIDIC Conditions for contract for Building and Engineering Works, designed by the employer, which conditions were annexed to the affidavit in para. as annex marked "LKS 4". He has also stated that the contractor unilaterally and without authority of the Government started works on Motonyi-Pimbiniet road. When the Government discovered that the contractor was doing a different road from that that had been contracted for, the parties convened a meeting on 27/8/2014. In that meeting it was mutually agreed that the contractor was to stop any further works on Motonyi – Pimbiniet road and that the work done was to be assessed and the contractor to be paid off in respect of work already done. It was also mutually agreed that the contractor was to vacate the site immediately. The Government Secretary has in para. annexed annex marked LKS – 5 which are the minutes of the meeting held on 27/8/2014, which show that the parties never agreed that the contractor was to continue with works on Motonyi-Pimbiniet road. The Government has also stated that an assessment was done by the joint team and a meeting was held on 30/9/2014 in which a sum of Ksh.10, 797,200/= was the agreed assessment of the work evaluation by both parties and as a result of which the contractor was subsequently paid. In this regard, the Government has in paragraph 9 of the supporting affidavit annexed the minutes of the meeting held on 30/9/2014 marked as annex LKS – 6.

6. The Government has also stated that the contract between the parties was effectively terminated on 30/9/2014 for material breach of the contract by the contractor resulting in the contractor being asked to vacate the site immediately. The Government has further stated that there existed no contract for works to be done on Motonyi-Pimbiniet road and neither was there any contract between them to submit before the arbitration concerning works on Motonyi – Pimbiniet road. That notwithstanding the contractor stubbornly and with impunity continued with the works even when having been issued with notice to vacate the site on 18/11/2014, which forced the Government to forcefully evict the contractor from the site on 8/1/2015. Annex LKS 7 to paragraph 12 is the notice to vacate from the Government to the contractor dated 18/11/2014. The Government has also stated that it is not in dispute that the contractor unilaterally did improvements and gravelling works on Motonyi-Pimbiniet road when there was no contract between them for such works to be carried on.

7. The Government has also stated that following advice from their counsel Prof. Tom Ojienda of Messrs. Prof. Tom Ojienda & Associates, the Government believed his advice that the contractor exceeded his jurisdiction by determining a dispute not contemplated or falling within the terms of reference to arbitration contrary to section 35 (2)(a)(iv) of the Arbitration Act No. 4, 1995. The Government has also stated that it believed the advice of their counsel on record that the final arbitral award of the arbitration related to matters that were beyond the scope of arbitration, which award is

annexed hereto marked as annex LKS 11 to the supporting affidavit in para. 18. Furthermore, Mr. Lenku Kanar Seki has stated that he was advised by their counsel and he believed that the final award offended the mandatory provisions of section 47 of the Public Procurement and Disposal Act 2005, which directs that any variation to the contract of procurement, which involves a public entity as in the instant application, must be approved in writing by the tendering committee. In the instant application there was no such variation of the contract between the parties that is dated 3/7/2014.

8. Furthermore, Mr. Lenku Kanar Seki has further stated that he believed the advice of their counsel that the awards also offends the mandatory provision of rule 31 of Public Procurement and Disposal Regulations 2006, which caps any variation to a contract on the quantity of works to not more than 15% of the original contract quantity. He has also stated that the arbitrator awarded the contract Shs.35,288,253 with interest at 12% and costs which were assessed at Sh.4,806,000. And he has also stated that the award is overly illegal and against public policy for being contrary to section 35 (2)(b)(ii) of the Arbitration Act No. 4 of 1995. Finally, the County Government Secretary has stated that the arbitrator's final award is based on *quantum meruit*, when there was never any mutual agreement between the parties that permitted the contractor to perform any extra works, when the existing contract had been mutually terminated on 30/9/2014 for breach of the contract by the contractor as a result of which he was paid off.

THE CASE FOR THE CONTRACTOR

9. The contractor, Engineer Isensi Harrison Omari in his 20 paragraph replying affidavit has opposed the Government's application to set aside the arbitral award. He has deponed that he is the director of the respondent company to this application. He has further deponed to the following major matters.

1st he has stated that various applications were made by the Government challenging the jurisdiction of the arbitrator and his appointment and that the parties were heard and the arbitrator published his award on 23/3/2016 in its favour. He has further stated that following his counsel's advice he believed that the High Court lacks jurisdiction to hear and determine the application before it, for the following reasons.

Firstly, there existed no award filed in court for it to be set aside in accordance with Rule 4(2) of the Arbitration Rules of 1997. Secondly, that there existed a life suit under which the arbitral proceedings were conducted and therefore the application to set aside the award should have been conducted under Misc. Application No. 1/2015 at Naivasha High Court and therefore this was an abuse of the court process. He has also stated that following his counsel's advice which he believed that the present application is premature and fatally incompetent. He has further stated that the arbitrator did not determine matters outside the scope of reference and therefore the award is proper.

Furthermore, he has stated that following the advice on his counsel he believed that the arbitrator made an award based on the evidence that was presented before him by the parties and as a result he has stated that the findings of the arbitrator on both issues of law and fact cannot be the subject of setting aside an award, but can only be a ground of appeal under section 39 of the Arbitration Act. He has further stated that section 47 of Public Procurement and Disposal Act of 2005 and Rule 31 of Public Procurement and Disposal Rule of 2006 were considered by the arbitrator and findings were made and for that reason he says that the Government is asking the court to second guess the arbitrator and review the award on merits. He has also stated that the award could only be set aside on grounds of public policy in very limited circumstances, such as where; an award was arbitrary or capricious, which the Government has not demonstrated.

10. He has further stated that in applying the public policy test to an arbitration award this court does not act as a court of appeal and consequent errors of fact cannot be corrected. He has further stated that the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, when he delivers his arbitral award. On this point, he has finally stated that once it is found that the arbitral award is not arbitrary or capricious then the arbitrator's findings on the fact are final. On the issue of *quantum meruit* he has stated that the parties pleaded and led evidence on the same issue and then he made a finding of fact based on the joint assessment report prepared by both parties.

Furthermore, he has stated that the Government's application to this court is an appeal to this court against the arbitrator's award, which has been camouflaged as an application to set aside. He has finally stated following his counsel's advice he believed that the parties cannot appeal against an arbitral award as to its merit and the court cannot interfere and that the award made by the arbitrator is not to be lightly interfered with.

ISSUE OF THE PRELIMINARY OBJECTION

11. During the pendency of the application to set aside the arbitral award, counsel for the contractor raised a preliminary objection. Counsel submitted that the court lacks jurisdiction to admit and/ or adjudicate over the notice of motion because it was filed contrary to section 17 and 35 of the Arbitration Act and the applicable rules. He has therefore urged the court to dismiss the Government's application to set aside the arbitral award with costs. In this regard, counsel relied on rule 7 of the Arbitration Regulations of 1997 and argued that under rule 7 of those regulations the Government was under an obligation to file an application under section 35 of the Arbitration Act, which should be supported by an affidavit specifying the ground upon which it was based in seeking to set aside the arbitral award. In terms of that rule 7 the Government was also under an obligation to serve the application and the affidavit on the contractor and the arbitrator. In support thereof counsel cited **M.S.K vs S.N.K (2010) eKLR**. According to counsel failure to comply with Rule 7 was fatal to the application of the Government. I find in this regard that Rule 7 and other rules are hand-maidens of justice. That rule cannot override the provisions of section 35 of the Public Procurement and Disposal Act 2005, which donate statutory power to an aggrieved party to file an application to set aside the arbitration award. The reason is that Rule 7 is subordinate to section 35 of the Arbitration Act. Furthermore, I find that the arbitrator's final award is based on issues of law and not on allegations of misconduct, bribery, fraud, undue influence or corruption. He misapplied the law and that's what is under challenge. In the circumstances, I find that the arbitrator was not and is not a party to this application. It therefore follows that it was not necessary to serve both the application and the affidavit upon him that was referred to arbitration. I further find that the Government's application is within the purview of section 35(3) (1) of the Arbitration Act, which allowed it to file an application within 3 months from the date it received the arbitral award.

12. Furthermore, I take cognizance that this court is mandated to administer substantive justice without undue regard to technicalities and rules of procedure in terms of Article 159 of the 2010 Constitution of Kenya.

13. In the circumstances, I find that the Government was entitled to file this application after receiving the arbitrator's final award. This is in the spirit of timeous and expeditious disposal of the matter. For this reason, I overrule the preliminary objection which I hereby dismiss.

ISSUES FOR DETERMINATION

In the light of the affidavit evidence of the County Government Secretary (Mr. Lenku Kanar Seki) and the contractor (Engineer Isensi Harrison Omari) and the submissions of both counsel, I find the following to be issues for determination:

1. Whether or not Motonyi – Pimbiniet road was part of the contract between the Government and the contractor that was referred to arbitration.

2. Whether or not the doctrine of *quantum meruit* is applicable in the peculiar circumstances of this application.

3. Whether or not the Government is entitled to the costs of this application.

The first issue: on issue of Arbitral Jurisdication

14. On a proper consideration of the matter, the first issue raised is whether or not the Motonyi-Pimbiniet road was part of the Salabwek- Sachangwani- Mwangaza road. Furthermore, the related issue is whether

or not the arbitrator had jurisdiction to hear and determine the dispute in respect of Motonyi – Pimbiniet road. In this regard, it is important to make reference to the procurement contract dated 3/7/14 for the improvement and gravelling works on salabwek-Sachangwan-Mwangaza road. The contractual sum of that project was Kshs. 11, 750,000/-

15. The contract that was referred to arbitration was in respect of improving and gravelling works on Salabweki-Sachangwani-Mwangaza road. This is what formed the arbitral contract in terms of the contractual obligations dated 3/7/2014. The contractor instead of improving and gravelling works on salabwek-sachwagwan-Mwangaza road, proceeded to improve and gravel Motonyi-Pimbinet road. This he did without the authority of the applicant. In doing so, he acted unilaterally. As a result a meeting was held on 27/8/14 between the representatives of the parties. It was resolved in that meeting that the contractor was to stop works on Motonyi-Pimbiniet road. It was also resolved that the contractor was to be paid for the amount of work already done. Finally, it was also resolved that the contractor was to vacate the site.

The contractor started works on Motonyi-Pimbiniet road without the authority of the Government. This was contrary to the resolutions of the meeting of 27/8/2014. The minutes of those resolutions are hereby reproduced and are as follows:

"Present

Motonyi-Pimbiniet road issue

1. CEC, RDS (KESHEI) – nkeshei@yahoo.com

2. CO,RDS (CHERUIYOT) – *johanakipkorirc@gmail.com*

3. CONSULTANT (PARSIMEI) – parasimeiyitaw@gmail.com

4. OMARI(CONTRACTOR)– engomariprimetech@gmail.com

5. *MCA (MONICAH) – in attendance*

Agreed

1. The length of road done is 5.2 km

2. The width of road done is 5.3 meters

3. The depth done gravel is within permissible threshold in the BQ

4. The current road being done is salabwek/sachangwan is actually Motonyi – Pimbiniet.

5. Subsequently, the said road should be terminated and actual work done paid for and proper corrective records be established which will inform the way forward in liaison with other offices responsible

6. The road done serves the purpose of the country economic and development objectives.

Signed 27/08/2014

1. CEC (KESHEI) signed

2. CO, RDS (CHERUIYOT) signed

3. PARSIMEI) CONSULTAN) signed

4. MCA (MONICAH) signed

5. CONTRACTOR (OMARI) signed"

16. It is clear from the above minutes that the contractor re-started works on Motonyi-Pimbiniet road in the absence of any contract, which was also in violation of the resolutions of the meeting of 27/8/2014: [see para 7 of the affidavit of Mr. Lenku annex marked LKS 5]. There is also the affidavit evidence of County Government secretary that the contract between the Government and the contractor was terminated and was paid off for works already carried out (see para. 5 of the supporting affidavit, annex LKS 5).

There is further affidavit evidence that the contract between the parties was effectively terminated on 30/9/2014 for material breach of the contract and was asked to vacate the site (see para. 10 of the supporting affidavit of County Government Secretary).

Mr. Omwanza's submission that the arbitrator is the ultimate master of the quantity and quality of the evidence to be relied upon in making his final award is subject to the principle that the arbitrator's award must be based on some evidence tendered before him.

17. In the instant application, there is absolutely no evidence to show that when the contract was mutually terminated and the contractor paid off following the resolutions of the meeting of 27/8/2014, the parties entered into another contract to continue works on Motonyi-Pimbiniet road. I accept as persuasive the authority of ***British Steel Corp v Clevaland Bridge & Engineering Co. Ltd 1 All ER 504*** that for payments to be made on the basis of *quantum meruit*, four elements must be established. First, that valuable service was rendered. Second, that the services were rendered to the defendant. Third, that the services were accepted by the defendant. Fourth, that the defendant was aware that the plaintiff in performing the services, expected to be paid by the defendant.

18. The facts in the instant application are distinguishable from those in ***British Steel Corp v Clevaland Bridge & Engineering Co. Ltd,*** *supra*.

19. In the instant application, the contract for works done had been terminated and paid for. Furthermore, the Government was not aware that the contractor had re-started works on Motonyi-Pimbinet road, after the mutual termination. The services of the contractor were not accepted by the Government following the mutually agreed termination of 27/8/14 by the two parties.

I bear in mind that I am not sitting on appeal over the sole arbitrator's final award. The principle that the arbitrator is a master in respect of his findings of fact in respect of the arbitral award must be based on evidence even if that evidence is slim in terms of quantum. In the instant application, the parties had mutually terminated the contract for works and bid each other farewell. The arbitrator's jurisdiction ended the moment it became clear to him that the parties had mutually terminated the contract. And the reason for termination was that the improvement and gravelling works were not being done on Salabwek-Sachangwani-Mwangaza road, but on Motonyi-Pimbiniet road.

20. With the said mutual termination of the contract for works, the sole arbitrator had no jurisdiction to arbitrate on works done on Motonyi-Pimbinet road. I agree that in law according to **Owners of Motor Vessels *Lilian "S" v. Caltex (K) Ltd (1989) 1 KLR at page 14*** that jurisdiction is everything and without jurisdiction, a court has to lay down its tools in respect of the matter before it, because it cannot in law proceed further in the matter before it. I find that in the instant application, the moment it became clear to the arbitrator that the works done were in respect of Motonyi-Pimbiniet road, the arbitrator was in law obliged to down his tools, because that was not the road that was in contemplation of the arbitral agreement. Furthermore, he was additionally obliged to down his tools in view of the undisputed mutual termination of the contract between the parties (see para.7 of the supporting affidavit of Mr. Lenku Kanar Seki, in particular annex marked "LKS 5")

21. It therefore follows that the submission of the contractor's counsel, Mr. Omwanza that the arbitrator

had jurisdiction to arbitrate the dispute over Motonyi-Pimbiniet road is lacking in merit. It is not supported by any evidence. In this regard, it is equally important to point out the contractor in his 33 paragraph replying affidavit, he has not challenged the mutual termination of the contractor as set out in para. 7 of the supporting affidavit of the County Government Secretary, Mr. Lenku Kanar Seki. Instead that contractor is dead silent over the issue of the mutual termination of that contractor. Furthermore, it is equally important to point out that in law the findings of an arbitrator that are based on admissible evidence are entitled to respect. I find it difficult to accept Mr. Omwanza's suggestion that is implicit in his submission that the arbitrator's findings are final as he is the master in terms of both the quantity and quality of evidence. In the circumstances, I find and hold that the sole arbitrator had no jurisdiction to arbitrate the dispute over Motonyi-Pimibeniet road following the mutually agreed termination of the contract works on Motonyi-Pimbiniet road, on 27/8/14.

22. I find that the sole arbitrator's findings on jurisdiction to arbitrate on Motonyi-Pimbiniet road amounts to equating his final award to a jury verdict, that is binding on the presiding lawyer - judge, even if the jury verdict is perverse. In the circumstances I find and hold that the sole arbitrator had no jurisdiction to arbitrate the dispute over Motonyi-Pimibeniet road, following the mutually agreed termination of the contract works on Motonyi-Pimbiniet road, on 27/8/14.

23. <u>Second issue: Applicability of the doctrine of *Quantum Meruit*</u>

The final award by the arbitration is based on the doctrine of *quantum meruit*. This is an English common law principle that forms part of our laws by virtue of the reception clause in section 3 of the Judicature Act (Cap 8) laws of Kenya. It therefore forms part of our unwritten laws in terms of the hierarchy of the laws to be applied by this court, amongst others. This court is obligated to apply the Constitution of Kenya and subject thereto all other written laws and subject to those written laws (i.e statues or acts of parliament) the substance of the common law, the doctrines of equity amongst other laws as set out in section 3 of the Judicature Act.

24. In terms of our hierarchy of laws common law and doctrines of equity are subordinate to all written laws (statutes). The contract for works done in the instant application is governed by the Public Procurement and Disposal Act of 2005 and The Public Procurement and Disposal Regulations of 2006. It is not in dispute that the Government in the instant application is a public entity within the meaning of Section 4 (1)(a) of the Public Procurement and Disposal Act of 2005. Furthermore section 3 of the Public Procurement and Disposal Regulations of 2006 defines a public entity as one that includes anybody that uses public assets in any form of contractual undertaking including public-private partnerships. Furthermore, regulations 5 of the Public Procurement and Disposal (County Government Regulations of 2013) a County Government or an entity of that Government is a public entity. It was so held in the **<u>Erick Okeyo v County Government of Kisumu and 2 others (2014) e KLR)</u>**

25.It is therefore clear that the Government is a public entity and is subject to the Public Procurement and Disposal Act of 2005 and the Public Procurement and Disposal Regulations of 2006.

Furthermore, in terms of section 47 of Public Procurement and Disposal Act of 2005, any amendment or variation of a contract must be in writing. It must also have prior approval of the public entities of respective committees such as the tender or procurement committee of the public institution in accordance with section 47 of the Public Procurement and Disposal Act of 2005. This was applied and approved by the court in **<u>National Highway Authority v Total Security Surveillance Limited (2013) e KLR.</u>** It is therefore clear that the tender contract of 3/7/2014 was not approved as required both by case law and statute. It is also clear that the Civil Engineering Construction Rules (The FIDIC conditions) also entitle an engineer to vary the form, quality and quantity of works, and to fix rules for the varied works, subject to a maximum of 15% variation to for works and /or rates. In the instant application, the contractual price when the matter was referred to the arbitrator was Ksh.11,750,000. In terms of the statutory requirements the maximum valuation in terms of price would therefore be Ksh.13,512,500. It also follows that the arbitrator's award in the sum of Ksh.35,288,235 by the arbitrator contravened section 47 of the Public Procurement and Disposal Act of 2005. It also contravened the FIDIC conditions of contract for works of Civil Engineering Construction to which the parties in the instant application

were signatories.

26. In the circumstances, the arbitrator by his final award contravened public policy. The arbitrator relied on ***British Steel Corp v Clevaland Bridge & Engineering Co. Ltd (1984) 1 All ER 504***, *supra,* which is distinguishable from the application at hand. He also relied on ***Wamunyu Decorators Company Limited v Mugoya Construction Engineering Limited (2014) e KLR*** . In that case the High Court ruled that the principle of *quantum meruit*, applies where an express contract is mutually modified by the implied agreement of the parties. It is clear that for a party to be entitled for an award on the basis of *quantum meruit,* there must be a mutual agreement between the parties for services to be rendered. In the instant application, there was no such agreement for works to be done on Motonyi- Pimbiniet road, following the mutual termination of the contract between the parties on 27/8/2014. The contractor had no authority to embark on the improvement and gravelling works on Motonyi-Pimbiniet road. This was done in the absence of any contract. *Quantum merit* applies as set out in *Graves v Okanagan Trust Company (1956) 20 W. W. R. (N.S) 17 (B.C.S.C.)* in which it was held that if the parties enter into a contract for services and services are rendered, the courts will impose and obligation on the person who has benefitted to pay reasonable compensation even though no contract price had been agreed. It is clear from that case that for the principle of *quantum meruit* to apply there must be in existence a contract. I therefore find and hold that the arbitral award by the arbitrator in the sum of Ksh. 35,288,235 is contrary to the statutory law of this country namely the Public Procurement and Disposal Act of 2005 and Public Procurement and the Regulations of 2006. The authorities relied upon by the arbitrator cannot override the statutory provisions of the Public Procurement and Disposal Act the regulations made thereunder. Furthermore, they are also distinguishable.

In the event of any conflict between the statutory provisions and regulations made thereunder on the one hand, and case law emanating from England or any other English common based jurisdiction, on the other hand, the provisions of our statutes and the regulations made thereunder will take precedence in terms of the hierarchy of the laws to be administered by the courts as set out in section 3 of the Judicature Act (Cap 8) of the Laws of Kenya. In other words, the substance of the common law and doctrines of equity cannot override the statutory provisions as contained in the Public Procurement and Disposal Act of 2005 and the regulations made thereunder. The doctrine of *quantum meruit* is a common law principle and for that reason it can also not override the provisions of the Public Procurement and Disposal Act of 2005 and the regulations made thereunder.

27. In the light of the foregoing, I find that the arbitrator misapplied the law in his final award. In the light of the foregoing evidentiary findings, the legal provisions of our statutory laws and the submissions of both counsel, I find that the final award based as it is, on the principle of *quantum meruit* is in breach of our statutory laws and is therefore inapplicable in the instant application. In the circumstances, I hereby set aside the arbitrator's final award.

28. Third issue: payment of costs

The 3rd and final point for determination is as to who should bear the costs of this application. In terms of section 27 of the Civil Procedure Act, (Cap 21) Laws of Kenya, costs follow the event. This simply means that the successful party is entitled to his costs unless he has misconducted himself. The Government has succeeded in this application. It has not misconducted itself. It therefore follows that the Government will have the costs of this application together with interest at court rates.

Judgment delivered in open court this 23rd of February, 2017 in the absence of Mr. Makokha for the Applicant and in the presence of Mr. Omwanza for the Respondent.

J. M. BWONWONGA

JUDGE

23/2/2017