



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Miscellaneous Civil Application 684 of 2008**

**DEWDROP ENTERPRISES LTD.....APPLICANT**

**VERSUS**

**HARREE CONSTRUCTION LTD.....RESPONDENT**

**RULING**

The applicant entered into a sub-contract agreement with the respondent by which the applicant agreed to install television masts, structured cabling and intercom wiring in the premises situate at LR. No. 4857/62 Kileleshwa, Nairobi. The respondent had been engaged as the main contractor of the building which was to be constructed on the said parcel of land. The total cost of the sub-contract was Kshs.2,114,190 /=. Before the applicant was paid the last installment due in the contract, differences arose between the applicant and the respondent regarding whether the applicant had completed the contracted works to the satisfaction of the respondent as stipulated in the sub-contract agreement. The applicant and the respondent adopted the standard agreement and conditions of sub-contract for building works prepared by the Kenya Association of Building and Civil Engineering Contractors (KABCEC). Pursuant to clause 45.1 of the said agreement, the dispute was referred for determination by arbitration.

The arbitrator who was appointed to hear and determine the dispute was Norman Mururu. After hearing the dispute, the arbitrator made his award. He held that the applicant was not in breach of the sub-contract and was therefore entitled to be paid the final sum due in contract. The arbitrator awarded the applicant the sum of Kshs.211,200.48 less the sum of Kshs.2,865 /=- which was to be deducted from the sum awarded in regard to a finding made by the arbitrator that the applicant should be surcharged for supplying a defective mild steel rod that was to be installed to support television aerials. The sum awarded to the applicant was therefore Kshs.208,335.48. The arbitrator disallowed the applicant's claim to be awarded interest on the amount awarded at commercial rates. The arbitrator declined to award costs of the arbitration proceedings to the applicant. The arbitrator directed that the cost of arbitration be shared equally between the applicant and the respondent. He further ordered that, in the event that the amount awarded shall not be paid within thirty (30) days of delivery of the award, interest would be charged on the unpaid sum at the rate of 12% per annum on simple rate basis until payment in full.

From the affidavit sworn by Edward Thiong'o Wachira, the managing director of the applicant in support of the application, it was apparent that although the arbitrator's award is dated 19<sup>th</sup> November 2007, the same was published to the applicant and the respondent through the arbitrator's letter dated 11<sup>th</sup> August 2008. According to the applicant, it received the arbitrator's award on 15<sup>th</sup> August 2008. The delay in publishing the award was occasioned by failure by the parties to settle the balance of the arbitrator's fees.

The applicant was aggrieved by the part of the arbitrator's award which failed to award it interest at commercial rates and costs of the arbitration. By an application filed pursuant to the provisions of **Section 35(2)(a)(iv) and (v), Section 35 (2)(b)(ii), Section 35(4)** of the **Arbitration Act,1995** and **Rules 4(1) and (2),7 and 11** of the **Arbitration Rules**, the applicant sought the orders of this court to set aside part of the arbitral award that the applicant was aggrieved by. The applicant contends that the arbitrator disregarded the terms of contract between the parties by failing to decide on the substance of the dispute and further by acting in excess of his jurisdiction. The applicant faulted the arbitrator for making decisions on issues that were not in controversy and that were not pleaded by the parties. It was the applicant's contention that the arbitral award contained decisions on issues not contemplated or falling within the terms of reference to arbitration. The applicant was finally aggrieved that the award was made in conflict with the public policy of Kenya. As stated above, the application to set aside was supported by the affidavit of Edward Thiong'o Wachira, the managing director of the applicant.

The application is opposed. Akwana Mahero, the advocate for the respondent and Harish Bhudia, an official of the respondent, swore replying affidavits in opposition to the application. In the said affidavits, it was contended on behalf of the respondent that the applicant had filed a suit before the subordinate court in respect of the same subject matter of the arbitral award. The respondent was of the view that the applicant should not be allowed to pursue the two claims together at the same time without formally withdrawing one of them. The respondent deponed that the applicant was guilty of laches in that it had failed to file the application to set aside arbitral award within the period stipulated in the **Arbitration Act, 1995**. It was the respondent's case that the application herein was in contravention of the spirit and principles of arbitration on account of the applicant's failure to pay its share of the arbitrator's fee. The respondent was of the view that the application to set aside the arbitral award did not have any merits as the arbitrator had considered all the issues in dispute between the applicant and the respondent and had thereby rendered a final award. The respondent maintained that the grounds raised by the applicant in support of the application did not support the applicant's contention that the arbitrator had made an award that was beyond the scope of the reference to arbitration or that he had made an award that was not contemplated by the terms of reference to arbitration or that the arbitral award was against the public policy of Kenya.

At the hearing of the application, I heard submissions made by Mrs. Kinuthia for the applicant and by Mr. Akwana Mahero for the respondent. I have carefully considered the said rival arguments. I have also read the pleadings filed by the parties in support of their respective opposing positions. I have perused the arbitrator's award that is the subject of this application to set aside. The issues for determination by this court are twofold; firstly, whether the applicant presented the application to set aside within the statutory period stipulated under the **Arbitration Act 1995** and secondly, if the court rules in favour of the applicant on the first issue, whether the applicant established a case to entitle this court set aside part of the arbitral award that it complains about.

As regard the first issue, **Section 35(3)** of the **Arbitration Act 1995**, provides that a party aggrieved by an award of an arbitrator is required to make an application to the High Court to set aside the arbitral award within three months of receipt of the award. In the present application, it was the respondent's contention that the award was published by the arbitrator on 19<sup>th</sup> November 2007, and therefore if the applicant was dissatisfied with the award, it ought to have filed the application to set aside at least by 19<sup>th</sup> February 2008. On the other hand, it was the applicant's case that the award was in actual fact published on 11<sup>th</sup> August 2008 when the arbitrator released the award to the parties.

I considered the arguments made by the parties herein in regard to this issue. Whereas it is true that arbitrator notified the parties that the award was ready for publication as early as November 2007, it was evident that the arbitrator did not publish or avail copies of the said award to the parties on account of failure by the parties herein to pay the outstanding balance of the arbitrator's fees. The arbitrator withheld publication of the said award till 11<sup>th</sup> August 2008. I therefore hold that the date of publication of the said award was 11<sup>th</sup> August 2008. The applicant stated that it received the award on 15<sup>th</sup> August 2008. Taking either dates as the date on which the award was published, under **Section 35(3)** of the **Act**, the applicant was required to file the application to set aside the arbitral award before this court by either 11<sup>th</sup> November 2008 or 15<sup>th</sup> November 2008. The present application was filed on 23<sup>rd</sup> September 2008. The application was therefore presented to court within the period provided under the **Arbitration Act 1995**. I find no merit with the respondent's objection in this regard.

On the merits of the application, the applicant was aggrieved with three aspects of the arbitral award; it was aggrieved that the arbitrator failed to award it costs of the arbitration yet the arbitrator had substantially found in its favour. Secondly, it was aggrieved that the arbitrator had extended the defects liability period and thereby held the applicant liable to pay the sum of Kshs.2,865/= on account of an alleged defective mild steel rod. It was further aggrieved that the arbitrator had failed to award it interest at commercial rate as stipulated in the sub-contract agreement. As is expected in such cases, the respondent was of a contrary view. It was the respondent's view that there was nothing in the award of the arbitrator that could be impeached by this court.

As a general rule, this court will not interfere with an award made by an arbitrator. This is on account of the fact that courts are required to give effect to the wishes of the parties who have opted to have their dispute determined by arbitration. However, there are certain instances when the court can intervene. Under **Section 35(2)(a)(iv)** of the **Arbitration Act**, the court can intervene where the arbitrator has exceeded his jurisdiction by determining a dispute not contemplated or not falling within the terms of reference to arbitration or if it appears that the decisions contained in the award related to matters that were beyond the scope of reference to arbitration. Under **Section 35(2)(b)** of the **Act**, an arbitral award may be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya or if the award is in conflict with the public policy of Kenya.

Having considered the matters in dispute in this application, it was clear to the court that the arbitrator was of the firm view that the applicant was not in breach of the sub-contract and had performed the contract in accordance with the terms of the sub-contract. In fact, the arbitrator completely exonerated the applicant from blame in the entire saga. The arbitrator found that the certificate of practical completion of the contract had been signed and what had remained was

for the applicant to be paid the last installment due in the sub-contract. Having reached the finding, in a strange decision, the arbitrator, being aware that as a general rule costs ought to follow the event, declined to award the applicant costs of the arbitration. The reasons advanced by the arbitrator for his failure to award costs to the applicant were untenable. I agree with the applicant that the arbitrator rendered a decision that was outside the scope of reference to arbitration when he declined to award costs to the applicant. I hold that the applicant has established an appropriate case for interference by this court of the part of the arbitral award that failed to award costs to the applicant. That part of arbitral award is set aside and substituted by a finding of this court that the applicant was entitled to be paid costs of the arbitration. The costs include a refund of part of the fees that the applicant paid to the arbitrator and also its advocate's costs.

As regard whether commercial interest was payable, clause 23.7 of the sub-contract agreement entitled the applicant to claim interest in the event that there would be delay in payment of the amount due. In the present case, a practical completion certificate in respect of the sub-contract works undertaken by the applicant was issued on 15<sup>th</sup> March 2006. Under clause 23.6 of the agreement, the applicant was therefore entitled to be paid the said sum of Kshs.211,200.48 within seven (7) days thereof. Under clause 34.6, the applicant was entitled to be paid interest on any delayed payments. Although the commercial rate of interest to be paid was not specified in the agreement, it was clear that it was contemplated that such a rate of interest would be paid in the event of delay.

I therefore hold that the arbitrator, in failing to award interest at commercial rate, refused to address a dispute which was within his term of reference. I will set aside that part of the arbitrator's award that failed award the applicant interest at commercial rate from the date the certificate of practical completion was issued to the date of full payment thereof. I will substitute that part of the award with an appropriate award by this court. I hold that the applicant is entitled to be paid interest on the sum of Kshs.208,335.48 at commercial rate of 15% per annum from 15<sup>th</sup> March 2006 until payment in full. I have evaluated the evidence adduced in regard to whether the arbitrator was entitled to deduct the sum of Kshs.2,865/= from the amount due to the applicant. I hold that nothing turns on this point and therefore the arbitrator's award stands.

In the premises therefore, the application by the applicant to set aside part of the arbitrator's award substantially succeeds. The part of the arbitrator's award which failed to award the applicant cost of the arbitration and interest at commercial rate is set aside and substituted by this court's finding as stated hereinabove. The applicant shall have costs of this application.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY 2009**

**L. KIMARU**

**JUDGE**