REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISC APPL NO. E O146 OF 2023

NATIONAL WATER HARVESTING & STORAGE AUTHORITY.....APPLICANT

VERSUS

J & K INVESTMENT KENYA LIMITED.....RESPONDENT

RULING

1. The applicant's chamber summons dated 28.2.2023 seeks the arbitral award dated 25.8.2022 and rectified on 30.11.2022 to be set aside. The application is supported by the affidavit sworn by **Sharon Obonyo**.
2. The respondent opposed the application through a replying affidavit sworn by its managing director, **Li Shunkang** on 26.9.2023.

Background

3. The parties entered into a contract for the construction of the **Turkana Peace Dam – Naku'etum Site** for the sum of Kshs.

231,114,402.64. It was supplemented by an addendum of contract dated 14.10.2020.

4. A dispute arose between the parties and settled through arbitration leading to an award of Kshs. 397,440,203.93/- to the respondent by the Sole Arbitrator, **Hon. Justice Edward Torgbor**.

5. The award was published on 25.8.2022 and after its publication, the applicant applied for correction of computational and clerical errors on interest. The arbitrator then issued an additional arbitral award dated 30.11.2022 subject to payment of his fees.

6. The court (**Hon. Mulwa J.**) issued a ruling in respect of the respondent's application dated 2.5.2023 for recognition and enforcement of the award in **Misc Appl E366 of 2023** on 22.2.2024. It thereafter emerged that the applicant's application for setting aside the award was pending hearing and determination.

7. On 27.3.2025, this court issued directions for the disposal of the application through written submissions. It also issued a stay of execution of

the decree dated 23.2.2024 pending hearing and determination of the instant matter.

8. The applicant filed initial and supplementary written submissions dated 6.3.2024 and 23.10.2025. The respondent filed written submissions dated 24.10.2023.

Applicant's case

9. The instant application was brought mainly under **sections 10 and 35 of the Arbitration Act**. The core grounds stated in the supporting affidavit as well as the application are; that the award was issued absent the requisite jurisdiction as the procedure of arbitration was not in accordance with the arbitration agreement and that it contravenes public policy as it is inconsistent with the Constitution, written and unwritten laws of Kenya.

10. The applicant contended that award sum of Ksh. 517,430,001.30 (post-variation) significantly exceeds the original contract sum of Ksh. 231,114,402.64, leading to the unjust enrichment of the respondent at the expense of taxpayers. In

support, the applicant relied on **section 35(2)(b)(ii) of the Act** on the contravention of public policy. It also relied on **Christ for All Nationals v Apollo Insurance Co. Ltd and Rwama Farmers' Co-operative Society Limited v Thika Coffee Mills Ltd [2002] 2 E. A. 366**, for the proposition that public policy entails protection against acts injurious to the public or basic norms of society.

11. The applicant relied on **section 35(2)(a)(v)) of the Act** to argue that the arbitrator acted without jurisdiction and failed to follow the agreed procedure. It highlighted that the respondent failed to issue the mandatory prior notice of a dispute as required by Clause 20.1 of the contract. It faulted the respondent for failing to exhaust the mandatory dispute resolution mechanisms provided under Clause 20, in particular, the referral of disputes in the first instance to an adjudicator prior to commencing the arbitration proceedings. It relied on **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR)** to

argue that parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

12. The applicant faulted the respondent for disregarding its various correspondences urging that the dispute be referred to an adjudicator. It therefore argued that the arbitral award is liable to be set aside under **section 35 (2) (a) (v)** as the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement.

13. The applicant faulted the arbitrator for dismissing its preliminary objection without providing written reasons, which the applicant argues is a breach of the right to a fair hearing under Article 50 of the Constitution. The applicant relied on **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR,** to assert that jurisdiction is the threshold for any legal proceeding; without it, the tribunal must down its tools.

14. On bias, the applicant relied on **section 35(2) (a)(iii) of the Act** It faulted the arbitrator for

allowing the respondent to file a further affidavit without leave and failing to ensure the respondent served an amended notice of motion as directed. It relied on **Mistry Jadva Parbat & Co. Ltd v Grain Bulk Handlers Ltd [2016] eKLR** to the effect that the impression of bias to a right-minded person is sufficient to vacate a decision.

15. The applicant therefore asserted that it has satisfied the legal requirements for setting aside the award and that they will suffer irredeemable prejudice if the award is allowed to stand.

16. The applicant contended that the arbitrator failed to consider the evidence tendered by it about how the respondent took advantage of its own breach of contract to unjustly enrich itself. It also contended that there was apparent bias and lack of consideration of the evidence and submissions.

17. The applicant also challenged the arbitrator's fees of Kshs. 12,995,580/- for being manifestly excessive and unjustifiable.

Response

18. The respondent contended that the application is time-barred under **section 35 (3) of the Act** as it was filed beyond the three months statutory window that runs from the date of receipt of the arbitral award. It highlighted that the initial award was published on 25.8.2022. That 90 days from that date lapsed on 23rd November 2022. It questioned why the applicant did not attach the additional award published on 25.8.2022, noting that the award was published on 30.11.2022 and had not been picked to date.

19. The respondent relied on **Kenya Ports Authority v Base Titanium Limited (Misc Appl 456 of 2019) [2022] KEHC 265 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)** to the effect that time starts to run under the provision when the arbitrator notifies the parties that the award is ready for collection.

20. The respondent conceded that the dispute resolution mechanism was not exhausted. However, the respondent indicated that the parties failed to jointly appoint a Dispute Adjudication Board (DAB) as required by Clause

20.2. That therefore, the dispute could be referred directly to arbitration under Clause 20.8.

21. The respondent faulted the applicant for failing to appeal the arbitrator's ruling on jurisdiction within the 30-day window provided by **Section 17(6)**, arguing that it could not be challenged now.

22. The respondent contended that the applicant made general allegations of astronomical awards and unjust enrichment without demonstrating any actual inconsistency with the Constitution or law. It also relied on **Christ for All Nations v Apollo Insurance Co. Ltd [supra],** to argue that an award is only against public policy if it is illegal, immoral, or violates basic legal principles.

23. On bias, the respondent relied on the Court of Appeal decision in **Dari Limited & 5 others v East African Development Bank [2023] KECA 454 (KLR)** to submit that the test for bias is whether an informed, reasonable person would have a reasonable apprehension of bias. It asserted that a real likelihood must be demonstrated and mere suspicion is insufficient. It

pointed out that the arbitrator frequently accommodated the applicant's own delays during the proceedings.

24. As to the arbitrator's fees, the respondent asserted that the fees were based on the ranks of the Chartered Institute of Arbitrators. It highlighted that the applicant did not object during the case management stage and is estopped from claiming the fees are excessive at this stage.

25. The respondent therefore urged the court to dismiss the application with costs.

Analysis and Determination

Legal context: Constitution and Arbitration Act

26. Arbitration is recognized by, and is one of the methods for disputes resolution under **article 159(2)(c) of the Constitution**. It also has anchorage in international instruments on arbitration as well as domestic statute specially, the Arbitration Act. The latter is existing law and has to be read in line with the Constitution. The

cardinal navigator in alternative justice systems being party autonomy entrenched in the Constitution which the courts must respect and protect in accordance with the constitutional commandment that the judiciary shall promote all forms of alternative justice mechanism. **Article 159(2)(c) of the Constitution.**

27. This obligation -to promote- is understood through and derives content from its etymological trace in human rights framing and practice assigning it three core duties; to respect, protect and transform.

28. Respect denotes-let it be. Protect denotes-do no harm and defend. And, transform denotes-develop and make it better for purpose.

29. Therefore, cutting the manner of interactions court should have with AJS processes and outcome.

30. The non-interference or limited intervention principle stated in **section 10 of the Arbitration Act** now has a constitutional explanation and underpinning. The people are the owners, source, actors, users, provide the clay and are the potter

of alternative justice systems; **the Constitution** their constituting instrument giving commandments and general operating framing; **the Arbitration Act** in the sense of existing law, one of the implementing legislations; the judiciary bearing the primary role to promote AJS; and every person under obligation to promote, uphold and protect the Constitution.

31. The foregoing provides the functional foundation for determining application for setting aside an arbitral award.

Time barred?

32. An issue of preliminary importance; whether the application time barred?

33. **Section 35 (3) of the Arbitration Act** provides: -

> ***"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."

34. I note that the respondent based its computation on the date when the initial award was published. However, the above provision states that if a request for correction had been made, the computation would be from the date on which that request had been disposed of.

35. The number of days from the date the additional award was published, i.e. 30.11.2022 to the date the application was filed, i.e. 28.2.2023 is 90 days. This is within the statutory timeframe. Therefore, the application is not time-barred.

Grounds for setting aside an award

36. The grounds for setting aside an arbitral award are set out under section 35 (2) of the Arbitration Act, as follows: -

"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."

Jurisdiction

37. On jurisdiction, the respondent faulted the applicant for failing to appeal the arbitrator's ruling on jurisdiction within the 30-day window provided by **Section 17(6)**, arguing that it could not be challenged now.

38. **Section 17 (6) of the Act** provides that ***"(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after***

having received notice of that ruling, to decide the matter."

39. However, the issue of jurisdiction was addressed substantively in the award, not as a preliminary question. Therefore, in my considered view, the above provision is not applicable. I agree with the respondent's submission that section 17 (5) of the Act allows the issue of jurisdiction to be determined either in the preliminaries or in the arbitral award.

40. The applicant challenged the arbitrator's jurisdiction based on the respondent's failure to adhere to the agreed dispute resolution procedures. It faulted the respondent for failing to issue a mandatory prior notice of a dispute as required and for failing to refer the dispute in the first instance to an adjudicator prior to commencing the arbitration proceedings.

41. **Clause 20.1** provides that if the contractor shall give the engineer 28 days' notice if he considers that he is entitled to any extension of time of completion and/ or any additional payment.

42. **Clause 20.2** provides that disputes shall be adjudicated by a Dispute Adjudication Board (DAB), in accordance with subclause 20.4, jointly appointed by the parties.

43. The arbitrator's finding on jurisdiction was as follows: -

"From the evidence, the tribunal finds that: -

i. The parties did not appoint the Dispute Adjudication Board (DAB) in the prescribed manner within the time frames provided by the "GCC"

ii. The adjudication procedure became inoperable for being overtaken by the parties' failure to appoint jointly an adjudicator or implement the Dispute Adjudication Agreement at the commencement of the Project within a project execution time limit of 100 days, and

iii. The failure of the "DAB" process thereby opened the way to

arbitration as the adjudication process was not mandatory."

44. The applicant challenged the above finding based on clause 20.2, claiming that it provides for joint appointment of a competent adjudicator when a dispute arises by the parties and upon failure to agree on the choice of the adjudicator, the Chairman of the Chartered Institute of Arbitrators shall do so.

45. From my reading of the contract, clause 20.2 on appointment of the DAB was based on timelines. Clause 20.3 on the failure to agree on DAB was to the effect that if parties fail to agree on the appointment of a person to the DAB of three persons or either party fails to nominate a member for approval by the other party or fails to agree on the appointment of a replacement person within specified timelines, the appointing authority would upon the request of either or both parties appoint the member of the DAB.

46. Clause 20.8 states that **if a dispute arises between the parties, in connection with, or arising out of the contract or the execution**

of the works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise, (a) sub-clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Subclause 20.5 [Amicable settlement] shall not apply and (b) the Dispute may be referred directly to arbitration under sub-clause 20.6 [Arbitration].

47. In my understanding of the provision, the parties could refer the dispute directly to arbitration if there was no DAB in place. In my view, the above provision was put in place as it was foreseeable that there was a possibility that the parties could fail to agree on the appointment of an adjudicator hence the inclusion of the words ***"or otherwise"***.

48. Based the foregoing, I am inclined to agree with arbitrator's finding that since the parties did not appoint the DAB in the prescribed manner and within the timelines, the dispute could be referred directly to arbitration.

Public policy

49. The applicant contended that award sum of Ksh. 517,430,001.30 (post-variation) significantly exceeds the original contract sum of Ksh. 231,114,402.64, leading to the unjust enrichment of the respondent at the expense of taxpayers.

50. The respondent argued that the applicant has not demonstrated any actual inconsistency with the Constitution or law.

51. The applicant challenged the award on public policy based on an error of mixed fact and law.

52. On this aspect, I am content to cite **Christ for All Nationals v Apollo Insurance Co. Ltd and Rwama Farmers' Co-operative Society Limited v Thika Coffee Mills Ltd where Hon. Justice Ringera (Rtd)** stated in part that: -

> ***"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 or law or mixed fact or law or of construction of a statute or contract on***

the part of an arbitrator cannot by any stretch of imagination be said to be and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act."

53. **"Whether the Arbitrator got it right or wrong is not a ground for intervention less so on the basis of public policy." Dinesh Construction Limited another v Aircon Electra Services (Nairobi) Limited 2021 KEHC 6762 (KLR)** and **Mahan Limited v Villa Care ML HC Misc. Civil App. No. 216 of 2018 [2019] eKLR**

54. The applicant contended that award sum of Ksh. 517,430,001.30 (post-variation) significantly exceeds the original contract sum of Ksh. 231,114,402.64, leading to the unjust enrichment of the respondent at the expense of taxpayers.

55. The applicant made a generalized claim that the significant difference after variation was against public policy for it lead to unjust enrich of the

respondent at the expense of the tax payers without demonstrating how the variation was illegal or fraudulent as to amount to unjust enrichment. The applicant has not shown how the award was contrary to the Constitution, written law or defined moral or legal principles or illegal. **Christ for All Nations v Apollo Insurance Co. Ltd [supra],**

56. Therefore, I find that the applicant has not made out a case for the setting aside of the award on grounds of public policy.

Bias

57. The applicant accused the arbitrator of bias in allowing the respondent to file a further affidavit without leave and failing to ensure the respondent served an amended notice of motion as directed.

58. The respondent retorted that the arbitrator frequently accommodated the applicant's own delays during the proceedings.

59. The substantive and procedural position is that a question of bias must first be raised with the arbitrator under **section 14 of the Arbitration**

Act. **Chania Gardens Limited v Gilbi Construction Company Limited & another [2015] KEHC 6202 (KLR)**

60. The above procedure reinforces party autonomy in as well as propriety and efficiency of the arbitral process ensuring issues that may affect the ability of the arbitrator to conduct the proceedings are dealt with expeditiously by the arbitral tribunal but allowing the aggrieved party to come to court only after the determination by the arbitrator on the question of bias.

61. In any event, the claim of bias has not been substantiated.

Arbitrator's fees

62. The applicant challenged the arbitrators' fees for being excessive. This is not among the grounds for setting aside the award under section 35(2). Questions on arbitrator's fee should be dealt with under section 32B.

Disposal

63. In conclusion, the application dated 28.2.2023 is dismissed for want of merit with costs to the respondent.

Dated, signed and delivered at Nairobi through Microsoft Teams online application this 19th day of February, 2026

F. Gikonyo M

Judge

In the presence of: -

Ms. Kyumu for Muchemi for Applicant
Ms. Olendo for Respondent
Walukwe for Interested Party
CA – Ivan/Aggrey