IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, SICHALE & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 81 OF 2016

BETWEEN

SYNERGY INDUSTRIAL CREDIT LIMITED.....APPELLANT

AND

CAPE HOLDINGS LIMITED.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Kariuki, J.), dated 11th March 2016

in

MISC. CIVIL APPLICATION NO. 114 OF 2015

****

JUDGMENT OF THE COURT

One of the significant features of the ***Arbitration Act, Cap 49***, ***(the Act)*** is the principle of party autonomy, which entitles parties to have their dispute resolved by the forum and in the manner of their choice. For that very reason the instances when the court may intervene in arbitral proceedings or interfere with an arbitral award are not at large; they are few and only those specified by the Act.

One such instance when an aggrieved party in arbitral proceedings is allowed to challenge an arbitral award in the High Court is when an arbitral tribunal has exceeded its mandate. By dint of ***section 35 (2) (a) (iv)*** of the Act, such excess of jurisdiction arises if the arbitral tribunal deals with a dispute that was not contemplated by the parties, or deals with a dispute that is beyond the terms of the reference to arbitration, or if it decides matters beyond the scope of the reference. The provision, no doubt, to emphasise the principle of party auton-omy, allows the court, where severance is possible, to set aside only the part of the arbitral award containing decisions on matters that were not referred to arbitration, and to leave intact those that were properly within the arbitrator's ju-risdiction.

The main issue in this appeal is whether the High Court ***(Kariuki, J.)*** erred by setting aside an arbitral award in favour of ***the appellant, Synergy Indus-trial Credit Ltd***, on the ground that the arbitral tribunal had determined issues beyond the scope of the reference.

The facts, as expected, are contested by the parties, but the short back-ground to the appeal is as follows. After initial discussions and negotiations go-ing back to 2009, ***the respondent, Cape Holdings Limited***, agreed to sell and the appellant agreed to buy, an office block (14 units) known as ***Synergy Square*** that the respondent was developing on ***LR No. 209/19436*** along ***Riverside Drive*** in ***Nairobi***. The agreement is said to have been partly oral, and partly written, the latter represented by 14 agreements all dated 8th February 2011. The agreed purchase price was ***Kshs 700,000,000,*** together with ***Kshs 3,200,000*** for parking silos, making a total of ***Kshs 703,200,000***. As of the date of the formal agreements, the appellant contended that by mutual agreement with the respondent, it had already paid ***Kshs 577,200,000*** to the respondent and a further ***US$ 1,526,888*** to the respondent's nominee, ***Icarus Equities Inc***, in furtherance of the transaction.

A dispute subsequently arose between the parties, with each blaming the other of breach of the agreement, and the same was ultimately referred to a single arbitrator, ***James Ochieng Odoul***. The 14 written agreements contained a standard arbitral agreement (**clause U)** which provided for resolution, by arbitration, of any dispute, difference, or question whatsoever arising between the parties.

In its statement of claim the appellant set out the background to the dis-pute, including the negotiations and the agreements before and up to the signing of the 14 written agreements and the payments it made to the respondent prior to the execution of the formal agreements. The appellant contended that the respondent was in breach of the agreement and accused it of duress and unconscionable and fraudulent conduct in the transaction. The appellant therefore claimed from the respondent a sum of ***Kshs 1,475,344,477*** made up of various heads of claims,

namely, refund of advance payments, loss of interest, opportunity cost, loss consequent upon price escalation, loss due to exchange fluctuation, loss of goodwill and cost of inconvenience, and associated costs.

The respondent filed a defence and counterclaim. In the defence, the re-spondent denied the appellant's claim and all the averments, and contended that it had performed all its obligations under the agreements and that the agree-ments were in fact terminated by the appellant's repudiatory breach. In the premises, the respondent denied that the appellant was entitled to any refund and further denied any knowledge of the payments made by the appellant to Icarus Equities Inc. In the counterclaim which was based on the dealings between the parties prior to the execution of the written agreements, the respondent prayed from the appellant damages totalling to ***Kshs 506,953,544.18***, interest, and costs.

The arbitral tribunal heard the evidence adduced by the parties and their respective submissions, over a period of 46 days, and identified the facts not in dispute, the issues in contention, and 14 issues for determination. For clarity it is important to set out the issues that the arbitral tribunal identified for determination, which were as follows:

a) Whether the claimant's claim is barred by illegality and public policy in light of the claimant's pleadings and evidence given by the claimant in the course of the hearing?

b) Whether the matters raised in the statement of claim are properly before the Tribunal and whether I can address them?

c) Whether there were oral agreements entered into between the claimant and the respondent in January 2010? If so, what were the terms of the said agreements?

d) Whether there was an oral agreement between the parties, its terms as stated by Vipul pursuant to which the claimant was to make advance payments as part of the purchase price in US dollars?

e) Did the claimant make such payments?

f) Were such payments made to Icarus made at the request of the respond-ent and for the benefit of the respondent?

g) Whether the oral agreements were affected and /or modified by the agreements dated 9th February, 2011? If so, to what extent?

h) Whether there were breaches of the said oral and written agreements? If so, by who and in what manner?

i) Whether the respondent is guilty of unconscionable conduct?

j) Whether the respondent is guilty of fraud?

k) Whether the claimant and the respondent respectively suffered loss and damage as a result of the breaches above?

l) Whether the claimant is entitled to the reliefs it seeks in its statement of claim?

m)Whether the respondent is entitled to the reliefs sought in the counter-claim?

n) Who should bear and pay the costs of the arbitration and this award?

By an award published on 30th January 2015, the arbitral tribunal found in favour of the appellant and awarded it ***Kshs 1,666,118,183.00***, made up as follows:

Claim	***Kshs***
(a) Refund of funds advanced	*715,627,666.00*
(b) Interest on funds advanced	*750,476,683.00*
(c) Income opportunity loss	*147,825,034.00*
(d) Exchange fluctuations	*50,200,000.00*
(e) Costs to be reimbursed	*1,988,800.00*

The tribunal further awarded the appellant compounded interest at the rate of 18% per annum for the whole or part of the total award that shall be unpaid from 1st of January 2015 until payment in full, as well as costs of the reference and arbitration, to be taxed by the Deputy Registrar of the High Court on that court's scale. The respondent's counterclaim was disallowed in its entirety.

The respondent was aggrieved and by an application dated 25th February 2015 applied to the High Court under ***section 35*** of the Act to set aside the arbitral award. The grounds on which the application was made were that the arbitrator had exceeded the scope and mandate of the arbitration under the 14 agreements; by his award, the arbitrator had exceeded his mandate and scope of the arbitration; the arbitrator had violated section 19 of the Act (equality of arms) by denying the respondent an opportunity to question an independent accountant's report

and lastly that the award to the appellant of the moneys paid to Icarus Equities Inc. was without evidence and in any event the payment was illegal and contrary to public policy.

On its part, the appellant, on 4th March 2015, applied to the High Court pursuant to ***section 36*** of the Act for enforcement of the arbitral award.

The two applications fell for determination by Kariuki, J. who, quite properly in our view, directed that the application to set aside the arbitral award be heard first in time. By the ruling impugned in this appeal, the learned judge found that all the issues determined by the arbitrator fell out of the scope of the reference and set aside the arbitral award, but directed each party to bear its own costs. As a consequential order, the learned judge dismissed the application for enforcement of the arbitral award and similarly directed each party to bear its own costs.

A legal hiatus, so to speak, ensued after the appellant's appeal to the Court of Appeal was struck off on the grounds that there was no right of appeal to the Court of Appeal from a decision of the High Court under section 35 of the Act.

(See ***Synergy Industrial Credit Ltd v. Cape Holdings Ltd, CA. No .81 of 2016).*** Undeterred, the appellant proceeded to the Supreme Court and that Court, by a majority judgment dated 19th December 2019, affirmed that not every decision of the High Court under ***section 35*** of the Act is appealable to the Court of Appeal. However, the Supreme Court added, the Court of Appeal has residual jurisdiction to entertain an appeal under ***section 35*** in exceptional and limited circumstances where there is need to correct palpable injustice. Finding the appellant's was such a case, the Supreme Court allowed the appeal and di-rected this Court to hear and determine the appellant's appeal expeditiously and on priority basis. (See ***Synergy Industrial Credit Ltd v. Cape Holdings Ltd [2019] eKLR)***

In this appeal, the appellant impugns the ruling of the High Court on 12 grounds, which it concedes raise only two broad issues. The first is whether the learned judge exceeded his jurisdiction under section 35 of the Arbitration Act by treating the application to set aside the arbitral award as an appeal on the merits from the arbitrator's decision. The second is whether the learned judge erred by holding that the arbitration clauses in the 14 written agreements did not confer on the arbitrator jurisdiction to determine the issues addressed in the award.

As a result of an order that we made on 22nd July 2020 declining to ad-journ the appeal further to enable the parties to orally highlight their written submissions, the appeal was heard through written submissions only. The ap-pellant was represented by ***Mr Ahmednasir Abdullahi***, senior counsel, whilst the respondent was represented by ***Mr Elias Mwangi***, learned counsel.

On the first broad ground of appeal, the appellant submitted that instead of restricting himself to the terms of ***section 35*** of the Act, the learned judge undertook a full review of the law and the evidence adduced before the arbitrator, as if he was considering an appeal on merit, from the arbitral tribunal. In the appellant's view, the decision by the High Court that some payments made by the appellant were against public policy, as well as the conclusion that the ap-pellant's report was produced contrary to ***sections 19*** and ***27*** of the Act amounted to review of the arbitral award on merit rather than on the confines set by ***section 35*** of the Act. The appellant cited the decisions in ***Rural Housing Estates Ltd v. Eldoret Municipal Council [2009] eKLR, DB Shapriya & Co Ltd v. Bish International BV (2) [2003] 2 EA 404*** and ***Tersons Ltd v. Steven-age Development Corp. [1963] 3 All ER 863*** and submitted that the Court has no jurisdiction under ***section 35*** of the Act to interfere with the arbitrator's find-ings of fact or law.

On the second broad ground of appeal, the appellant submitted that alt-hough the learned judge framed the issue for determination to be whether the arbitrator had dealt with a dispute that was not contemplated by or not falling within the terms of the reference to arbitration, he ended up determining the application to set aside the arbitral award on a totally different consideration, namely, that the arbitrator had acted outside his scope of reference. It was the appellant's view that the learned judge was not entitled to determine the appli-cation on a different consideration other than what he had identified and further that the learned judge erred by failing to appreciate that section 35 of the Act contains three distinct and separate considerations on which the court could set aside an arbitral award.

In the appellant's view, for an award "to contain decisions on matters be-yond the scope of the reference to arbitration", it must be demonstrated that the dispute and the award were diametrically opposed so as to lead to the conclusion that the award was on a dispute or matter far removed from what the parties contemplated when they referred the dispute to arbitration.

The appellant further contended that the scope of the reference was set by clause U of the 14 agreements. In its view, it is the arbitration clause or agree-ment that determines the width and breadth of the arbitration and that clause U allowed the parties to refer to arbitration "***any"*** dispute arising under the agreements. The appellant submitted that the learned judge erred by constrict-ing and narrowing the otherwise broad arbitration clause by reference to **clauses D** and **T** of the agreements which recognised the written agreements as the only and entire agreements between the parties. It was contended that clauses D and T were not the arbitral agreement and that being in the nature of exemption clauses, those two clauses were peripheral to the dispute referred to arbitration and had to be construed strictly. The appellant cited the decision of the High Court in ***Kenya Tea Development Agency Ltd & 7 Others v. Savings Tea Brokers Ltd [2015] eKLR*** and submitted that the arbitrator's determination is tethered by the arbitration agreement, the reference, and the law.

Next, the appellant submitted that the pleadings and submissions by the parties were critical in determining the issues in dispute, as well as the proper scope of the reference. The appellant contended that it had set out in its plead-ings the history of the transaction before and up to the execution of the 14 agree-ments and explained, again in the pleadings, the basis upon which it made sub-stantial payments to the respondent before execution of the agreements. The respondent too, the appellant argued, had based its entire counterclaim on deal-ings and agreements between the parties prior to the execution of the 14 formal agreements, which the appellant contended only came at the tail-end of the transaction, and had a mere lifespan of 51 days.

We were therefore urged to find that the arbitral tribunal properly consid-ered the pleadings by the parties and concluded rightly that the scope of the dispute was not limited only to the 14 written agreements. The appellant cited the judgments in ***Charles Sande v. Kenya Co-operative Creameries Ltd, CA No. 154 of 1992, Bhang Bhari v. Medhi Khan [1964] 2 EA 94, Captain harry candy v Caspar Air Charters***

Ltd [1956] 23 EACE 139 and ***David Sironga ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR*** to emphasise the role of pleadings in crystallising the issues in a dispute.

Lastly the appellant urged that the High Court was not entitled to set aside the decision of the arbitral tribunal on the construction of clauses D,T, and U merely because if the court was hearing the reference, it would have reached a different conclusion. In that regard the appellant relied on ***Kelantan Govern-ment v. Duff Development Co (4) [1923] AC 395.***

The respondent opposed the appeal and defended the ruling of the learned judge that set aside the arbitral award. It contended that the appellant had exaggerated and sensationalised this appeal, and urged us to find that the learned judge was circumspect and did not treat the application before him as an appeal on merit from the arbitral tribunal's award. The respondent submitted that it was in fact the arbitral tribunal that went rogue and completely outside the scope of its mandate by determining the dispute on the basis of what it termed **"Agreed Terms of Purchase" (ATP)** rather than on the basis of the 14 written agreements. The appellants also contended that the arbitral tribunal went out of the scope of its mandate by holding that the 14 agreements were null and void, yet the appellant had not prayed for such a relief in its statement of claim. In the respondent's view, it was not open to the arbitrator to rely on the pleadings to expand the scope of the dispute beyond the 14 agreements. In sup-port of that proposition the respondent cited the judgment of the High Court in ***Hausram Ltd v. Nairobi City County [2017] eKLR.***

It was the respondent's further argument that under section 35 of the Act, the High Court's role is not to merely rubber-stamp an arbitral award, but to satisfy itself that the arbitral tribunal has stuck to determination of the dispute submitted to arbitration by the parties, which in this case was simply the inter-pretation and determination of the terms of the 14 agreements. The appellant relied on the judgments of this Court in ***Gitonga Warugongo v. Total Kenya Ltd [1988] eKLR*** and ***Kenya Bureau of Standards v. Geo Chem Middle East [2019] eKLR*** and that of the Supreme Court of India in **A*ssociated Engineering Company Ltd v. Government of Andra Pradesh & Another [1992] AIR 232*** and submitted that an arbitrator who determines questions that the parties have not asked him to determine, or acts in disregard of the contract, is acting beyond the scope of the reference and therefore without jurisdiction.

The respondent also added that in determining whether the arbitral tribunal had deviated from the scope of its mandate, the learned judge was not restricted to the arbitration clause, but was entitled to peruse the 14 agreements, all the relevant clauses therein, and to determine how they related to the arbitral clause. In the respondent's view, that was the only way the learned judge could deduce the clear intention of the parties. In support of the submission the respondent cited ***Rajasthan State Mines & Minerals Ltd v. Eastern Engi-neering Enterprises (1999) SC, India.***

It was the respondent's further submission that once the arbitrator failed to appreciate that the 14 agreements constituted the only agreement between the parties, he unlawfully expanded the scope of his mandate. The respondent relied on the decisions in ***Muthuuri v. National Industrial Credit Bank Ltd [2003] eKLR*** and ***Kinyanjui & Another v Thande & Another [1995-98] 2 EA 159*** and submitted that a written contract supersedes all discussions and agreements preceding its execution and becomes the exclusive memorial of the parties' agreement.

To further demonstrate its contention that the arbitral tribunal had exceeded the scope of its mandate, the respondent submitted that the tribunal declared the 14 agreements null and void even though the appellant had not sought such relief, awarded interest, compound interest, income opportunity loss and foreign exchange loss, all of which could not be awarded under the 14 written agreements. For the award of interest the respondent relied on ***Michael Mubea Kamau v. Robert Wanjiku Machua [2001] eKLR*** and argued that no interest was payable if it was not provided for in the agreement, and as regards compound interest, it cited ***Euro Blitz 21 v. Seneca Aircraft Investments CC (2015) ZASCA 21*** and ***Glahe International Expo v. ACS Computer Pte [2001] 3 LRC*** and submitted that compound interest was only awardable where the parties so agreed or there was clear evidence of universal custom to that effect. It was contended that the parties had neither agreed on compound interest nor had the appellant adduced evidence of universal custom. As for payment of damages, it was the respondent's contention, on the authority of ***Rural Housing Estates Ltd v. Eldoret Municipal Council (supra)***, that no damages were pay-able, save those that were reasonably foreseeable, unless the agreement between the parties provided for it, which was not the case. Lastly on award of foreign exchange loss, the respondent relied on ***Forty Five Aviation Ltd v. Captain Richard Oloka [2015] eKLR*** and submitted that the currency of financial award must be the local currency, namely Kenya shillings.

The respondent concluded by urging us to dismiss the appeal with costs and refer the dispute back to arbitration on the basis of the 14 written agree-ments, which are binding on them. The appellant cited the decision of the Su-preme Court of Appeal of South Africa in ***Palabora Copper (Pat) Ltd v. Motlokwa Transport & Construction (Pty) Ltd [2018] ZASCA 23*** in support of such course of action. The appellant however, would hear none of that, arguing that the respondent had not filed a cross-appeal to justify such an order.

As we have already adverted, in our view the crisp issue that calls for de-termination in this appeal is whether the learned judge erred in setting aside the arbitral award on the ground that the arbitral tribunal had determined issues beyond the scope of the reference that the parties submitted to it. Naturally the starting place is the terms of section 35 of the Act, on which the application before the High Court was based. That provision reads as follows:

> *"35. (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsec-tions (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)…*
>
> *(ii)…*

(iii)…

(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."

The appellant contends that sections 35 (2) (iv) of the Act contemplates three different scenarios under which an arbitral award may be set aside, namely:

i) the award deals with a dispute not contemplated by the terms of the reference;

ii) the award deals with a dispute not falling within the terms of the ref-erence;

iii) the award contains decisions on matters beyond the scope of the ref-erence to arbitration.

It is the appellant's further contention that a party who seeks to set aside an arbitral award must demonstrate which of the three situations the arbitral award offends and in this case faults the learned judge for identifying the first two grounds but determined the application on the basis of the last ground. The respondent did not directly address this contention.

It is important to bear in mind, as the Supreme Court noted in ***Synergy Industrial Credit Ltd v. Cape Holdings Ltd*** (supra), that ***section 35(2) (iv)*** of the Act, as indeed the entire Act, is based on the ***UNCITRAL Model Law on International Commercial Arbitration, 1985 (the Model Law)***. Section 35(2) (iv) is borrowed word for word from ***Article 34(2) (a) (iii)*** of the Model Law. On the other hand, ***Article 34(2) (a) (iii)*** of the Model Law is itself borrowed almost word for word from ***Article V(1) (c)*** of the ***United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention),*** which sets out the grounds upon which recognition and enforcement of an arbitral award may be refused. As the ***Explanatory Note by the UNCITRAL Secretariat on the Model Law as amended in 2006*** makes abun-dantly clear, that legislative approach was found desirable for the sake of har-mony. We are therefore satisfied that commentaries on the two provisions of the Model Law and the New York Convention are relevant in unpacking section 35(2) (iv) and in guiding us in the determination of this appeal.

The UNCITRAL Guide to the New York Convention, 2016 notes that the equivalent language to that in our section 35 (2) ***('may be set aside')*** is permis-sive and discretionary, rather than obligatory or mandatory, meaning that the court is not obligated to set aside an arbitral award, although it is free to do so if the circumstances of the case justify it. Secondly, from the use of the phrase ***"only if"*** in section 35, the list of grounds provided therein on the basis of which an arbitral award may be set aside constitute an exhaustive and closed list. No new or additional grounds may be introduced to impeach an arbitral award. It is for that reason that the High Court reiterated in ***Transworld Safaris Ltd v. Eagle Aviation Ltd & 3 Others***, ***HC Misc App. No 238 of 2003*** that an applicant under section 35 of the Act must strictly bring himself within the terms of the provision.

The third aspect of the provision is that an erroneous decision in law or fact by the arbitral tribunal is not a ground upon which a court may set aside an arbitral award under section 35. A court seized of an application to set aside an arbitral award under that section has no jurisdiction to review the merits of the arbitral award. Thus for example, in ***Paperworks v. Misco, Inc. 484 US 29 (1987) 108 S. Ct 364,*** the US Supreme Court expressed itself as follows ***(Justice White)*** while reversing a decision of the Court of Appeal for the Fifth Circuit which had refused to enforce an arbitral award (quotes and footnotes omitted):

"Collective bargaining agreements commonly provide grievance proce-dures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbi-tration for unsettled grievances. In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a lim-ited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or misrepresen-tation of the contract. The refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As long as the arbitrator's award draws its essence from the collective bargaining agreement and is not merely his own brand of industrial justice, the award is legitimate. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on the face of it is gov-erned by the contract. Whether the moving party is right or wrong is a question of the contract interpretation for the arbitrator. In these circum-stances the moving party should not be deprived of the arbitrator's judg-ment, when it was his judgment and all that it connotes that was bar-gained for. The courts therefore have no business weighing the merits of the grievance considering whether there is equity in the particular claim, or determining whether there is particular language in the written instru-ment which supports the claim." (Emphasis added).

Justice Ripple, speaking for the United States Court of Appeal for the 7th Circuit in ***Generica Ltd Pharmaceutical Basics, 125 F. 3d 1123 (7th Cir. 1997)*** reiterated the same principle (quotes and footnotes omitted):

"As the court noted on the first opinion, arbitration is simply a matter of contract between the parties. When the parties agree to have their dispute settled by an arbitrator, they also agree to accept the arbitrator's view of the facts and of the meaning of the contract. Courts thus do not sit to hear the claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts". (Emphasis added).

Here at home, the High Court took the same approach in ***Apa Insurance Co. Ltd v. Chrysanthus Barnabas Okemo [2005] eKLR,*** while considering an application to set aside an arbitral award under section 35 of the Act. ***Ochieng, J.*** rendered himself thus:

> *"In looking at this issue, I must remind myself that it is not for me to re-evaluate the evidence, as if it were an appeal. This is certainly not an appeal from the decision by the arbitrator. My role is to ascertain if the applicant had made out a case to warrant the setting aside of the arbitral award."*

The other salient feature of the provision, flowing directly from the words ***"the party making the application furnishes proof",*** that are employed in section 35, is that the party seeking to set aside an arbitral award bears the burden of satisfying the court that the arbitral tribunal determined a dispute not contemplated or not falling within the terms of the reference to arbitration or that the arbitral award contains decisions on matters beyond the scope of the reference. In determining whether the burden has been discharged, the court must pay due regard to the strong constitutional, statutory and national policy commitment to dispute resolution through arbitration and other alternative dispute resolution mechanisms. See ***Ministry of Defence of the Islamic Re-public of Iran v. Gould, Inc. (969 F. 2d 764).***

Having very carefully considered ***section 35 (2) (iv)*** of the Act, we do not think there is any substantive difference between an arbitral award that is *not contemplated* by the terms of the reference and one *not falling* within the terms of the reference. It is difficult to fathom how an award dealing with a dispute that is not contemplated by the reference can at the same time be described as falling within the terms of the reference. Or how an award that is contemplated by the term of the reference can be said not to fall within the same terms. However, there is no doubt in our minds that an arbitral award that deals with a dispute contemplated by the terms of the reference and falling within those terms, may contain matters beyond the scope of the reference.

A simple example may suffice as an illustration. If two people in a dispute on liability and quantum of damages for breach of contract agree on which of them bears liability and submit to an arbitral tribunal only determination of the quantum of damages payable, the tribunal will have determined a dispute not contemplated by the parties if it purports to find a different party liable to pay the damages it has assessed. At the same time such a determination would also clearly not fall within the terms of the reference. Where however, the tribunal sticks to determination of the quantum of damages without veering into the question of which party is liable, its award on quantum of damages cannot be said to constitute determination of a dispute not contemplated by the parties or not falling within the terms of the reference, however aggrieved a party may be by the quantum of damages awarded.

Where the failure to act within the terms of the reference has resulted in determination of issues that were not referred to arbitration and it is possible to severe them from those that were referred, then the court is empowered to set aside only the part of the arbitral award that contains matters that were not referred to arbitration. In the simple example above, the court would be entitled to set aside the determination on the question of liability, which is beyond the scope of the reference and leave intact the determination on quantum of damages which is properly within the scope.

In our perception, section 35(2) (iv) therefore does not create three separate and distinct grounds upon which a court may set aside an arbitral award, as submitted by the appellant. The provision requires the court, taking a broad view of the application to set aside an arbitral award, and guided by the principles we have set out above, to be satisfied by the applicant that the arbitral tribunal failed to act within the terms of the reference, say for example, by determining an entirely different dispute from that submitted to it by the parties.

In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in ***Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc. (supra),*** the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.

The 14 arbitral clauses or agreements (common clause U) pursuant to which the dispute was referred to the arbitral tribunal provided as follows:

> *"Any dispute, difference or question whatsoever which may arise be-tween the parties including the interpretation of rights and liabilities of either party shall be referred to an arbitrator under the rules of the Arbi-tration Act 1995 of Kenya as amended by the Arbitration (Amendment) Act 2009 or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other then on the application of any one party by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto." (Emphasis added).*

The arbitral agreement was broad and clearly comprised all kinds of disputes.

By it, the parties agreed to refer to the arbitral tribunal *"any dispute, difference or question whatsoever"* that may arise between them including interpretation of their rights and liabilities. They did not, in that arbitral agreement, limit the "dispute, difference or question" to only those arising under the 14 written agreements. As we have already pointed out, the pleadings by both parties similarly were not restricted to disputes, differences, questions or interpretation of the rights and liabilities of the parties under the 14 written agreements. Both parties went into great detail about the negotiations and agreements that they reached between themselves long before the written agreements were executed. In terms of conduct of the parties, it is instructive that the respondent, who strenuously contends that the arbitral award exceeded the scope of the arbitral agreement by considering matters antedating the written agreements, founded its counter-claim entirely on matters before the written agreements were entered into. It is instructive that the appellant has not explained why it took such an approach if indeed under the arbitral agreement between the parties, matters antedating the 14 written agreements were outside the scope of the reference.

Section 17 of the Act empowers the arbitral tribunal to rule on its own jurisdiction including any objection as to the existence, validity and scope of the arbitral agreement. In this case the arbitral tribunal addressed itself at length on the scope of the arbitral agreement and concluded that the agreement did not restrict the dispute that the parties referred to arbitration to the written agreements only. It is apposite to quote the tribunal verbatim in this respect:

> *"17.32 My interpretation of this clause is that this is an all dispute reso-lution clause and therefore I find that the contention by the respondent that the tribunal should restrict itself to the contents of the agreements of 8th February 2011 to be restrictive interpretation of the dispute resolution clause.*
>
> *17.33 I find and hold that the arbitration clause in the agreement is wide enough in terms and encompasses any dispute between the parties touch-ing on the transaction between the parties.*
>
> *17.34 Other than the issue of interpretation of the arbitral clause, an ex-amination of the statement of claim, the statement of defence and coun-terclaim and the defence clearly leave no doubt that the parties have brought all the disputes before the tribunal and their respective claims are not limited to the four walls of the written agreements dated 8th February 2011.*
>
> *17.35 The claims and the counterclaims are based on the verbal agree-ments reached in February 2010 as well as the written agreements of 8th February 2011. To this extent I agree with the claimant's submissions that the oral agreements and the written agreements are inextricably linked and cannot be dealt with in isolation. An examination of the de-fence and counterclaim put the issue beyond peradventure.*
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> *17.36 I further find that the respondent in its defence and counterclaim has relied on matters way before the agreement of 8th February 2011. The respondent has not pleaded its case based on the agreement on 8th February 2011 and the respondent is bound by its pleadings and cannot resile therefrom. The respondent is estopped from abandoning its plead-ings or the statements (under) oath by its witnesses in that regard.*
>
> *17.37 I further find and hold that the matters raised in the statement of claim in terms of the claim are properly before the tribunal for adjudica-tion."*

The parties had freely chosen arbitration as their preferred dispute resolution mechanism and the arbitral tribunal properly pronounced itself, as it was duty bound to do, on whether the dispute was properly before it. On the face of it, that was a reasonable decision and in our view, quite consistent with the arbitral agreement.

For his part the learned judge revisited the arbitral agreement, and like the arbitral tribunal held that:

> *"It would appear on the face of it that all dispute of whatever nature touch-ing on the transaction between the parties were to be referred to arbitration. Further the clause seems not to differentiate between disputes from pre-contract stage or after the contract stage."*

Nevertheless, in ultimately holding that the arbitration agreement was limited to only disputes under the written agreements, the learned judge invoked **clause D** of the agreements which declared that the written agreements constituted the entire agreement between the parties and any representations, warrantees or statements whether written, oral or implied and whether made before or after the agreements were expressly excluded, as well as **clause T** of the same agreements which stated that each party to the agreement agrees and confirms for the purposes of the Law of Contract Act (cap 23 Laws of Kenya) that it has executed the agreements with intention to bind itself to the contents thereof. The learned judge's final conclusion on this issue was that:

> *"After going through the parties agreements, pleadings and submissions, the court makes a finding that clause D of the contract did set the scope of the arbitrator's mandate and no amount of construction of the arbitra-tion clause could expand the arbitrator's jurisdiction to include the so called oral agreements nicknamed as agreed terms of purchase (ATP)."*

As we stated earlier, the primary consideration in determining the scope of the reference is the arbitral clause or agreement. It is in the the arbitral agree-ment that the parties have agreed to submit their dispute to arbitration and it is that agreement therefore which provides the basis of the arbitration. By dint of section 17 of the Arbitration Act, the arbitral agreement in a contract is an independent agreement, separate and independent from the other terms of the contract and a finding that the contract is void does not invalidate the arbitral agreement.

Where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement. If the parties wished to restrict the arbitration to only the written agreements, we would have expected them to state so expressly in the arbitral agreement itself. Furthermore, a look at how the learned judge dealt with the question leaves no doubt in our minds that he did not confine himself to the real question, namely the terms of the arbitral agreement, but instead went into a determination that amounts to saying the arbitral award was erroneous under the law of contract. This was tantamount to undertaking a merit review of the arbitral award, based on consideration of provisions of the written agreements far removed from the arbitral agreement itself, so as to reach a different finding from the arbitral tribunal, which we think the learned judge was not entitled to do.

In ***Fiona Trust v. Pavlov [2008]1 Lloyds Law Reports 254,*** involving the question of construction of arbitration clauses, Lord Hoffman stated as follows regarding the proper approach, which we agree with:

> *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessman, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be*

decided by the same tribunal. The clause should be construed in accordance with this presumption un-less the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction…if any businessman did want to exclude disputes about the validity of a contract, it would be com-paratively easy to say so." (Emphasis added).

If, as we have found, the learned judge was not entitled to set aside the arbitral award on the basis that it dealt with disputes not contemplated by or not falling within the terms of the reference or contained decisions on matters beyond the scope of the reference to arbitration, then all the respondent's arguments on award of interest, compound interest, income opportunity loss and foreign exchange loss, which are founded on the argument that written agreements were the sole basis of the reference, cannot be sustained and therefore do not merit further consideration.

We will only add that decisions on the equivalent provisions of the New York Convention and the Model Law abound and are clear that an arbitral tribunal has discretion to award remedies where its powers are not specifically limited. Thus for example in ***Telenor Mobile Communications As v. Strom LLC., 524 F. Supp. 2d 332 (2007)***, one of the complaints in an application to vacate an arbitral award was that the arbitral tribunal had awarded a remedy that the parties had not asked for. Rejecting the argument, the ***US District Court, Southern District of New York*** stated (quotes and footnotes omitted):

> *"Arbitrators enjoy broad discretion to create remedies unless the parties ' agreement specifically limits this power. While an arbitrator's award must draw its essence from the parties 'agreement…the effectiveness of arbi-tration in resolving complicated commercial disputes would be severely undermined if arbitrators were limited to the mechanical application of contested contractual provisions. If the arbitration clause does not include any limit on the arbitrators' powers to craft a remedy, a respondent must overcome a powerful presumption that the arbitral body acted within its powers. Accordingly, while an arbitrator may not award relief expressly forbidden by the agreement of the parties, an arbitrator may award relief not sought by either party, so long as the relief lies within the broad dis-cretion conferred by the FAA (Federal Arbitration Act)."*

The respondent contends that the High Court was entitled to set aside the arbitral award because the arbitral tribunal declared the 14 agreements null and void without a specific prayer by the appellant to that effect. It is clear, in our view, that the appellant pleaded in its statement of claim that agreements were vitiated by duress and unconscionable and fraudulent conduct on the part of the respondent, which the respondent denied in its statement of defence. Both parties led evidence on those issues and among the issues for determination that the arbitral tribunal identified were whether the respondent was guilty of unconscionable conduct or fraud. We do not in the circumstances see how the arbitral tribunal can be said to have acted outside its powers.

The UNCITRAL Guide to the New York Convention, 2016 (page 176) also refers to two decisions that support the proposition that an arbitral tribunal has discretion to award costs and interest. In the first, ***Mgmt. & Tech. Consultants, SA v. Parsons-Jurden Int'l. Corp., 820 F. 2d 1531 (1987)***, the US Court of Appeals, Ninth Circuit held that where the arbitral tribunal's authority to reach the main decision was within the scope of the arbitral agreement, the tribunal also had the authority to award costs and fees for obtaining the arbitral decision. In the second, ***Shipowner v. Time Charterer Oberlandesgericht [OLG] 6 Sch. 3/98, XXV Y.B. Com Arb. 641 (2000), Hamburg, Germany,*** the Hamburg Court of Appeal rejected a challenge to enforcement of an arbitral award based on the contention that the arbitral tribunal had awarded more interest than was claimed, holding that the tribunal had discretion to award interest and compound interest. This is quite consistent with ***section 32B*** and ***section 32C*** of the Act on award of costs and interest.

As for the argument about admission of evidence and equality of arms, we take note that the arbitral tribunal is the master of procedure and that by dint of ***section 20 (3)*** of the Act, it has power to determine the admissibility, relevance materiality and weight of any evidence. We take further note that under ***section 7*** of the Act, both parties were entitled to seek from the High Court interim measures of protection during the arbitral proceedings, if indeed there was cause for concern and complaint.

Ultimately we find merit in this appeal. The learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration, or had decided matters beyond the scope of the reference. The appellant will have the costs of the appeal. It is so ordered.

Dated and delivered at Nairobi this 6th day of November, 2020.

K. M'INOTI

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F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR