Tumaz and Tumaz Enterprises Limited v Morison Engineering Limited
(Miscellaneous Civil Application E018 & E015 of 2022 (Consolidated))
[2025] KEHC 2730 (KLR) (Commercial and Tax) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2730 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E018 & E015 OF 2022 (CONSOLIDATED)

PJO OTIENO, J

FEBRUARY 28, 2025

BETWEEN

TUMAZ AND TUMAZ ENTERPRISES LIMITED ..... APPLICANT

AND

MORISON ENGINEERING LIMITED ..... RESPONDENT

RULING

Case Background

1. There are two Applications before the court for its determination. The first is Application is Notice of Motion dated 31st January 2022 seeking orders for adoption of the same award. The second is the Summons dated 17th February 2022 seeking to set aside the award published by the Arbitrator on 15th October, 2021. As disclosed in the heading of this decision, Tumaz and Tumaz Enterprises Ltd, the party seeking setting aside shall be identified as the applicant while, Morison Engineering Ltd, the party resisting setting aside and seeking enforcement, shall be the respondent.

2. Because the two applications are the flip sides of the same coin and the appreciation that on the possible success of the application to set aside, that for enforcement suffers a definite fate, besides the fact that setting aside must be brought within defined timelines, the court shall determine the application for setting aside first, and only should that application fail, then consider that for enforcement. First, however, must be the summary of the facts availed by both sides.

The history.

3. The dispute stems from an agreement entered into between by the parties and embodied in the Local Purchase Order dated 11th April, 2017. By it, the Respondent was contracted to supply the

Applicant with firefighting equipment worth Kshs.1,246,000/=. The contract and supply have not been disputed. The dispute as presented by the Applicant is that some of the items supplied by the Respondent were defective and needed to be replaced and that the same were never replaced. On the other hand, it was the Respondent's assertion that equipment supplied to the Applicant were in good order and condition and met the specifications agreed between the parties.

4. The terms of the contract were that once the Respondent had made delivery of the equipment, the Applicant would pay to the Respondent the purchase price of the supplied equipment within 45 days of issuance of the Invoice. The invoice was presented to the Applicant on 16th May, 2017 demanding for payment of the goods.

5. The Applicant however failed to make payments as demanded in the invoice, which failure prompted the Respondent to invoke the arbitral Cause No. 17.1 of the aforesaid Local Purchase Order on dispute resolution. The dispute was thus referred to arbitration before Mr. Dave Ashok J on 8th June 2020.

6. Consequent to the ensuring proceedings, an arbitral Award was published on 15th October, 2021 in favour of the Respondent against the Applicant. In the award, the Applicant was to pay to the Respondent sum of Kshs.1, 246, 000/= for goods supplied plus interest at court's rate from 12th September, 2019 until payment in full. The applicant was equally ordered to pay to the Respondent's the Arbitration costs. It is that award which the applicant wants set aside as the respondent seeks to be enforced.

Application dated 17/02/2022 (Application for setting aside)

7. The Application seeking to set aside the Arbitral Award published by the arbitrator on 15th October, 2021stes forth the grounds to merit such reliefs on the face and reiterated same in Affidavit in support to the Application.

8. Firstly, it is contended that the Award, proceedings and reasons for the decision displays lack of impartiality, unfairness, misconduct and bias on the part of the Arbitrator. The Applicant present that the Arbitrator, in his Order for Directions Number 9, unilaterally decided that the Arbitration was a documents-only process notwithstanding the fact that the Applicant reserved the right to fair hearing under Article 50 of *the Constitution* and contrary to Section 35(2)(a)(i) of the *Arbitration Act*.

9. The Applicant avers to have written to the Arbitrator on multiple dates including 19th May, 2021, 30th August, 2021 and 15th October 2021 inquiring the matter to be slotted for hearing only for such requests to be disregarded by the arbitrator. It is stated that the Arbitrator refused to allow the parties to proceed by way of viva voce evidence and that from the Orders for Direction No. 5, 7 & 9; the Arbitrator was in a hurry to write the award and earn his fees hence failed to accord the parties herein a fair Hearing.

10. It is the Applicant's case that the main issue for determination by the arbitrator having been whether the Respondent performed its contractual obligations, the Arbitrator's impartial approach of solely relying on the Respondent's evidence altogether arrived at the erroneous decision. It is presented that the arbitrator not only refused to refer to witness – statements and other documentary evidence presented by the Applicant but instead took into account documents by Respondent including the invoices that lacked receiving stamp hence not duly executed.

11. The Applicant also asserts that the Award is in conflict with public policy pursuant to section 35(2)(b)(ii) of the *Arbitration Act* for encouraging unjust enrichment by the Respondent. It is stated that the Respondent is not justified in claiming Kshs.1, 246,000. The Applicant present that the decision

by the Arbitrator was evidence-based selective by giving no reasons for discounting or dismissing the evidence incorporated in the Agreement and not according the Applicant fair trial.

12. Another ground put forth to support setting aside is that the Award contains obvious errors. The Applicant presents that the Arbitrator granted the Respondent an unfair advantage and benefit by ordering the Applicant to pay Kshs.1, 246, 000. It is further contended that the Arbitrator failed to give reasons upon which his decision/award was based as required under Section 32(3) of the *Arbitration Act*.

Response to Application dated 17/02/2022.

13. The Respondent through its General Manager, Suleiman Maina, filed a Replying Affidavit to the Application dated 15/01/2022 on 16th March 2022. The Respondent's case is that on 14th July 2020, the Arbitrator vide a letter requested the parties to the dispute to attend a meeting that was to be held at his office in Regal Plaza on 24th July 2020.

14. It is asserted that the Applicant in the meeting was only represented by its Advocate and who confirmed to be acting on the Applicant's authority and instructions. Further, that during the preliminary meeting, the parties identified the contentious issue to be whether the goods delivered by the Respondent to the Applicant met the contractually agreed standards and therefore whether the Applicant was liable to pay the full purchase price for the goods delivered.

15. The Respondent posits that the parties were unable to reach an amicable settlement and agreed to have the dispute determined vide documents only with parties being given the liberty to call expert witnesses to speak on the quality of the goods, if need be, given that the issue in dispute had been narrowed down to the quality of the goods delivered.

16. It is added that the arbitrator by the Order for Directions No. 1 directed parties to file and serve their pleadings which directions the parties complied with. The Applicant in its Reply to Statement of Claim admitted to owing the Respondent Kshs.971, 000/=. That on 17th December, 2020 in compliance with Order for Directions No. 2, the Respondent indicates to have filed its List and Bundle of Documents and served the same upon the Applicant's advocate at the time.

17. It is further presented that the Arbitrator on 28th January, 2021 issued Order for Directions No. 3 in which he directed that parties name their witnesses within 3 days of the said order and that a hearing date be fixed as the matter was based on Documents only as agreed by parties on 24th June, 2020. In compliance, the Applicant vide a letter dated 12th February, 2021 named a Parkinbum Munzala as its only witness and prayed for extension of time to file a witness statement and report.

18. The Respondent states that Order for Directions No. 4 given by the Arbitrator on 23rd February 2021 directed that the Applicant file its Witness statement by 2nd March, 2021 and that a physical hearing would be held on 11th March, 2021. The same was complied with by filling a witness statement by one of the Applicant's employees, who was not an expert, contrary to the directions agreed on by parties during the preliminary meeting of 24th July 2020.

19. The Arbitrator adjourned went back on its orders stating that the matter would not be adjourned on the basis of non-attendance and adjourned the hearing of 11th March, 2021 to the 25th March, 202, on account of the Applicant's witness having been taken ill, to the next day, 26th March, 2021. However, on the eve of the hearing date on 25th March, 2021, the then Applicant's Advocate, sent an email and informed the Arbitrator and the Respondent's Advocate that the Applicant's nominated witness was still ill and sought for another adjournment.

20. The Arbitrator granted the adjournment and directed that a virtual hearing would be held on 7th May, 2021. On the 7th May 2021, the Applicant once again applied to have the hearing adjourned on grounds that it had appointed Messrs JGS Law to take over the conduct of the arbitration on its behalf from Messrs Matete Mwelesi & Co. Advocates and that it wished to amend its pleadings. The Arbitrator still accommodated the applicant and granted it the adjournment together with the leave to amend its pleadings by 14th May 2021. The Applicant did not comply and only came to file its amended pleadings on 17th May, 2021 and in the Amended Reply to Statement of Claim and Counter Claim, the Applicant once again admitted that it owed the Respondent Kshs.971,000/=.

21. The Respondent indicates that after it had similarly amended its pleadings, the Arbitrator issued Order for Directions No. 8 in which he called for a further deposit on his fees of Kshs.50,000/= to paid equally by each party. The Respondent complied but the Applicant failed to settle the said amount despite having filed a counterclaim against the Respondent. It is then averred that on 29th September 2021, the Arbitrator issued Order for Directions No. 9 in which he informed the parties that having perused the pleadings and documents filed by the parties and the arbitration being a documents only arbitration, he would, in the interest of settling the dispute in a timely manner, proceed to write his Award and that the said Award would be delivered on 15th October, 2021 at 11a.m. at his offices.

22. The Respondent thus maintain that despite the contents of Order for Direction No. 9 being well within the Applicant's knowledge, the Applicant did not raise any concerns regarding the same. The Arbitrator the proceeded to deliver the award on 15th October 2021 in favour of the Respondent with the Applicant's Counterclaim being dismissed on grounds that there was no evidence adduced to support the counter claim. The Respondent then concludes that the Applicant is not candid with the court on the fact at the tribunal and that it does not stand to suffer any prejudice if the Arbitral Award is adopted and enforced as a judgment of the Court.

Application Dated 31/01/2021

23. The Application seeks orders for adoption of the impugned Arbitral Award published by the arbitrator on 15th October, 2021. In supporting the Application herein, the Respondent reiterated the grounds for opposition of the above Application dated 17/02/2022 and asserts that nothing stands on the way of giving effect to the finality of arbitral proceedings as intended by the parties.

Response by the applicant.

24. The Applicant's filed a Replying Affidavit by its director, Julius Mwale on 25th May 2022 and resisted the adoption and enforcement and accused the respondent of contemptuous breach of its obligations under the contract by not only delivered the said goods outside the contractual period but also delivering goods that were defective and/or faulty to its detriment. The respondent is further accused of failure and neglect to replace the defective goods despite numerous requests from the Applicant.

25. The Applicant adds and avers that vide the Order for Directions No.9, the Arbitrator unilaterally decided to proceed on a document-only basis despite the fact the parties had on previous occasions requested for a hearing date denying the parties an opportunity to present their respective cases – a clear violation of the right to a fair trial and the principles of natural justice.

26. The Applicant avers not to have been given a fair opportunity to present its case contrary to Section 35(2)(a)(iii) of the *Arbitration Act*. The Applicant takes issues and faults the arbitrator for acting in a callous disregard of the various requests by parties for the oral hearing to present their cases by proceeding on a document-only basis and as such infringement of the parties' right to fair trail and the principles of natural justice.

27. The matter was directed to be canvassed by written submissions which were then highlighted by the parties. For the applicant, it is submitted that by Order of Directions No.9, the Arbitrator unilaterally decided that the arbitration was a documents-only process notwithstanding its reserved the right to call witnesses, cross examine the Respondent's witnesses on the veracity of the documents relied upon.

28. The Applicant submits that the Arbitrator never responded to its emails both dated 19th May 2021, 18th July 2021 & 30th August 2021 where it requested for a Hearing date. Further, the Applicant submits that it wrote to the arbitrator vide letter dated 15th October 2021 imploring him to slate the matter for hearing but the Arbitrator in total disregard of the request proceeded to write the impugned Award.

29. The decision to proceed with the matter based on the documents only, and without viva voce evidence was termed without the consent of the parties but rather the Arbitrator's unilateral decision made without consulting the parties and against the wishes of the parties who wished for oral evidence. The Applicant submits that based on such indiscretion, Section 35(2)(v) of the *Arbitration Act* empowers this court to set aside an arbitral award if it is proved that the arbitral procedure was not in accordance with the agreement of the parties or the Act.

30. The Applicant bemoans not to have been given an opportunity to present its case contrary to Section 19 of the *Arbitration Act* which obligates an arbitral tribunal to grant a fair and a reasonable opportunity to every party in arbitral proceedings to present its case. The Applicant presents that the evidence on record shows that the Respondent on several occasions requested the arbitrator to issue the parties with a hearing date but, such requests were never responded to.

31. That the Arbitrator totally disregard the Applicant's requests and proceeded to write the impugned award without giving it an opportunity to present its case was underscored with an assertion that the award is ripe for setting aside. It is the Applicant's case that a cursory look at the impugned award portrays outright bias by the Arbitrator having based his decision on the Applicants evidence only with no reasons for discounting or dismissing the evidence incorporated in the Agreement itself and the Response to the Claim. To the applicant failure to respond and grant its request, the arbitrator exhibited outright bias and impartiality.

32. The Respondent further contends that the award sanctions unjust enrichment by the Applicant who is not justified in claiming Kshs. 1, 246, 000/= propelled by a clandestine move by which the respondent replaced on 3 pages out of the 9 pages of the Contract before the Arbitrator notwithstanding, its act of supplying faulty equipment. To the applicant, the award is therefore downright absurd and contrary to public policy.

33. on whether the arbitrator is guilty of misconduct, the Applicant submits that a plain reading of the Order for Direction No. 5, Order for Directions No. 7 and Order for Directions No. 9; the Arbitrator was in a hurry to write the award and earn his fees and therefore failed to accord the parties herein a fair Hearing by denying the parties the right to attend in person and offer viva voce despite the numerous requests from the parties. In sum, the applicant sees the award as tainted by misconduct and prays that it be set aside.

34. For the respondent, the alleged lack of impartiality, unfairness and bias on the part of the Arbitrator, on the alleged unilateral decision to proceed by way of documents only in the proceedings, thus denied the right to a fair hearing, can only be untrue. It contends and submits that the decision to proceed by way of documents was not made unilaterally by the Arbitrator as alleged by the Applicant but the same was consented on by the parties. It is on this premise that the Arbitrator proceeded to give an Order for Directions No.1 directing parties to file and serve their pleadings. The Applicant submits

that the Respondent did not furnish this Court with material that would prove his contention on the alleged arbitrariness.

35. The Respondent submits that the Arbitrator directed the parties to file their Witness Statements, which the Respondent did, but in its well calculated scheme of delaying the expeditious hearing and determination of the proceedings, it sought adjournment of the scheduled hearings on account of supposed sickness of its witness and which was indulged by the Arbitrator on all occasions.

36. The Respondent submits that the Arbitrator contrary to the Respondent's allegations, was fair, impartial and unbiased by allowing both the parties to file documents following their agreement, to call witnesses and even had the matter fixed for hearing on numerous occasions when the Applicant manufactured reasons to adjourn and even further indulged the Applicant on all those occasions.

37. On the issue that the Arbitral Award being against public policy, the Respondent submits that the Applicant has not demonstrated how the Award contravenes national values and principles or governance as enshrined under Article 10 of *the Constitution*. It is the Respondent's case that the Award is a result of interpretation of the pleadings filed by the parties and evidence tendered by the parties and not the Arbitrator's whims as claimed by the Applicant.

38. The Respondent submits that the Award directly corresponds to the pleadings filed by the parties contrary to the averments by the Applicant without showing which legal matrix of Arbitration is lacking and how it correlates with the right to a fair hearing under Article 50 of Constitution. Finally, it is asserted that the Award is based on sound analysis of legal principles and evidence.

39. In conclusion, the Respondent cites the decision in Samura Engineering Limited vs Don-Wood Co Ltd [2014] eKLR and submits to have met the preconditions for the enforcement of the award indicating that the agreement between parties as well as the final award have been filed in Court and as such shifts the onus to the Applicant to demonstrate why the award should not be adopted.

40. The respondent further cited the decisions in Nairobi Golf hotels Ltd vs Linotic Floor Co Ltd (2015) eKLR, Mumias Sugar Co Ltd vs Mumias Outgrowers Co (1998) Ltd (2012) eKLR and Superior Homes (K) Ltd vs Joyce Cherotich Sang (2014) eKLR on the principles applicable in setting aside while stressing the fact that; failure by an arbitrator to arrive at a particular decision is never a ground for setting aside; that an arbitrator like a judge has the latitude to exercise some elementary element of bias to enable him prod into issues before him in order to prevent miscarriage of justice and that justice is a double edged sword that cuts both sides, that the conduct that discloses bias to warrant disqualification id the kind that destroys the confidence of the parties and, lastly that it portends danger to assign impropriety every time an arbitrator adopts an interpretation of a contract contrary to the understanding of one of the parties.

Issues, Analysis and Determination

41. I have anxiously considered the two Applications and the rival affidavits sworn and filed by both parties, the entire proceedings taken before the tribunal and the subject award, in light of the respective sets of submissions. Notably, both applications do target the award by the arbitrator with one seeking for adoption orders for its recognition and enforcement while the other aimed at its setting aside.

42. As a matter of fact, the determination of the application for setting aside positively affects, to a substantial extent, the outcome of the other. As such the court will first address the Application dated 17th February 2022 seeking to set aside the arbitral award and only consider that for adoption in the event that the award sails through. The sole issue for determination in the said application is whether the conditions for setting aside an arbitral award have been met by the Applicant.

43. In seeking to determine that application, the court has posed for itself the question, what is the extent of the courts liberty to interfere with arbitral proceedings? The *Arbitration Act* and Rules made thereunder, provide for both the substantive and procedural manner in which matters arbitral are to be dealt with. Section 10 as read with Section 32A of the Act limits the court's jurisdiction to only enumerated and clear circumstances specified under the Act. The rationale for this limitation is the fact that arbitration is simply a matter of agreement between parties.

44. The principle of party autonomy provides that when parties agree that their dispute is to be settled by an arbitrator, and not by the national courts as by law provided, they also agree to accept the arbitrator's view of the facts and the meaning of the contract between them. As such, courts are not entitled to make determinations as to claims of factual or legal error by an arbitrator like in the case of an appellate court in reviewing decisions of lower courts. In intervening on arbitral proceeding, the High Court does not exercise appellate powers.

45. The Court of Appeal in Synergy Industrial Credit Ltd (2020) eKLR while affirming the above position held: -

> "One of the significant features of the *Arbitration Act* (the Act) is the principle of party autonomy, which entitles parties to have their disputes 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."

46. Here, the Applicant faults the Arbitrator for unilaterally deciding that the arbitral proceedings would be on a documents-only basis, allegedly, contrary to Section 35(2)(v) of the *Arbitration Act*, thereby, denying him the right to fair hearing. The Applicant posits to have been denied the benefit of having a physical hearing despite several requests to the arbitrator through various correspondences to fix the matter for physical hearing and which requests were all dismissed.

47. On the other hand, the Respondent contends that the decision to proceed with the arbitral proceedings on a document-only basis was consented upon by both parties in a preliminary meeting held on 24th June 2020. In the said meeting, the Respondent indicates that the Applicant in the said meeting was represented by its Advocate having had its full authority and instructions for representation.

48. By the directions of that date, the arbitrator directed that though the proceedings would be document-only basis, the parties however were at liberty to call expert witnesses to speak on the quality of the goods, if need be, given that the issue in dispute was as to the quality of the goods delivered to the Applicant. The record of the tribunal shows that neither of the parties filed any witness statements by any expert. To this court, that failure limited the proceedings to be by way of documents only. If the applicant was aggrieved by such an order, it ought to have taken his liberties granted by section 17 of the Act. It never did so.

49. The court notes that the fact that the arbitrator held a preliminary meeting to the arbitral proceedings with the participation on the parties on 24th June 2020has not been disputed by the Applicant. Likewise, it is not in contention that the Applicant in the said meeting was represented by its Advocate having had its full authority and instructions on representation.

50. In the meeting, it has also not been disputed that the only issue identified by both parties to be in contention was whether the goods delivered by the Respondent to the applicant met the contractually agreed standards, and thus, whether the Applicant was liable to pay the full purchase price for the

goods delivered. What is contended by the Applicant is that the decision to have the document-only proceedings was unilaterally made by the Arbitrator.

51. On the manner of conduct of the arbitral proceedings, the court notes that the arbitrator's Order for Directions No. 1 directed the parties to file and serve their pleadings, and both sides complied without protestation the same way they did with Order for Directions No. 2 which required them to file Lists and Bundles of Documents save that the compliance by the applicant was done out of time. Even Order for Directions No. 3 was complied with by the applicant but on its own terms in that it was expected that it files witness statement by an expert to testify on the quality of the goods but the applicant filed a statement by its employee, Parkinbum Munzala, who has not been demonstrated to have been an expert.

52. Thereafter, the records confirms that the Arbitrator fixed the matter for a physical hearing for the 11th ,25th, 26th March 2021 and for virtual hearing on 7th may 2021at his offices at Regal Plaza, Nairobi Offices, but matter did not proceed on all the occasions on account of the fact that, the Respondent's witness had been taken ill on the first three occasions and for the need to change counsel for the last occasion. Thereafter the matter was adjourned to give the applicant time to and its pleadings with a specified time line with further direction that it effects a deposit of the tribunals fees but disregarded the timelines and the matter proceeded to conclusion without the deposit of fees being paid.

53. From the foregoing, it is clear to the court that this is not a case where the Applicant was not given sufficient and reasonable opportunity to present its case in the arbitral proceedings. Even the Applicant's accusation that the Arbitrator unilaterally decided that the arbitral proceedings would be on a documents-only basis may not be candid and justifiable on the facts disclosed.

54. To the court, physical hearing would have been necessarily had parties filed expert testimonies on the quality of the goods. That never was and it was within the arbitrator authority, as the case manager, in tandem with the promptitude as a critical attribute of arbitration, when face with apparent recalcitrance by the applicant, to take steps as would be necessary to progress the matter towards conclusion. Because the arbitrator is a consensually appointed arbiter, parties before the tribunal undertake to respects all its decisions including the mode of taking the matter forward. It cannot be the case that since he is an appointee of the parties, he loses his right to sidestep all ignoble manouvres by either party to defeat the just determination of the case. He is an adjudicator and his actions and decisions must retain all the norms of a justice system. If the tribunal was to be relegated to the level of total reliance on the whim and wishes of the parties, to be wagged by the parties as a dog would deal with its tail, arbitration would lose its character and the attraction and traction as an expeditious dispute resolution mechanism. The process would lose its advantage over litigation and make it no alternative to litigation. The court finds no transgression by the arbitrator when it made the directions now challenged by the respondent. Far from disclosing impartiality or bias, the court views the direction to have been tailored towards timely determination of the dispute and in consonance with section 20(2) of the Act.

55. However, even if the court was to find that the direction could not have been made as a discretion of the case manager, the court would still hold the Applicant had the chance to raise the issue before the tribunal under section 17(2) and (3). It did not. The court finds the applicant's complaint to be that the tribunal was bereft of jurisdiction to or exceeded jurisdiction when it sought to determine the mode of proceeding. That was a matter to be raised preliminarily and in case one was dissatisfied with the decision, it had a period of 30 days from the date of decision to change it before the High court. So, this matter having filed outside the statutory time set, it does not lie as a valid challenge to the final award.

56. The Court finds and determines that the tribunal acted within its authority in designing how the matter would be heard and that it did afford to the applicant the right to be heard but the applicant by recalcitrance waived his right to be heard. One only needs to cite Republic vs Commission on Administrative Justice & 2 others Ex parte Michael Kamau Mubea (2017) eKLR, citing with approval Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. 179 of 1998: the proposition that: -

> Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilize the opportunity can be heard is why he did not utilize it."

57. The last challenge by the Applicant is contention that the arbitral award is against public policy, once again on the sole issue that parties needed to consent on the mode of hearing. That challenge must suffer the same fate of failure for the foregoing reasons and what the laws sets as the due considerations. When faced with same scenario and what amounts to public policy, Ringera J, held in Christ for All Nations vs Apollo insurance Company Limited [2002] EA 366 that: -

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

58. In this matter to concede to the applicant's position would be to reward and applaud lack candour and a design to derail arbitration. No court of law needs to countenance such a position.

59. The court thus finds no basis to agree with the Applicant on the allegations that the Arbitrator was biased, partial and unfair against it and makes a finding that Applicants Application is unmerited hence it is dismissed in its entirety. Its costs are awarded to the respondent.

60. Having dismissed the challenge against the award and its enforcement, the focus must now turn to the need to enforce the award in finality and bring the dispute to a closure. With the request under Section 36 of the *Arbitration Act* to recognize and enforce the award, it becomes the duty of the court to respect the parties' choice of arbitration over litigation. The preference of arbitration over litigation before the court.

61. The court is of the learning that the only instance it can refuse to enforce an award is when the limited window for interference under section 37 of the Act becomes available. Because the application for setting aside has failed, no impediment stands on the way of the award for purposes of enforcement. The Court finds the Application for adoption and recognition of the award to have wholly merited. It is allowed as prayed with costs to the respondent.

62. The court thus makes the following orders it considers appropriate: -

a. The Applicant's application dated 17th February 2022 in Msc. E018 of 2022, seeking the setting aside of the award, is hereby dismissed with costs for lack of merit.

b. The Respondent's Application dated 31st in Misc. E015 of 2022, seeking enforcement, is allowed with costs with the consequence that the Final Arbitral Award dated 15th October 2021, made by Hon. Mr. Ashok J. Dave, is hereby adopted and shall be enforced as a Judgment of the Court.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 28TH DAY OF FEBRUARY, 2025.

PATRICK J O OTIENO

JUDGE