



**Cytonn Integrated Project LLP v Ikwawe & another (Commercial Arbitration Cause E067 of 2023) [2024] KEHC 7674 (KLR) (Commercial and Tax) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7674 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E067 OF 2023**

**PM MULWA, J**

**JUNE 27, 2024**

**BETWEEN**

**CYTONN INTEGRATED PROJECT LLP ..... APPLICANT**

**AND**

**JOB O IKWAWE ..... 1<sup>ST</sup> RESPONDENT**

**EUNICE C. A. OWITI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed a Chamber Summons application dated 10<sup>th</sup> August 2023 and sought orders that the court to set aside the arbitral award published by the Sole Arbitrator, John W. Mwera JSC FCIArb on 13<sup>th</sup> June 2023 in the matter of the arbitration between Job Ikwawe & Eunice C.A. Owiti (as “Claimants”) and Cytonn Integrated Projects LLP (as “Respondent”).
2. This application was supported by the grounds on the face of it and by the sworn affidavit of Grace Weru who stated that the arbitral proceedings having been commenced, conducted and concluded without any proper notice to the applicant, the composition of the arbitral tribunal was thus not in accordance with the agreement of the parties.
3. Further that the Final Award dated 13<sup>th</sup> June 2023 contravenes the rules of natural justice, is in conflict and violates the applicant’s constitutional right to a fair hearing under Article 50 for condemning the applicant unheard. It was also in conflict with the public policy of Kenya as it is inconsistent with the Constitution and the Laws of Kenya, and it is contrary to justice. The Arbitrator in issuing his award disregarded the law of contract and thus issued an award that is bad in law.
4. In response the respondents filed a Replying Affidavit dated 2<sup>nd</sup> October 2023 and stated that the Final Award is not in contravention with the rules of natural justice and neither does it violate the



- applicant's constitutional right to a fair hearing as alleged, as the applicant was notified many times of the impending arbitration proceedings but chose not to take part thereof.
5. In addition, the Final Award is not in conflict with the public policy of Kenya as alleged, as the Arbitrator was guided by the Law of Contract and the Sale Agreement between the parties.
  6. The court has considered the application, the response therewith as well as the written submissions by the parties and frames one issue for determination; that is, whether the arbitral award should be set aside for being contrary to public policy.
  7. The brief background of this case is that on 26<sup>th</sup> June 2017, the respondents entered into an agreement with the applicant to purchase an Apartment J-14 Block J, The Alma, Ruaka, which was being erected on Title Number Kiambaa/Ruaka/5188 which parcel was in the process of being amalgamated with others. The sale agreement set a time frame for payment and completion of construction as 30<sup>th</sup> September 2018, with the respondents being at liberty to seek a further extension of 12 months if construction is not completed in time.
  8. The respondents paid a total of Kshs. 8.1 million by 30<sup>th</sup> September 2018 while the balance of Kshs. 0.9 million was to be paid when the completed flat was being handed over. However, in September 2018 the construction work was not complete. Subsequent visits after a year showed that works on the Apartment had ceased altogether yet the applicant had not given a Notice of Extension of Completion time as provided for under Clause 5.1 of the agreement, or any inkling on when the respondents would get the premises. After a lot of discussions and correspondence, the respondents sought a refund of the Kshs. 8.1 million. This was without success and therefore resorted to arbitration.
  9. Clause 2.0 of the parties' Agreement for sale states that:

“All claims and disputes whatsoever arising under this Agreement, shall first be subject to amicable negotiations between the parties failing which the same shall be referred to arbitration in accordance with the provisions of the *Arbitration Act* 1995 by a single arbitrator to be appointed by agreement between the parties of failing (sic) agreement within fourteen (14) days of notification by either party to the other of the existence of a dispute or claim to be appointed by the Chairman for the time being of The Chartered Institute of Arbitrators, Kenya Branch, Nairobi on application of either party”
  10. It is now applicant's case that the arbitral proceedings were commenced, conducted and concluded and the final award given in the absence of and without any proper notice to the applicant hence not in accordance with the agreement of the parties, the Final Award contravenes the rules of natural justice, is in conflict and violates the applicant's constitutional right to a fair hearing under Article 50 for condemning the applicant unheard and that it is in conflict with the public policy of Kenya as it is inconsistent with the *Constitution* and contrary to justice.
  11. In a nutshell, the applicant argued that the award is inconsistent with the public policy of Kenya as it has been shown that it is inconsistent with the *Constitution* and the Law of Contract therefore contrary to justice and morality.
  12. In contrast, the respondents held the position that the arbitral award is not in conflict with the public policy of Kenya as alleged by the applicant, as the arbitrator was guided by the Law of Contract and the Sale Agreement between the parties.



13. Public policy was defined in the case of *Christ for All Nations v Apollo Insurance Company Limited* [2002] EA 366 as follows:

“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 the *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.”
14. Was there a proper notice of appointment of the arbitrator? Having perused the documents annexed herein, it is this court’s considered opinion that the respondents’ advocates letter dated 15<sup>th</sup> February 2022 to the Chairman, Chartered Institute of Arbitrators requesting for appointment of an arbitrator to deal with the dispute was duly received by the Institute on 16<sup>th</sup> February 2022 and the same was copied to the applicant.
15. Therefore, proper notice of the intended arbitral proceedings was issued to the applicant through its advocates on record several times. Vide a letter dated 30<sup>th</sup> November 2021, the respondents wrote to the applicant through its advocates, to concur to the appointment of an Arbitrator, to deal with the dispute at hand. The applicant however, failed to respond or propose a different Arbitrator. The respondents wrote to the applicant a second time on 17<sup>th</sup> December 2021, requesting for their reaction to the suggested Arbitrator, and this time, the applicant sought for 14 days to get back to the respondents but never did.
16. Further, the applicant cannot argue that all along it was not aware of the proceedings between itself and the respondents. The applicant was previously represented by a firm in the arbitral proceedings and the applicant must have been appraised on the status of the arbitral proceedings. The applicant was copied in the correspondences and therefore has no excuse for failing to take part in the proceedings.
17. In addition, vide a letter dated 16<sup>th</sup> December 2021, the applicant wrote to the respondents and acknowledged the respondents’ intention to refer the matter to arbitration while proposing that the matter be settled amicably.
18. Further, after his appointment, Hon. John M. Mwera notified both parties of the said appointment and served the parties with his Terms of Engagement for execution, but the applicant failed to sign the same. The applicant’s advocates later withdrew for lack of instructions.
19. The applicant faulted the Arbitrator for ordering a reimbursement of the arbitrator’s costs by applicant, in addition to the award of costs, thus leads to unfair enrichment, amounting to a breach of the rules of natural justice. This issue was well addressed by the Arbitrator who at Para. 19 of the award cited Section 32B of the *Arbitration Act* and went on to state that it was his discretion to deal with costs and expenses of the parties as well as his own as there is no regime governing assessment of the same under the *Act*.
20. It was also the applicant’s position that the Arbitrator made the final award without considering the terms of the agreement more so in his determination for damages on account of delay in completion, interest and costs. This is notwithstanding that the applicant has always been willing and ready to complete the project up until there were preservation orders granted against the project in a ruling delivered on 6th January 2023 in HCINP E063 of 2021 - *CHYS v the Official Receiver* and in HCINP E064 of 2021 - *CPN v the Official Receiver*. In his determination, no reference was made to the agreement, which thus falls outside the scope of the agreement. According to the applicant, the



Arbitrator, in considering these issues thus, re-wrote the contract, which goes against the laws of contract.

21. The court agrees with the respondents that the Arbitrator did not re-write the agreement between the applicant and the respondents as contended by the applicant. The Arbitrator fully relied on the evidence presented before him.
22. The applicant is simply asking the court to venture into the merits or the demerits of the award which is not the function of this court when asked to set aside an arbitral award. The applicant has failed to point out any illegality committed by the Arbitrator.
23. This court reiterates the holding of the court in [Cape Holdings Ltd v Synergy Industrial Credits Ltd](#) [2016] eKLR, thus:

“The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the [Act](#) as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.

24. It is trite that for an arbitral award to be against the public policy of Kenya, it must be shown that it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society as was held in the case of [Glencore Grain Limited v TSS Grain Millers](#) [2002] I KLR 606, The applicant did not prove that the award was illegal and/or immoral and that it went against public policy.
25. The upshot of the above is that the applicant has failed to demonstrate that there exist sufficient grounds to warrant the setting aside of the Arbitral Award. Consequently, the Chamber Summons application dated 10<sup>th</sup> August 2023 lacks merit and is dismissed. No orders as to costs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Mr. Orina for Applicant

Ms. Nyambura for Respondents

Court Assistant: Carlos

