REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 435 OF 2013

IN THE MATTER OF THE ARBITRATION ACT 1995, NO. 4 OF 1995

EQUITY BANK LIMITED :: APPLICANT

VERSUS

ADOPT A LIGHT LIMITED :::::::::::::::::::::::::::::::::::::: RESPONDENT

R U L I N G

1. There are two applications before the court to be determined together. The first application is a Chamber Summons dated 3rd October 2013 and filed in this cause. It is filed under Section 36 of the Arbitration Act, and Rules 6 and 9 of Arbitration Rules, and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks the following orders:

> ***1. This Honourable court be pleased to receive and recognise the Arbitral Award made on 25th June 2013.***
>
> ***2. The Arbitral Award made on 25th June 2013 be deemed as a Decree of this Honourable court.***
>
> ***3. This Honourable Court be pleased to grant leave to the Claimant/Applicant to enforce the Arbitral Award made on 25th June 2013.***
>
> ***4. The costs of this application be awarded to the Claimant/Applicant.***

2. The application is premised on the grounds set out therein, and is supported by affidavit of **Esther Muthoni Passaris** dated **3rd October 2013** with award and other annextures attached thereto.

3. The application is opposed vide a replying affidavit sworn by John **Nyanjua Njenga** dated **11th February 2014**.

4. The second application is a Chamber Summons dated 29th October 2013 filed in **Misc. Civil Application No. 465** involving the same parties. The application is filed under Section 35 (2) and 35 (3) of the Arbitration Act and Rule 7 of the Arbitration Rules Section 3 of the Judicature Act, and Sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks to set aside the Arbitral Award, which the first application herein seeks to adopt. The applications are therefore mutually exclusive. The particular orders sought under the second application are as

follows:-

> ***1. That this application be certified urgent and be heard ex-parte in the first instance.***
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> ***2. That pending the inter-partes hearing and determination of this application, there be a stay of execution and or further proceedings arising from the award of the Arbitral Tribunal In the Matter of Arbitration between Adopt A Light Limited and Equity Bank Limited made and published on 25th June 2013 and supplied to and received by the parties on 2nd August 2013.***
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> ***3. That the award of the Arbitral Tribunal In the Matter of Arbitration between Adopt A Light Limited and Equity Bank Limited made and published on 25th June 2013 and supplied and received by the parties on 2nd august 2013 be and is set aside and the Claim against the Applicant be dismissed with costs.***
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> ***4. That the Respondent pays and bears the costs of the Tribunal's Award.***
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> ***5. That the counterclaim by the Applicant as against the Respondent In the Matter of Arbitration between Adopt A Light Limited and Equity Bank Limited be allowed with costs.***
>
> ***6. That the costs of this application be borne by the Respondent.***

5. The application is premised on the grounds set out therein and is supported by affidavit sworn by **John Nyanjua Njenga** dated **29th October 2013**.

6. The application is opposed by a replying affidavit sworn by **Esther Muthoni Passaris** dated **14th November 2013** with its annextrues. It was agreed that these two applications be determined together.

7. The brief history of the application is as follows. The Applicant, Adopt A Light Limited, entered into an advertising agreement with the Respondent Equity Bank Limited on 10th July 2006. Clause 18 of the Agreement required that any dispute whatsoever arising out of the contract would be referred to arbitration in accordance with Arbitration Act. It was also a term of that contract that the determination of the arbitration should be final and binding upon the parties and not subject to any appeal. A dispute subsequently arose in the execution of the said Agreement, and after parties pulling apart on the issue of referral to arbitration, they eventually referred the matter for arbitration. To ease the process of arbitration, the parties agreed on the issues to be referred to arbitration. These issues as per annextrue "**E MP – 4**" of Esther Muthoni Passaris' affidavit dated 14th November 2013, were as follows:-

> ***1) Did the Respondent through its Company Secretary misrepresent to the Clamant that the Advertisement Contract dated 10th July 2006 only incorporate the terms agreed upon by the parties prior to execution?***
>
> ***2) Was the contract dated 10th July 2006 to commence on the installation of all the signs?***
>
> ***3) Did the Respondent provide signed and approved artworks within the time stipulated in the contract?***
>
> ***4) Did the Claimant and Respondent discharge their respective obligations under the Advertisement Contract?***
>
> ***5) Did the Respondent repudiate the contract by its letter dated 12th June 2009?***

6) Is the Force Majerure Clause under the contract applicable to the performance of the contract by the Claimant?

7) Is the Claimant entitled to the sum of Kshs.30,959,605.48 and the prayers in the Statement of Claim?

8) Is the Respondent entitled to a refund of the sum of Kshs.41,926,000.00 paid as the first year's advertisement fees and the prayers in the Counterclaim.

8. Upon hearing and review of the evidence of the respective parties and after consideration of the submission made on behalf of the parties, the arbitral tribunal made the following award and directions on 25th June 2013, that:-

a) The Respondent shall pay the claimant the sum of Kshs.30,956,605.48 which is inclusive of VAT;

b) The Respondent shall pay the Claimant interest on the said sum of Kshs.30,965,605.48 at the rate of 4% per annum from 22nd June 2009 to the date of the award (that in 25th June 2009) being Kshs.4,963,846.43;

c) The Respondent shall pay its own cost and pay the claimant's costs, the same if not agreed, to be taxed by the tribunal; and

d) The Respondent shall pay and bear the costs of the tribunal's award in the sum of Kshs.3,556,000.00 (inclusive of VAT).

9. The award dated 25th June 2013 was published and forwarded to the Advocates on 1st August 2013. A true copy of the award was annexed to both applications. This is the award which Adopt A Light Limited now wants this court to adopt as the Judgement of the court, and which Equity Bank Limited wants this court to annul and set aside.

10. Counsel for Equity Bank submitted that the arbitral award is in breach of Section 35 (2) (b) (ii) of the Arbitration Act for being contrary to the Public Policy of Kenya and that the award is contrary to Section 35 (2) (iv) of the Arbitration Act by virtue of the Arbitral Tribunal dealing with a dispute not contemplated by or not falling within the terms of reference to arbitration and in addition thereto contained decisions on matters beyond the scope of reference. The counsel submitted that the reference in this case was the contract between the parties. The disputes arose from the express terms of the contract. It was not open for the arbitral tribunal to consider matters outside of the said contract/reference in reaching a decision with regard to the disputes presented before them. As a result the same contains matter beyond the scope of reference to arbitration. The dispute here was the insertion of the word "**all**" into the contract. The arbitrators found that there was no consensus ad idem on the insertion of the word '**all'** (see paragraph 33 page 11 of the award).

At paragraph 40.3 page 14 of the award, the Tribunal confirms that and agrees with the Bank that the insertion of the word "**all**" was merely for the "**avoidance of doubt"** in the face of the lacuna for "**otherwise the word Signs speaks for itself as the whole composite of the installation of signs**".

At paragraph 40.4 of the award, the arbitrators state that the word "all" was undertaken unilaterally hence lacks consensus ad idem.

11. It is on this basis that under paragraph 40.7 (page 15) of the award that the arbitrators say they are inclined to ignore and to disregard the word "all" as to proceed otherwise would result in an unconscionable burden being placed on the Claimant. However, they then shift the same unconscionable burden to the Applicant herein by interpreting the contract based on the supposed

modus operandi of the respondent herein. Equity Bank submitted that the tribunal ignored the provisions of the contract itself or as to how the payments for the first stage of the contract were carried out to determine what the intention of the parties was with regard to this clause. In any event had they found that the word 'all' was unilaterally added by the Applicant herein then all the tribunal would have done was to interpret the contract without the offending word. Had they done so, then it would not have been necessary for the tribunal to consider the extraneous matters stated as the Respondent's modus operandi and matters contained in the two contracts between the Respondent herein on one side and Parker Radio House and Communications Solutions on the other side.

12. It was submitted that in substituting the word 'all' with the Respondent's modus operandi in the interpretation of the Clause amounted to the tribunal giving credence to matters beyond the scope of reference. It was submitted that the tribunal outwent the confines of the contract itself and provided a determination that arose from an act that completely altered the terms of reference for the tribunal. It went in excess of what was agreed. The counsel cited the case of **Kenya Pipeline Company Limited vs. Kenya Oil Company Limited and another, Nairobi Civil Appeal 13 of 2010** (unreported) and **Express Kenya Limited - vs - Peter Titus Kanyago HCCC Misc 963 of 2002** (unreported). To this regard it was stated that the scope of reference to arbitration should be the subject contract and any attempt by the arbitral tribunal to impose an alternate agreement or terms not agreed upon by the parties amounts to a misdirection and as such any part of the award incorporating such references ought to be set aside. The counsel also cited the decision in **Associated Engineering Company - Vs - Government of Andhra Pradesh & another [1991] R.D.S.C 153 (1992 AIR 232 15th July 1991)**. In this case Kimondo J. and Musinga J. at paragraph 59 of their decision setting aside the Arbitral award in Civil Appeal No. 13 of 2010 state:

> ***". . . In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outwent the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary . . . "***

Equity bank also submitted on the issue of public policy as a factor to be considered. They submitted that it is trite law that an arbitral award may be set aside by a court despite the absence of the right to appeal if the said award flies in the face of public policy. This power is granted to this court by dint of Section 35 (2) (b) (ii) of the Arbitration Act. They cited the case of **Christ For All Nations v Apollo Insurance Co Ltd (2002) 2 EA 366, where Ringera J. stated as follows:**

> ***"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 other laws of Kenya, whether written or unwritten, or (b) inimical to the national interests of Kenya, or (c) contrary to justice and morality."***

The counsel submitted that the award was against the public policy of Kenya as envisaged by Section 35 (2) (b) (ii) of the Arbitration Act. It was submitted that an award that is contrary to public policy is one that is inconsistent with the Constitution or other laws of Kenya, whether written or unwritten. It is this limb that the Applicant herein seeks to rely on. It was submitted that the tribunal's action of substantially re-writing the contract between the parties and rendering a decision thereon was an affront to the laws of Kenya as stated by the ruling in Christ of All Nations. Secondly, the decision to re-write the terms of the contract went against the implied partiality accorded to an independent arbiter seized with the ardous task of determining a contractual dispute, thereby affecting the just administration justice.

13. Counsel for Adopt a Light dismissed the submissions of the counsel for Equity Bank. The counsel submitted that the Arbitral Tribunal had considered the evidence adduced in determining all the issues that the parties had by consent agreed upon. The claim that the award dealt with a dispute not contemplated or outside the terms of reference to arbitration was therefore unfounded. The counsel also dismissed the claim that the Arbitral Tribunal rewrote the contract between the parties and therefore that the award is contrary to public policy as a non-serious contention. The counsel further submitted that the contention that the Arbitral Tribunal had proceeded to grant an award on an Agreement that was contrary to law and therefore unenforceable was a matter that was not pleaded by Equity Bank either in its defence to the claim or in its counter-claim, and that if it had any merit the issue would have been framed for determination by the Arbitral tribunal. Finally counsel submitted that in any event, Equity Bank's application is an afterthought, and that an appropriate application should have been made under Section 17 (3) of the Arbitration Act.

14. I have carefully considered the submission of the parties. It seems to me that there are only two major issues for determination, and those are:-

i. Whether the arbitrators went beyond the scope or terms of reference in reaching the award?

ii. Whether the decision is against public policy?

15. Section 32 (2) (a) (iv) of the Arbitration Act stats that an Arbitral Award may be set aside only in the proof that:-

(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 . . ."

Section 32 (2) (b) (ii) provides that such award can be set aside upon proof that:-

(b) (ii) "the award is in conflict with the public policy of Kenya."

Section 17 (3) of the Act states:-

(3) "A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings".

16. I will start with Section 17 (3). This Section requires that Equity Bank ought to have raised the issue of the Arbitral Tribunal exceeding its authority as soon as the wrong took place. This was not done. However, this failure did not deny them an opportunity to bring this application under Section 35 (2) (a) (iv) of the Act. The issue for determination here is really, whether the Arbitrators went beyond their scope. A closer look at the arbitral proceedings especially paragraphs 33 and 40.4 of the Award it is clear that the Arbitrators were agonizing on a true and proper interpretation of the word "**all**". This 'agonizing' was not frivolous, but was meant to interpret a word in a contract with the intent of giving it efficiency. This cannot at all be construed to mean that the Arbitrators went into a frolic of their own. Indeed if the Arbitrators had gone off the tangent and into a frolic of their own imagination, Equity Bank would have under Section 17 (3) of the Act, instantly responded and requested for a stop of the proceeding pending the determination of the issue. That they did not must be taken to mean that they were aware that

there was no such veering off the tangent to require them to intervene under Section 17 (3) of the Act. I am inclined to agree with Adopt A Light submission that the issue is an afterthought. Having said that, what does the law say? Equity Bank has cited the case of **Associated Engineering Company – Vs – Government of Andhra Pradesh & Another, [1991] R.DS.C. [1992 AIR 232 8 15th July 1991)** which was adopted by Kimondo J. and Musinga J. in **Civil Appeal No. 13 of 2010**. In that case, the court found out that the Tribunal went beyond its scope, and said,

> ***". . . in the instant case, the umpire decided mattes strikingly outside his jurisdiction. He out went the confines of the contract. He wondered far outside the designated area. He digressed far away from the allotted task. . . . It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary . . ."***

17. With all due respect, there is no valid comparison between what happened in the cited Tribunal, and the one at hand. The Tribunal at hand appeared, with all due diligence, and with the acquiescence of all the parties, to innocently seek to interpret the effect of the word "**all**" and failing which, it decided to adopt "*modus operendi*". There is no proof that the arbitrators went beyond the scope of their jurisdiction, or engaged in a floric of their own. An Arbitrator sitting as a Tribunal, has the authority to interpret contractual documents. The law must give them enough latitude to interpret those documents in a manner which makes them more effective, without re-writing the contracts. This court will accept a genuine attempt by a Tribunal to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties. In the case of **Mahican Investments Limited – Vs – Giovani Gaid & 80 others**, Justice P.J. Ransley stated the position which I agree with. He said,

> ***"In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the Applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute."***

I totally agree. There is no proof in this matter that the Tribunal went off the tangent and in an expedition looking for fresh terms to insert into the contract. I reject any such suggestion or insinuation.

18. The other issue was that the award should be set aside as it offends public policy. In **Christ for All Nations – Vs – Apollo Insurance Co. Ltd. [2002] EA 366** the High court considered what would constitute an award made against public policy. Justice Ringera held:-

> ***"An Award could be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten: or (b) inimical to the national interest of Kenya: or (c) contrary to justice or morality."***

The learned Judge went onto hold that;-

> ***"I also do not accept the Applicant's contention that the award is contrary to justice. To accept the Applicant's contention would be tantamount to accepting a most dangerous notion that whenever a tribunal adopts an interpretation of a contract contrary to the understanding of one of the parties thereto, injustice is perpetrated. Justice is a doubt edged sword. It sometimes cuts the Plaintiff and other times the Defendant. Each of them must be prepared to bear the pain of justice cut with fortitude and without condemning the law's justice as unjust.***
>
> ***In my Judgement this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by involving the most elastic of the grounds***

for doing so. He must be told clearly that an error of fact or law or mixed fact and law of construction of statute or contract on the part of an arbitrator cannot be by any stretch of legal imagination, said to be inconsistent with the public policy of Kenya".

19. Similarly in **Mahican Investments Limited – Vs – Giovanni Gaidi & 80 Others** (above) the court held that;-

"A court will not interfere with the decision of arbitration even if it is apparently a misinterpretation of contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.

20. Pursuant to the foregoing, it is the finding of this court that there was neither a breach of public policy nor an illegality in the conduct of proceedings of the Arbitral Tribunal, and that the Award of that Tribunal dated 25th June 2013 was arrived at lawfully.

21. The upshot is that Adopt A Light Limited's application succeeds while Equity Bank Limited's application fails with the following orders:-

a) The Arbitral Award dated 25th June 2013 is hereby received and recognised and adopted as the Judgement of this court and leave is herewith granted to Adopt A Light Limited to enforce the same.

b) The costs of this application shall be for Adopt A Light Limited.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Mugo holding brief for Issa for the Applicant

Ogot holding brief for Akhulia for the Respondent

Irene – Court Clerk