IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPL. NO. E321 OF 2019

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

AND

IN THE MATTER OF ARBITRATION OF AN

APPLICATION TO SET ASIDE THE ARBITRAL AWARD

BETWEEN

MINISTRY OF ENVIRONMENT AND FORESTRY.....APPLICANT

AND

KIARIGI BUILDING CONTRACTORS.....1ST RESPONDENT

ENGINEER ISAAC WANJOHI .....2ND RESPONDENT

RULING

Introduction

1. The Applicant has moved the court by a Notice of Motion dated 6th December 2019 under **section 35** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking to set aside the Arbitral Award dated 30th May 2019 ("the Award") issued by Isaac G. Wanjohi (FCIArb) ("the Arbitrator'). The application is supported by the affidavit of Alfred Gichu, the Head of Forest Conservation Directorate. The 1st Respondent ("the Respondent") opposed the application through the affidavit of Josphat Thuo Githachuri, the proprietor of the firm trading in the name and style of the 1st Respondent, sworn on 15th January 2020. Both parties filed written submissions in support of the respective positions. The 2nd Respondent did not participate in these proceedings.

Background

2. The subject of the arbitral proceedings is a contract between the parties for the rehabilitation of earth surfaced forest roads in Nyeri District being Contract No 4/92-93 dated 20th July 1993. It comprised the following standard documents; an in-house conditions of contract in the form *Republic of Kenya F.O. 55 (Revised)* and *Conditions of Contracts Parts I and II (FIDIC)* ("the Contract"). The contract price was Kshs. 19,736,295.34 and the construction period was 12 months.

3. A dispute arose between the parties and the matter was referred to arbitration pursuant to the arbitration clause. The Arbitrator, after hearing the matter, gave an award published on 30th May 2019 awarding the Respondent Kshs. 1,052,821,100.00 under several heads of claim ("the Award").

Applicant's Case

4. The Applicant now seeks to set aside the award under **section 35** of the ***Act*** on the following principal grounds:

a. Whether the Arbitrator, in resolving the dispute, went outside the scope of reference to arbitration and thereby acted without jurisdiction.

b. Whether the Arbitrator in making the Award effectively re-wrote the Contract contrary to public policy.

c. Whether the Arbitrator acted in excess of jurisdiction in making the Award.

d. Whether the Award was made in a claim that was time barred and contrary to **section 3(2)** of the ***Public Authorities Limitation Act (Chapter 39 of the Laws of Kenya)*** is against the public policy.

5. According to the Applicant, the crux of the dispute before the Arbitrator was the allegation that the Respondent terminated the Contract following frustration by the Applicant. The Applicant therefore contended that the Arbitrator's scope of reference was based on the terms of the Contract but in resolving the dispute, the Arbitrator laid considerable reliance and emphasis on bank statements produced by the Respondent in awarding him compound interest at a rate of 1.5% per month for delayed payments. The Applicant argued that compound interest was not part of the Contract hence the Arbitrator proceeded outside the scope of the reference and acted without jurisdiction. Counsel cited the case of ***Consolidated Bank of Kenya v Arch Kamau Njendu t/a Gitutho Associates*** **HC MSA No. 195 of 2013 [2015] eKLR** where the court held that an arbitrator has no power apart from that given to him under the contract and if he does so, he acts without jurisdiction.

6. The Applicant complained that the Arbitrator computed interest based on a formula not provided for in the Contract. It submitted that the Arbitrator awarded the Respondent Kshs. 589,312,905.00 which it termed colossal as well as usurious and which was later updated to Kshs. 1,052,921,100.00. In effect the Applicant argued, that by relying on a non-existent formula to make the award, the Arbitrator re-wrote the contract between the parties against well-established principals of contract law. Counsel for the Applicant submitted that the award of compound interest award was punitive in so far as the interest was being levied on accumulated interest and not the principal sum. He cited the decision in ***Premier Bag & Cordage Limited v National Irrigation Board*** **ML HC No. 1123 of 2001 [2014] eKLR** where the court held that charging compound interest was punitive and not compensatory.

7. Counsel for the Applicant further submitted that the Award was contrary to public policy and amounted to unjust enrichment on the part of the Respondent. Counsel cited ***Christ for all Nations v Apollo Insurance Co. Ltd*** **[2002] EA 366** to submit that under **section 32(2)(b)(ii)** of the ***Act***, the award should be set aside as it amounts to unjust enrichment which is contrary to public policy of Kenya. The Applicant contended that the Arbitrator ignored the express provisions of the Contract in tabulation of interest and by so doing awarded interest that was injurious to the national and economic interests of Kenya as taxpayer funds would be used to settle the Award if it is not set aside.

8. Counsel for the Applicant submitted that in respect of each head of award, the Arbitrator acted in excess of jurisdiction. He submitted that Kshs. 191,639,734.00 for Variation of Price ("VOP") was awarded despite being rejected by the Ministry of Environment & Forestry. That the sum of Kshs. 176,072,179.00 awarded on account of an unpaid certificate was awarded despite not being certified by the Project Manager as required by the Contract while Kshs. 25,712,954 being Retention Money could not be justified under the Contract. Counsel further complained that Kshs. 135,178,214.00 awarded for idle time and equipment were not based on the Contract and were not supported by Bills of Quantities.

9. The Applicant also raised the issue that the Award was made in a claim that was time barred and contrary to **section 3(2)** of the ***Public Authorities Limitation Act*****.** In this respect, Counsel urged that the award was in conflict with the Public Policy of Kenya and ought to be set aside. According to the Applicant, the Respondent terminated the Contract on 25th September 1995 and on 13th May 2002, the Respondent issued a notice to commence arbitral proceedings which is the date time started running. The Applicant submitted that the claim was time barred as the Respondent filed its statement of claim in 2015, 13 years after the cause of action had accrued. Counsel for the Applicant submitted that the Arbitrator was wrong to entertain the claim and to do so amounted to an illegality.

10. Based on all the aforesaid grounds, the Applicant urged the court to set aside the entire Award under **section 35** of the ***Act***.

Respondent's Case

11. The Respondent submitted that the application lacked merit as the Arbitrator made a finding of fact that the Applicant had breached the terms of the Contract. He denied that the Arbitrator relied or placed emphasis on his bank statements in awarding compound interest. On the contrary, he submitted that what the Arbitrator relied on were documents produced by him in evidence which were not opposed to prove that the Respondent suffered loss. He pointed out that he was entitled to claim damages for loss under Sub-Clause 69.3 which entitles him to compensation for loss and damages as a consequence of termination and under Sub-Clauses 60.13 which entitles him to interest on delayed payments.

12. The Respondent submitted that the Arbitrator framed the issues for determination to include whether he had suffered loss, and the Contract provided for the compensation for '*any other loss*' under Sub-Clause 69.3. He pointed out that he proved loss and damage by producing bank statements for the commercial loans he had taken as evidence of the bank interest and penalties he sustained as a result of the Applicant's actions. Since the Applicant did not object to the evidence and production of the statements at the hearing or raise any objection to these documents, he submitted that the Applicant lost its right to object as provided by **section 5** of the ***Act*** and it could not challenge the Arbitrator's findings at this stage.

13. The Respondent further submitted that the Applicant did not prove or substantiate the allegation that the Arbitrator went outside the

scope of reference to arbitration or that the award was contrary to public policy. He maintained that the Arbitrator followed the provisions in the Contract.

14. The Respondent rebuffed the Applicant's contention that the Arbitrator based the computation of interest on a formula not provided for in the Contract and therefore the claim that he rewrote the contract was baseless as it has not shown the formula that the Arbitrator used was not provided for in the Contract. He submitted that the Applicant did not raise the issue of computation after the award was published pursuant to **section 34 (1) (a)** of the ***Act*** which allows a party to seek review and interpretation of the Award hence it lost its right to object on the award and computation for interest pursuant to **section 5** in the ***Act***. In the circumstances, he submitted that the Applicant has not shown or demonstrated that the Award is against public policy of Kenya. The Respondent further submitted that the Arbitrator dealt with all the issues framed for determination and made findings of fact based on the Contract and the evidence produced.

15. The Respondent pointed out that the award for VOP amounting to Kshs. 191,639,734.00 was founded on provisions in the Contract, the authority of the Engineer's decision and was acknowledged by the Applicant. As regards the award for Retention Money amounting to Kshs. 25,712,954.00, he submitted that this was founded on the Contract. The award for unpaid certificate No. 7 for Kshs. 176,072,179.00 was also based on the Contract as well as all the heads of award including the award for idle equipment.

16. In answer to the contention that the claim was statute barred, the Respondent submitted that the Applicant was attempting to raise a ground of appeal in an application to set aside. He submitted that the Applicant raised the issue of limitation through a preliminary objection at the arbitral proceedings. That the arbitrator heard and finally determined the preliminary objection therefore the issue of limitation is now *res judicata* as a final decision was made on it and was not appealed against.

Determination

17. The Applicant seeks to set aside the Award under **section 35** of the ***Act*** which provides 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 subsections (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) that a party to the arbitration agreement was under some incapacity; or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
>
> (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption
>
> (b) the High Court finds that-
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
>
> (ii) the award is in conflict with the public policy of Kenya:
>
> (3) ----------
>
> (4) ---------- [Emphasis mine]

18. The principal grounds upon which the Applicant seeks recourse to this court are under **sections 35(2)(a)(iv)** and **2(b)(ii)** of the ***Act***. In an application seeking to set aside an award on the ground that the Arbitrator exceeded the scope of reference, the court must resist the temptation to become an appellate court. In ***Kenya Oil Company Limited & Another vs. Kenya Pipeline Co.*****NRB CA CA No. 102 of 2012 [2014] eKLR** the Court of Appeal cited with approval the following dicta by Steyn LJ., in ***Geogas S.A v Trammo Gas Ltd (The "Baleares")*** **1 Lloyds LR 215**:

> The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.

19. That is the same position that Ransley J., has succinctly summarized in **Mahican Investments Limited and 3 others vs Giovanni Gaida & Others NRB HC Misc. Appl. No. 792 of 2004 [2005] eKLR**, that:

> A court will not interfere with the decision of an Arbitrator even if it is apparently a misinterpretation of a 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. The subject and scope of public policy as a ground of setting aside an arbitral award under **section 35** of the ***Act*** was explained by Ringera J., in ***Christ for all Nations v Apollo Insurance Co. Ltd*** **(Supra)**, which was quoted with approval by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR**, as follows:

> An award could be set aside under page 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 to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.

21. When parties agree to refer a matter to arbitration, they must take the consequences of that Award and be bound by the fact that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award. The court, under **section 35** of the ***Act***, does not exercise appellate jurisdiction as the parties are entitled to reserve the same if they wish. As Tuiyott J., held in ***Mahan Limited v Villa Care*** **ML HC Misc. Civil App. No. 216 of 2018 [2019] eKLR**:

> [9] It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that the decision of the Arbitrator would be final and binding on them .It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they are happy to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act.

22. Public policy, as defined above, is a broad, infinite and malleable concept and when considering it, the salutary warning of Burrough J., in ***Richardson v Mellish*** **[1824] 2 Bing 228** that, *"Public policy is a very unruly horse, and when you get astride, you never know where it will carry you"* must never be far from the horizon. As stated in the ***Christ for All Nations Case*** **(Supra)**, the Court must also consider finality as a key consideration:

> [I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act.

23. Even the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **(Supra)** upheld the principle of finality of arbitral awards:

> We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy.

Compound interest

24. It is against the aforesaid principles that I now turn to determine the issues raised by the Applicant. From the depositions and submissions, the submissions in relation to the Arbitrator exceeding the scope of the reference and of the award being inconsistent with public policy concern the award of interest which permeates the other claims made by the Respondent.

25. There were two contentions before the Arbitrator on this issue. The Respondent contended the Clause 60.13 of the FIDIC Conditions of Contract provided for interest at 1.5% per month or part thereof for delayed payments. He claimed that interest was to be calculated on the basis of the compound interest used by the bank to advance him credit to enable him perform the Contract. The Respondent added that in any case he was entitled to compensation and damages for loss following termination.

26. The Applicant on the other hand, submitted to the Arbitrator that compound interest was not contractual and that the Arbitrator was bound by the wording of the contract and could not award compound interest. The Arbitrator considered the evidence of advances by the bank produced by the Respondent and held that the bank charged compound interest. The Arbitrator then concluded as follows:

> E.3.2 It is universally accepted that damages for breach of contract, should be compensated in such a manner as to put the victim as far as money can provide where it would have been had the breach not occurred. ….. I find and hold that on balance of probability, the breach caused injury to the Claimant which application of compound interest as a way of compensation thereof would be appropriate.

27. As I understand the issue before the Arbitrator was whether, under the Contract the Respondent was entitled to simple or compound interest on delayed payments. This was an issue framed for determination by the Arbitrator as is apparent from the Award. He considered the facts, evidence, Contract and submissions and came to the conclusion that the Respondent was entitled to compound interest. In my view, an error in the interpretation or application of the Contract terms, as illustrated by the authorities, I have cited above, is insufficient as a ground for setting aside the Award as parties have agreed the dispute be determined by the Arbitrator and I would not intervene on the aforesaid ground.

28. The above finding does not dispose of the issue whether the Award is contrary to public policy because of the manner in which compound interest was applied to the claim. The Applicant was awarded Kshs. 1,052,821,100.00. Bearing in mind the value of the Contract was Kshs. 19,736,295.34, the amount awarded is over 50 times the contract price. A summary of the principal claim assessed by the Arbitrator as set out in Column 2 vis- a – vis the amount awarded in Column 4 of the Table below shows that the amount awarded in respect of each claim was 39 times the principal award without compound interest being applied.

Head of Claim	**Principal Claim without any interest**	**Award Amount updated to 31/03/2016 with Compound interest**
1. Value of VOP on certified amounts, (PC1-6)	**3,662,286**	191,639,734
2. Delayed payment certificates (PC 6)	**287,042**	287,042
3. Retention money	**662,737**	25,712,953
4. Unpaid Certificate No. 7. inclusive of VOP	**2,811,749**	176,072,179
5. Costs of idle time	**3,840,000**	135,178,214
6. VAT @15% of gross value		EXEMPTED
7. Supplementary 1	**1,310,830**	60,422,783
8. Subtotal as at 31st March 2016		589,312,905
9. Subtotal at the time of publication		1,052,821,100
10. Supplementary 2:Item 2	**100,000**	**100,000**
Overall Total	**12,584,644**	**1,052,921,100**

29. The purpose of the interest is to compensate the injured party from being kept out of its money. In this case the parties expressly agreed on the interest in the Contract at Clause 60.13 of the FIDIC Contract which provides as follows:

> Payment upon each of the Engineers Certificate as provided by Sub-clause 60.4 shall be made within 45 days from the date the Certificate has been signed by the Engineer or in the case of the Final Certificate as referred to in Clause 60.9, 56 days, and in the event of failure by the Employer to comply with the provisions of Sub-clause, or to pay the Retention money or any part thereof at the time prescribed by Sub clause 60.5 of this clause he shall pay to the Contractor, interest at the rate of one (1½) per cent per month or part thereof upon payments overdue from the date of expiry of the period of payment specified in this clause.

30. By compounding the interest on each head of claim, the result was that the Respondent was not only compensated for the loss but reaped a financial windfall. As regards compound interest, Havelock J., in ***Premier Bag & Cordage Limited v National Irrigation Board*** **(Supra)**, expressed the following view:

> [C]harging interest on interest otherwise known in the commercial world as compound interest is punitive and not compensatory. As already held, interest is meant to compensate a party for having been kept out of its/his funds or property for some time and not either to enrich such a party or punish the opposing party. In this regard, the moment any interest is levied on any accumulated interest and not principal sum, such interest stops being simple and becomes compounded, and therefore punitive.

31. As I stated, for the Applicant to succeed in setting aside an award, it must show that the award **is inconsistent with the Constitution or other laws of Kenya, whether written or unwritten or inimical to the national interest of Kenya or contrary to justice or morality.** In

Glencore Grain Ltd v TSS Grain Millers Ltd **MSA HCCC No. 388 of 2000 [2002] eKLR**, Onyancha J., stated that, " *"Against public policy" would also include contracts or contractual acts which would offend conceptions of our justice in such a manner that enforcement would stand to be offensive."*

32. I hold that the Applicant has shown that the Award in this respect is inordinately high, does not constitute compensation but is punitive and amounts to unjust enrichment to the extent that if it is enforced, would injure the public finances. I would accordingly set it aside for violation of public policy.

Variation of Price

33. The issue of VOP arose out of an application by the Respondent to the Applicant through its Engineer following an escalation in prices as a result of devaluation of the Kenyan currency against the US Dollar in 1993. The Arbitrator found as a fact that the Engineer received the application, accepted it, made the necessary calculations and forwarded the findings to the Applicant. Unfortunately, a decision was never made or communicated to the Respondent. The Respondent complained that the letter containing those findings made to the Permanent Secretary for approval was internal correspondence and could not be relied on and that at the material time the application was made, the Respondent should not have continued with the works.

34. The Arbitrator considered the evidence on this issue and concluded that the Engineer had the obligation to make a decision on the request by the Respondent and he did so, *"independently and without bias, made a professional valuation in terms of FIDIC conditions of contract clause 70.1 & 70.2 and/or in-house clause 13(iv). The Engineer did so in exercise of the power and authority provided….."* VOP was a matter within the Contract and the admission of any document was wholly within the province of the Arbitrator as provided under **section 20(3)** of the ***Act*** which empowers the Arbitrator to determine matters of admissibility of evidence. VOP was a matter within the Contract and was an issue for consideration and the Arbitrator considered the evidence, the contract and came to a conclusion that was what was contemplated by the parties for determination.

Amount not certified

35. The claim for Kshs. 176,072,179.00 was contested on the basis that the amount was not certified by the Engineer. The claim arose from the fact that after termination of the contract, the Respondent claimed that the Engineer failed to evaluate the work done and the payment due to him within 14 days as required by Clauses 69.3 and 65.5 of the FIDIC Conditions of contract. The Applicant's Engineer thereafter requested him to submit his claim which it did vide Certificate No. 7 for Kshs. 9,748,598.75 which the Engineer acknowledged and returned with guidance how it should be corrected. The Respondent corrected and resubmitted it for certification but never did so. The Arbitrator considered the evidence on this issue which was essentially a claim for work done. He pointed out that, *"My focus now goes to the integrity of the Kshs. 2,811,749 on a certificate not signed by the Engineer…. I am persuaded to believe that the Claimant having complied with the contract procedure, had done all he could, within its power and therefore must be the beneficiary of any doubt. I am inclined to accept the Claimant's version of the final measurement of the work done of Kshs. 2,811,749 …..."*

36. On the basis of the evidence, the Arbitrator cannot be faulted for awarding the principal sum.

Retention money

37. The question whether or not Retention money should be released was also an issue and was dealt with by the Arbitrator in the award. The Respondent relied on Clause 69.1, 69.2, 69.3, 69.5 and 65.8(c) of the FIDIC conditions of contract to argue that the payment of retention money would have been made because it was part of all the work executed prior to the date of termination. It further argued that because of termination, it was entitled to be relieved from obligations of a Defects Liability Period. The Applicant took the opposite view that the money could only be released after the remedial works had been carried out but since the Respondent refused to carry out remedial works, the retention money could not be released to him.

38. The Arbitrator considered the evidence and concluded that since the Applicant was in default, the contract was prematurely terminated, the retention money was due to the Respondent under the Clause 65.8 of the FIDIC Conditions of Contract. Once again, this is an issue that was considered based on the Contract provisions and evidence and for that reason I cannot say that it is a matter that was outside the scope of arbitration or was not founded on the Contract.

Cost of idle time

39. According to the Respondent, it was forced to suspend work due to interference and obstruction caused by logging licencees which it notified to the Applicant. The Applicant stated that this claim was not founded on the Contract as it is the Respondent who unilaterally suspended the works instead of giving notice under the Contract. The Arbitrator considered the detailed evidence on both sides and came to the conclusion that the claim was within the Contract provisions and was justified. This court cannot intervene in this conclusion based on the principles I have outlined elsewhere in this ruling.

Limitation of Actions

40. It is common ground that the Arbitrator made a ruling on 24th August 2017 dismissing the Applicant's preliminary objection that the Respondent's claim was statute barred. The objection is a matter that goes to jurisdiction of the Arbitrator to proceed with the claim and had it succeeded the proceedings would have come to an end and the Arbitrator would have lacked jurisdiction to proceed with the claim any further. Such an objection is covered by **section 17(6)** of the ***Act*** which provides as follows:

> 17(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

41. Having raised the issue as a preliminary point and the matter having been adjudicated upon, the only option for the Applicant was to move the High Court appropriately under **section 17(6)** aforesaid. Since the Applicant failed to invoke the statutory procedure for challenging the Arbitrator's decision, it is now precluded from re-visiting the issue in this application as a ground for setting aside the award.

Conclusion

42. The Applicant has succeeded to the extent only that I have found that the award of the compound interest on the Respondent's claims is contrary to public policy of Kenya. The question then is whether I should set aside the entire award. Unlike **section 35(2)(a)(iv)** of the ***Act*** which is clear that the court may separate the offensive part of the award that is outside the scope of the reference if it is possible, **section 35(2)(b)** does not have such a provision.

43. Although **section 35(2)(b)** and its counterpart at **section 37(1) (b)** do not expressly refer to separation of the part of the award that is found to be against public policy in case of setting aside or enforcement, this does not necessarily mean that the separation is excluded by the ***Act***. This issue was considered in Hong Kong in ***JJ Agro Industries (P) Ltd (a firm) v Texuna International Ltd*** **[1992] HKF1** where the local legislation is based on the UNCITRAL Model Law on International Commercial Arbitration. The court held as follows:

> [32] ….. The policy of the courts in modern time has been supportive of the arbitral process. Legislation has been introduced to limit court interference on the merits in domestic cases without leave. In international cases there is now the Model Law which does not permit any court interference on the merits. Arbitration is the preferred method of dispute resolution in many areas both internationally-and domestically. If an award contained an objectionable part, it would be absurd if the remainder of the award was to fail as well. This would be elevating form over substance which the courts have for some time been concerned to prevent where possible.

44. Following the aforesaid decision, the High Court in Singapore in ***BAZ v BBA and Others*** **[2018] SGHC 275** set aside part of an award it found as being contrary to public policy as the offensive part violated the law of Singapore that protected the minors. The Court expressed the view that;

> [187] ……. Although there is no express reference to severability under Art 34(2)(b)(ii) of the Model Law, unlike that in Art 34(2)(a)(iii), I find that the Award is severable, because the successful public policy challenge only pertains to the Minors. I agree with the Hong Kong court in JJ Agro Industries (P) Ltd (A firm) v Texuna International Ltd [1992] HKCFI 182 at [39] (a case on enforcement based on the New York Convention) in holding that the doctrine of severability applies where only part of an award is tainted by a challenge on a public policy ground.

45. Kenya arbitration law is based on the Model Law and in this case, I am also convinced that the ***Act*** does not prevent the court from separating the offensive part of the award and for that purpose, award includes part of the award that may be set aside.

46. Turning to the matter at hand, in ***JJ Agro Industries (P) Ltd (A firm) v Texuna International Ltd*** **(Supra)**, the court cited a case with similar facts as follows:

> [40] I am happy to note that the conclusion at which I have arrived accords with the view of at least 2 other courts in the United States. In **LaminoiresTrefileries Cableries de Lens S.A. v. Southwire company and Southwire International Corp.,484 Fed. Suppl. 1065** (see also vol. VI Yearbook of Commercial Arbitration (1981) pp 247-248) Judge Tidwell in the U.S. District Court of the Northern District of Georgia was asked to enforce an I.C.C. award against the U.S. defendants. One of the grounds of opposition was that the arbitrators adopted the French rate of interest on the sums due and that the French rate violated the enforcing forum's public policy and was usurious. Having stated that the public policy ground only applies "where enforcement would violate the forum country's most basic notions of morality and justice" the learned judge held that the French rate was penal and not compensatory and bore no reasonable relation to any damage resulting from delay in recovering the sums awarded. The judge went on to conclude that; "Therefore that portion of the award which purports to' to assess the rates of interest at 14.5 and 15.5% will not be enforced or recognised by this Court."

Disposition

47. The consequence of my finding is that the Notice of Motion dated 6th December 2019 is allowed on terms that the Award dated 30th May 2019 is hereby set aside only to the extent of compound interest applied to each head claim. For avoidance of doubt, compound interest shall not apply to each head of claim in the Award.

48. Since the Applicant has partially succeeded, it shall have half the costs of the application.

DATED and **DELIVERED** at **NAIROBI** this **30th day of SEPTEMBER 2020**

D. S. MAJANJA

JUDGE

Mr Josphat Thuo Githachuri, the Applicant in person.

Mr Leiteipan, Advocate instructed by the Office of the Attorney General for the Applicant.