



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 69 OF 2016

RELIABLE CONCRETE WORKS.....PLAINTIFF/APPLICANT

VERSUS

NGEWANJI COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of two applications: Notices of Motion dated **23rd February 2021** and **14th July 2021** both filed by the plaintiff and defendant respectively.

2. Notice of Motion dated **23rd February 2021** seeks the following orders:

a) That there be a stay of execution of the arbitral award published by the Sole Arbitrator, Sylvia Mueni Kasanga MCI Arb on 11 May, 2021 pending the hearing and determination of this application;

b) That this Honourable Court be pleased to set aside the Arbitral Award published by the Sole Arbitrator, Sylvia Mueni Kasanga MCI Arb on 11 May, 2021.

c) That costs of this application be borne by the Defendant / Respondent.

3. The application is supported by the grounds on the face thereof and the sworn affidavit by **Mwangi Mucemi** a director of the plaintiff dated **23rd February 2021**. He deposed that the plaintiff entered into a construction agreement with the respondent and a dispute arose on payment. That the matter was referred to arbitration and was heard and the arbiter delivered the award on **12th May 2021**. He deposed further that the arbitrator dismissed its claim and awarded the defendant Kshs. 520,000/= for delay in completion of the work even after the defendant's witnesses had admitted that they contributed to the delay in construction. That the said decision was manifestly unjust, amounted to unjust enrichment, a misuse of the power conferred upon the appointed arbitrator and against the law. He deposed further that the applicant will suffer great loss if the award is not set aside and completely invalidated.

4. The defendant opposed the Notice of Motion dated **23rd July 2021** through a replying affidavit sworn on **30th August 2021** as mentioned in the submissions by both parties although the same is not on the court records.

5. The **Notice of Motion** dated **14th July 2021** on the other hand seeks the following orders:

a) That the honourable court do adopt the award by the arbitrator dated 11th May 2021 as judgment of this court.

b) That the honourable court be pleased to grant leave to the applicant to execute the said judgment against the respondent.

c) Costs of this application be borne by the respondent.

6. The application is supported by the grounds on the face thereof and the sworn affidavit by **Michael Kaime** a director of the defendant. He deposed that on **5th July 2016** the plaintiff filed this suit before court and on **29th September 2016** applied for the same to be heard before an arbitrator. That M/s Silvia Kasanga was agreed upon by all parties and the case was heard before her to its conclusion. He deposed further that on **11th May 2021** the arbitrator rendered her findings and made an award to the effect that the plaintiff/respondent pay the applicant a sum of Kshs 520,000 within 60 days. That the said 60 days had lapsed and the plaintiff has not paid a single cent. He deposed that it was imperative that the arbitrators award be adopted and confirmed as the judgment of this court for purposes of execution.

7. The plaintiff responded to Notice of Motion dated **14th July 2021** through a replying affidavit sworn by **Mwangi Mucemi**, its director. He

deposed that the applicant opposed the application and had instructed its advocates on record to file an application to set aside the award. That it was in the interest of justice and fairness that the said application be determined first as the plaintiff will suffer great loss if the court fails to do so.

8. When the matter came up for hearing the court directed that both applications be determined simultaneously and by way of written submissions which the parties have complied.

Plaintiff's Submissions

9. The plaintiff raised the issue of whether the award is against public policy and it placed reliance in the case of **Cape Holdings Ltd v Synergy Industrial Credit Limited [2016] eKLR** which cited with the case of **Christ for All Nations v Apollo Insurance Company Limited, NRB HCC No. 477 of 1999**, where the court held that an award will be set aside under **section 35(2) (iii)** of the **Arbitration Act** as being either (a) inconsistent with the public policy of Kenya if it was 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 and morality.

10. The plaintiff submitted that the contract was to run for 40 weeks however the same was completed one year later and this was because the defendant delayed in making payments. That clause 29 of the contract provided for circumstances when the applicant may suspend work among them being when he has not received a payment certificate and payment in accordance with clause. That further, the defendant's witness had admitted that there was delayed payment on numerous occasions and the delay of work totaling to 46 weeks on account of payments on its part but the same was not factored in hence the defendant should not have been awarded the Kshs. 520,000/=.

11. The second issue was whether the arbitrator was biased. It was submitted that **section 35** of the **Arbitration Act** specified conditions that must be met for an arbitral award to be set aside. While placing reliance in the case of **Castle Investments Company Ltd v Board of Governors – Our Lady of Mercy Girls Secondary School [2019] eKLR**, the plaintiff submitted that bias was a ground for setting aside an arbitral award. That arbitrator exhibited open bias by failing to consider its evidence demonstrating that it incurred massive loss as a result of the illegal and improper termination of the agreement by the defendant. That further, the prayers it had sought like the claim for security did not appear in the final submission despite the same not being contested. The plaintiff submitted that the same was for its claim for breach of contract arising from how the contract was illegally terminated by the defendant and claim of materials and equipment on site.

12. On the last issue, whether the award should be adopted or set aside the plaintiff submitted that same should be set aside as it was based on skewed analysis of facts and law.

13. In conclusion, the plaintiff submitted that the arbitrator abdicated her responsibility to weigh the evidence by ignoring its evidence without weighing it against the evidence on record. That the said act by the arbitrator amounted to abuse or misuse of power conferred upon her and thus the said misconduct vitiated the award and rendered it null and void *in limine*.

Defendant's Submissions

13. The defendant in reference to its application date 14th July 2021, submitted that the plaintiff made an application that this case be heard before an arbitrator and the same was heard and finding made that the plaintiff pay it Kshs. 520,000/= for work delay within 60 days. That the plaintiff did not raise a finger against the said award and when the 60 days lapsed, it sought to have the award adopted as judgment of the court. The defendant submitted further, that as per **section 32** of the **Arbitration Act No. 4 of 1995** of the **Laws of Kenya**, the arbitrator's award was final. That further, the finality of the award is also clearly captured in the agreement dated 17th October 2014 between the parties herein.

14. Regarding the plaintiff's application dated 23rd February 2021, the defendant submitted that the said application was bad in law *ab initio* since by the time it was made the award of the arbitrator had not been read. That the plaintiff in its plaint under prayer (d) seeks that the finding/award of the arbitrator be adopted in court for purpose of adoption as a decree and order of this court. The defendant referred the court to **section 37** of the **Arbitration Act of 1995** on setting aside of arbitral awards. The defendant submitted further that the dispute herein was to the effect that the plaintiff had done extra work on a building than he had been paid by 4th July 2016 when he brought the matter to court. That by a consent order dated 19th July 2016, the parties agreed to do re-measurements using each their own quantity surveyor but the plaintiff later failed to do so even after the arbitrator ordered for the same to be done three times.

15. The defendant went on to submit that the arbitrator was forced to rely on the re-measurements that it had done. That the agreement had a clause that stated that any delay by the plaintiff will attract Kshs. 10,000/= per week and that there was a delay of 52 weeks between 31st November 2014 and April 2016 when the building was completed. The defendant submitted that the arbitrator awarded it after making a finding that plaintiff acted unprofessionally, casually and corruptly. That there was no evidence of bias proved by the plaintiff and urged the court to dismiss the application dated 23rd February 2021 and allow the one dated 14th July 2021.

16. The courts attention was drawn to the following cases; **Misc. Civil Application E 679 OF 2020 Capture Solutions Ltd vs Nairobi City Water and Sewerage Co. Ltd** on what public policy entailed and **Commercial Mis. E596/2019 Nada Properties Ltd vs Amreek Singh Mudher & Another**.

Analysis and Determination

16. I have considered both applications and submissions by parties and hold that an order for the setting aside of the arbitral award if made shall have a direct bearing on that for the enforcement of the award. They are in a sense conjoined twins.

17. In the instant case as per the plaint herein dated 4th July 2016, the plaintiff entered into a contract dated 17th October 2014 with the

defendant for the construction of a commercial building upon the parcel known as NAKURU MUNICIPALITY BLOCK 9/73. Further, the payment of the contract was to be made on a continuous basis as the construction of the commercial building proceeded. A dispute arose on payment on 22nd April 2016 when the defendant had defaulted in paying for the work done and the plaintiff issued a demand letter requiring the defendant to settle the amount accrued. However, that amount was settled albeit late and not as per the contract.

18. On 29th June, 2016 or thereabout, the plaintiff, having completed the phase of the works which was to be completed at that time wrote to the defendant demanding payment of the balance for the phase that had been completed but defendant failed and/or refused to settle the balance and instead issued a letter dated 17th July 2016 issuing a (14) days' notice to terminate the contract.

19. The matter proceeded to court and this court by consent of both parties issued an order dated 23rd September 2016, referring the matter to arbitration and the arbitrator who was appointed by the Architectural Association of Kenya accepted the appointment via a letter dated 24th October 2016 referenced Arb/Ovt242016/001. The matter proceeded to hearing which culminated in the award dated 11th May, 2020, in which the following orders were issued: -

Accordingly, and in full and final settlement of all claims and counterclaims in this arbitration, I hereby AWARD AND DIRECT as follows:

a. That I award the Respondent the sum of Kshs 520,000.00.

b. That the amount of Kshs 520,000,00 shall be paid within 60 days from the date of the Award. In default thereof, Interest shall accrue at court rates after the 60 days. |

c. That each party shall bear its own costs of the Claim and Counterclaim.

d That each party shall equally bear the costs of this Reference.

19. The court appreciates the fact that an arbitral process is a consensus, voluntary procedure through which parties choose to resolve their dispute. However, this court can only intervene in that process as set out under **Section 10** of the **Arbitration Act** which provides that:

“Extent of court intervention

Except as provided in this Act, no court shall intervene in matters governed by this Act.”

20. **Section 32A** of **Arbitration Act** states:

“Except as otherwise agreed by the parties, an arbitral award is final and upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”

21. Further, the Court of Appeal in the case **Nyutu Agrovot Limited v Airtel Network Limited [2015] eKLR** in regard to limited intervention by the courts of arbitral process stated as follows:

“The rationale behind the limited intervention of Court in Arbitral proceedings and awards lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to choose how best to resolve a dispute between them. Where the parties therefore have consciously opted to resolve their dispute through Arbitration, intervention by the Courts in the dispute is the exception rather than the rule...”

22. **Section 35** of the **Arbitration Act** stipulates:

“(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) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.” (Emphasis mine)

23. Further, **Section 36** of the said the Act on recognition and enforcement of an award provides:

“(1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.

(2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish-

(a) the duly authenticated original arbitral award or duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.”

24. **Section 37** on the other hand as regards grounds for refusal or recognition or enforcement of the award provides: -

“(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only-

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that-

(i) 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, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(b) if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.*

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.”

25. Courts have taken the position that the grounds for setting aside of an arbitral award as set out under the above section of the Act are strict and spell out the jurisdiction of the court in setting aside an Arbitral Award. This is the position that was taken in **Midco Holdings Limited v Summit Textiles (EA) Limited [2014] e KLR** where it was held:

“[36] Section 35(2) of the Arbitration Act circumscribes the grounds upon which an arbitral award can be set aside, and an applicant seeking to set aside an arbitral award must bring himself strictly within the legal bounds of that Section. See the case of TRANSWORD SAFARIS LTD V EAGLE AVIATION LTD & 3 OTHERS NBI MISC APPLICATION NO. 238 OF 2003, Nyamu J. (as he then was).”

26. The Application herein dated 23rd February 2021 for setting aside the arbitral award is based on two main grounds, namely, that the award goes against public policy and that the Arbitrator acted contrary to the established principles of law and considered extraneous matters.

27. On the first ground, the plaintiff submitted that the defendant should not have been awarded the Kshs. 520,000/= as it resulted to unjust enrichment of the defendant and was contrary to public policy as it promoted unfair and unconscionable commercial practices. On the second ground, the plaintiff submitted that the arbitrator exhibited open bias. That she failed to consider the evidence it adduced contrary to the Evidence Act and that she ignored the fact that it was the defendant who breached the agreement by shifting blame on it yet the agreement was clear on the termination procedure at clause 38.

28. The plaintiff submitted further that the arbitrator relied on bills that were never produced by the defendant contrary to the law on evidence. That its prayers for the claim for security, breach of contract and materials and equipment on site were disallowed by the arbitrator even though they were not contested by the defendant. The defendant on its part submitted that the said grounds by the plaintiff were not proved and the same were mere allegations.

29. In addressing the issues raised above, in the case **Christ for All Nations Vs. Apollo insurance Company Limited [2002] EA 366** Ringera J. held 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.”

28. Further, The Court of Appeal decision in **Nairobi Golf Hotels Ltd vs Linotic Floor Company Ltd [2015] eKLR** held thus: -

“We do not agree that the learned Judge erred in giving a narrow interpretation of misconduct. The interpretation he gave was the correct one even under the repealed Arbitration Act. We agree with the finding of the High Court of Tanzania in DB Shapriya and Co Ltd v Bish International BV (2) [2003]2 EA 404, (cited by learned counsel for the appellant) to the effect that;

“Courts cannot interfere with findings of fact by an arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct.”

29. In **Mahican Investments Limited and 3 others vs Giovanni Gaida & Others NRB HC Misc. Civil Application No. 792 of 2004 [2005] eKLR** held that:

“A court will not interfere with the decision of an Arbitration 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 a 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.”

30. I have perused the Final Award and the documents filed by the parties before the arbitrator and note that the arbitrator took time to address the issues raised by both the plaintiff and the defendant in detail and gave the reasons for her conclusion. I also note that the plaintiff did not object to the documents produced by the defendant under clause 6.2 of the award and they therefore formed part of the evidence that the Arbitrator needed to consider in determining the dispute between the parties.

31. Under paragraph 9.1-9.6 of the award, despite the defendant making several claims in the counter claim it was only successful on the one for delay of completion whereby it was awarded Kshs. 520,000/=. Further, this delay was not disputed by the plaintiff and same was in breach of the contract terms. On the other hand, I note that the arbitrator under paragraph 8.26 - 8.28 of the award addressed the plaintiff's claims on security and breach of contract and did not award the same on the grounds that the plaintiff failed to demonstrate goodwill and that they were not proved. In addition, no evidence was produced to show that the arbitrator acted contrary to public policy or any form of misconduct on her part. Instead, the arbitrator confined herself to the issues listed by the parties as requiring determination and cannot therefore be said that she went on her own frolics.

32. In view of the above, the court agrees with the arbitrator's decision because as it is the plaintiff's claims have not been proved and remains allegations. From the foregoing reasons, it is my view that the plaintiff has failed to demonstrate that there exist sufficient grounds to warrant the setting aside of the Arbitral Award. Further, it has failed to meet the threshold for the conditions provided under Section 35 of the Arbitration Act cited above. The Notice of Motion application dated 23rd February, 2021 is not merited and the same is dismissed it with costs.

32. On the other hand, the application dated 14th July 2021 is allowed as prayed with costs.

DATED SIGNED AND DELIVERED VIA VIDEO CALL AT NAKURU THIS 10TH DAY OF FEBRUARY 2022.

H K CHEMITEI.

JUDGE