REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCOMMMISC/E084/2021

CITATION: LAND LAYBY KENYA LIMITED VS WILFRED OGOT LUSI

RULING

RULING

Introduction

1. This ruling determines two applications, namely, Miscellaneous application No. E005 of 2021 dated 6th January 2021 filed by Wilfred Ogoti Lusi against Land layby Kenya Limited (herein after referred to as the first application) and Miscellaneous application No. E084 of 2021 dated 3rd February 2021 filed by Land layby Kenya Limited against Wilfred Ogot Lusi (herein after referred to as the second application).

2. The common thread between the two applications is that they arise from the same arbitral proceedings between the parties and the parties in the two applications are the same. In the first application, the applicant is Wilfred Ogot Lusi while Land layby Kenya Limited is the Respondent. In the second application, Land layby Kenya Limited is the applicant while Wilfred Ogot Lusi is the Respondent. For ease of reference, in this consolidated ruling, Wilfred Ogot Lusi will be referred to as the applicant while Land layby Kenya Limited will be referred to as the Respondent.

3. Despite the extremely divergent positions taken by the parties in their respective applications, the factual matrix which triggered the arbitral proceedings which culminated in the award now the subject of the consolidated applications is essentially uncontroverted. It is common ground that the parties entered into a sale agreement dated 18th January 2015 in which the Respondent agreed to sell to the applicant a parcel of land described therein in being part of all that parcel of Land Known

as Kajiado/Kaputiei-North/27521.

4. Clause 22 of the subject agreement provided that any dispute that may arise between the parties will be referred to and settled by arbitration. The agreement provided that the tribunal shall consist of one arbitrator agreed upon by parties. It also provided that the award shall be final and binding upon parties. Clause 22 provided: -

"22. Arbitration

Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation. Should such negotiations fail to achieve a resolution within Fifteen (15) days, either party may declare a dispute by a written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:

(a) Such arbitration shall be resolved under the provisions of the Kenyan Arbitration Act, 1995 (as amended from time to time);
(b) The tribunal shall consist of one arbitrator to be agreed upon between the parties failing which such arbitrator shall be appointed by the Chairman for the time being of the Law Society of Kenya upon the application of any party;
(c) The place and seat of arbitration shall be Nairobi and the language of arbitration shall be English;
(d) The award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by law and any party may apply to a court of competent jurisdiction for enforcement of such award;
(e) Notwithstanding the above provisions of this clause a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award or the arbitrator;
(f) Each of the parties irrevocably waives any immunity in respect of its obligations under this Agreement that it may acquire from the jurisdiction of any court or any legal or arbitral process for any reason including but not limited to the service of notice, attachment prior to judgment or attachment in aid of execution."

5. A dispute arose between the parties and vide a letter dated 6th March 2019 the parties jointly appointed M/s Mercy Okiro Akeyo, who responded vide a letter dated 24th March 2019 accepting the appointment, and stating that the dispute fell within her area of competence; that she had no conflict of interest and had nothing to disclose with respect to circumstances which might give rise to justifiable doubts regarding her independence and impartiality; and lastly, she confirmed her availability to commence the arbitration proceedings right away. The Parties framed the issues for determination and advised the arbitrator on common ground/convergence and/or uncontested issues/points. The Arbitrator upon hearing the dispute rendered the award on 6th November 2020. The final award was: -

i. The Respondent shall forthwith pay to the claimant the sum Kshs. 210,000/= together with the accrued simple interest at the rate of 3% above current prevailing rate of Barclays Bank of Kenya (Now ABSA Bank Kenya) from 24th April, 2017 until payment in full.

ii. The Respondent shall further pay the Claimant his costs for this Arbitration to be agreed upon by the parties failing which the same be taxed by the Deputy Registrar of the High Court of Kenya.

6. The point of departure is that the two applications seek diametrically opposed orders. Whereas the applicant seeks an order adopting and recognizing the said award as a judgment of this court, the Respondent seeks to set aside the same award.

The first application

7. The applicant, Mr. Wilfred Ogoti Lusi's seeks orders that the subject award be adopted and recognized as a judgment of this court and that this court awards costs of the application on full indemnity basis. He also prays that this court awards interest at commercial rates on the sum awarded by the Arbitrator and on costs from the date of the Ruling until payment in full.

8. His grounds are that the award was published on 6th November, 2020 but the Respondent has failed to honour the same despite demands for settlement, and, that, the lower risk of injustice and balance of convenience lies in allowing the application. Lastly, he states that no plausible, probable or possible prejudice can be suffered by the Respondent because the debt accrued under a commercial contract and remains due and owing to date. The grounds are also explicated in his supporting affidavit. It will add no value to rehash them here.

The Respondent's Reply

9. Mr. Nderitu Njogu, the Respondent's Resident Conveyancer swore the Replying affidavit dated 24th February 2021 in opposition to the first application the bulk of which replicates the pleadings before the arbitral tribunal. It will serve no value to rehash them here.

10. He deposed despite the Arbitrator stating that she had paid heed to the letter dated 3rdJuly 2017 and the termination of the Agreement, she disregarded the import of the date when the said letter was delivered to the Respondent thereby rendering the contractual practice in Kenya and in particular the requirements of notice susceptible to the non-observance of important explicit provisions rendering issuance of notices unpredictable and uncertain to the detriment of the contracting parties and to the public at large contrary to public policy.

11. Mr. Njogu deposed that the Arbitrator despite finding that the Respondent had confirmed its ability to complete the transaction vide its various letters and it had executed the required forms to

finalize the transaction, the arbitrator failed to accede that such conduct estopped the applicant from claiming breach of contract considering the applicant's rescission dated 3rd July 2017 was delivered to the Respondent on 4th September 2017 which is grossly in conflict with public policy in Kenya. Lastly, he deposed that the applicant seeks orders which were not granted by the Arbitrator.

The second application

12. The Respondent, in its application prays that the Award be set aside and it be paid costs of the application on grounds that it is in conflict with the public policy of Kenya.

The applicant's Replying affidavit

13. In response to the second application, Mr. Wilfred O. Lusi in his Replying affidavit deposed that the application is fatally and incurably defective, for want of compliance with the mandatory requirements of the Arbitration Act (herein after referred to as the Act), as read with the Arbitration Rules, 1997. He deposed that this court's jurisdiction under Section 35 of the Act has not been properly invoked. He averred that section 10 of the Act mandatorily limits this courts intervention to only matters permitted by the Act, and, that Rule 4(2) of the Arbitration Rules, 1997 mandatorily provides and requires that all applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing. He averred that once an award has been filed in court and its filing has been brought to the parties' attention, any application filed in a cause other than the one in which the award has been filed is defective and incompetent in law.

14. Mr. Lusi deposed that Rule 7 mandatorily provides that "an application under section 35 of the Act shall be supported by an affidavit specifying the grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator." He deposed that an application failed to enjoin and serve the Arbitrator hence its application is fatally and incurably defective and incompetent. He deposed that he filed Misc. No. E005 of 22021 after the award was published seeking its recognition and enforcement and served the Respondent, but the Respondent failed to enjoin the Arbitrator in its application nor did it serve her.

15. Mr. Luci deposed that the second application seeks to impugn the Arbitrators findings of fact. In particular, he deposed that the applicant is asking the court to consider when the claimant's notice

of termination was received and whether at that time the applicant had dutifully confirmed its ability to complete. He averred that the applicant has not raised any legal issues, and, that the Respondent's application is an invitation to this court to sit on appeal on findings of fact. He deposed that for an award to be contrary to public policy, there must be a departure from the law and legal norms.

16. Additionally, he averred that under section 37(2) of the Act, where a party seeks to set aside an arbitral award the court may order adequate security be provided. He deposed Clause 22(f) of the Agreement provided that each party irrevocably waives any immunity in respect of its obligations under the Agreement that it may acquire from the jurisdiction of any court or any legal or arbitral process for any reason including, but not limited to, the services of notice, attachment prior to judgment or attachment in aid of execution. He deposed that the question of the dates when service of the termination was done falls short of the threshold for public policy. Lastly, the bulk of his averments are legal submissions.

The Respondent's Supplementary affidavit

17. The nub of Mr. Nderitu Njogu supplementary affidavit dated 24th February 2021 is that the applicant's assertion that this court lacks jurisdiction to entertain the Respondent's application is unfounded.

Determination

18. I will first to address the Respondent's application which seeks to set aside the award. This is because the nature of the application is such that if it succeeds, it would not serve any utilitarian value to address the applicant's application seeking to enforce the award.

19. Mr. Komu, the Respondent's counsel submitted that the Arbitral Award is in conflict with the public policy of Kenya because the Arbitrator despite stating that she heeded to the letter dated 3rd July 2017 and the purported termination of the Agreement, she proceeded to disregard the import of the date when the said letter was actually delivered to the Respondent. He argued that this failure renders contractual practice in Kenya and the requirements for notice susceptible to the non-observance of important customs and explicit provisions. Such a scenario, he argued would render issuance of notices unpredictable and uncertain to the detriment of the contracting parties which would ultimately be injurious to the public which is against the Public Policy of Kenya. He argued

that despite the Arbitrator finding that the Respondent confirmed its ability to complete the transaction, she failed to accede that such conduct estopped the applicant from claiming breach of contract since the purported rescission was delivered to the Respondent on 4th September 2017.

20. Mr. Komu argued that the reasons cited in the Respondent's supporting affidavit are sufficient to set aside the award. He relied on Christ for All Nations v Apollo Insurance Co. Ltd which cited with approval by the Court of Appeal in Kenya Shell Limited vs Kobil Petroleum Limited which held that "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 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. Additionally, Mr. Komu argued that a literal meaning of Rule 4 (2) is that after an award has been filed, any person filing an application shall do so by way of summons, which should be filed in the same cause in which the award had been filed. He cited P.N. Mashru Limited v Total Kenya Limited in which the court addressing the competence or otherwise of an application for failing to comply with the provisions of Rule 4 (2) of the Arbitration Rules, 1997 stated that "The East Africa Court of Appeal in Brooke Bond Liebig (T) Ltd Vs Mallya [1975] E.A. 266 held that Rules of procedure are designed to give effect to rights of the parties and once parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiation of proceedings".

22. Fortified by the above decision, Mr. Komu submitted that non-compliance with Rule 4 (2) of the Arbitration Rules is not fatal particularly in light of the provisions of Article 159(2)(d) of the Constitution which obligates a court of law to administer justice without undue regard to procedural technicalities at the expense of substantive justice, especially if no injustice is caused to either party. Mr. Komu maintained that in determining the application, the court would assess whether or not the Respondent has discharged the onus of proving one or more of the grounds cited in Section 35 of the Act. He argued that the determination whether the Respondent is citing grounds of appeal can only be made after considering the merits of the application.

23. On the failure to enjoin the Arbitrator, Mr. Komu argued that the Rule 7 requires that the Arbitrator be served with the application and the affidavit, but it does not say that the arbitrator must be enjoined to the suit as a party. He cited Mashru Ltd v Total Kenya Limited in which the

applicant had cited both section 35 of the Act and Sections 3A and 80 of the Civil Procedure Act but the court rejecting a Preliminary Objection based on the cited provisions stated "…no issue turns upon the citing of superfluous and irrelevant provisions." He argued that the alleged misjoinder does not render the application fatally defective.

24. The Respondent's application is strongly opposed. Mr. Lusi relied on Jiwanji v Jiwanji in which the court observed that "where there is no ambiguity in an agreement, it must be construed according to the clear words used by the parties." Further, the court in the said case cited National Bank of Kenya v Pipelastic Samkolit for the holding that "a court of law can only interpret and enforce the clear terms of a contract and would not rewrite a contract not even to save a party from bad bargain."

25. He also cited Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd which held that it is not the business of courts to re-write contracts between Parties and that parties are bound by the terms of their contracts unless coercion, fraud or undue influence is pleaded and proved. He submitted that the contract waives any objection or immunity to attachment in aid of execution. He submitted that the above term of was intended to safeguard either party from unwarranted difficulty in execution or even prior to judgment. He argued that the applicant holds an award which may be rendered otiose and urged the court to uphold and give effect to Clause 22(f) of the Arbitration Agreement.

26. Mr. Luci argued that the Respondent's application seeking to set-aside the arbitral award is fatally and incurably defective, for want of compliance with mandatory requirements of the Act, as read with the Arbitration Rules, 1997. He argued that this court's jurisdiction under Section 35 of the Act has not been properly invoked and that the application offends Section 10 of the Act, hence, this court is divested of jurisdiction to intervene on any matter not contemplated under the act.

27. Mr. Lusi submitted that the Respondents application violates Rule 4(2), of Arbitration Rules, 1997 which requires "All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date." He argued that failure to observe this provision, renders the application defective and incompetent in law. He submitted that the failure to enjoin or serve the Arbitrator as provided under Rule 7 renders the application untenable. He urged the court to decline jurisdiction and refuse to entertain the application. To fortify his argument, he cited Seven Seas Technologies Limited v Eric Chege for the proposition that jurisdiction means the authority which a court has to

decide matters before it, which limit is imposed by the statute, charter, or commission.

28. Mr. Lusi submitted that the Respondent's argument that the award offends public policy is premised on an allegation that the arbitrator disregarded the date of delivery of a letter dated 3rd July 2017 by the applicant terminating the contract; and that the Respondent had confirmed its ability to complete before the receipt of the notice of termination. He submitted that the said grounds amount to impeaching the merit of the arbitrator's findings or interpretation of fact. To fortify his argument, he cited KEBS v Geochem Middle East in which the court observed that "if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator the court would be sitting on an appeal over the decision in issue. In the light of public policy in Kenya which loudly pronounces the intention of giving finality to Arbitral Awards, it would actually be against the said public policy to have the court sit on an appeal over the decision of the arbitral tribunal."

29. Mr. Lusi submitted that the jurisdiction to set-aside an award on public policy under section 35(2)(b)(ii), of the Act, when read alongside section 10, envisages setting-aside an award only where, "it is inconsistent with the Constitution of Kenya or to other laws of Kenya written or unwritten; or inimical to the national interests of Kenya; or contrary to justice or morality. Also, he cited Glencore Grain Ltd v TSS Grain Millers Ltd in which the court held that an award violates public policy if it would violate in a clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society. He also placed reliance on Capture Solutions Ltd v Nairobi City Water and Sewerage Company Ltd which succinctly summed the threshold for successfully asserting breach of public policy stating that there must be some fundamental departure from the law and legal norms. He submitted that the Respondent's invitation amounts to inviting this court to unlawfully and irregularly sit on appeal against the subject award.

30. Lastly, Mr. Lusi submitted that the Respondent is in clear abuse of legal process. He cited GeoChem Middle East v KEBS which held that "arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of the courts has been greatly diminished notwithstanding the narrow windows created by section 35 and 36 of the Act."

31. A useful starting point is to mention that the general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Act which provides that except as

provided in the Act, no court shall intervene in matters governed by the Act. Section 10 in peremptory terms restricts the jurisdiction of the court to only such matters as are provided for by the Act. I have in several decisions stated that the section exemplifies the recognition of the policy of party's "autonomy" which underlie the arbitration generally and in particular the Act. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy. The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

32. Section 10 of the Act permits two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or permits the intervention of the court. Second, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially. This position was best explained by the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), (the Nyutu case) which stated that this judicial intervention can only be countenanced in exceptional instances. The Apex court stated: -

[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle. (Emphasiss added)

33. The Supreme Court stated that Section 10 of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. It follows that parties who resort to arbitration, must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and

recognition and enforcement of arbitral awards amongst other specified grounds.

34. Section 35 (2) of the Act sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.

35. By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel. By agreeing to arbitration, the parties limit interference by courts to the ground set out in section 35 of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. Parties entering into an arbitration agreement must be aware that the arbitration award will be final, except in limited circumstances. If parties want the option of appealing the award, such right of appeal must be set out in the arbitration agreement itself.

36. The applicant's main grounds of assault is that the award is against public policy of Kenya. The basis for this ground is two-fold. Because of the centrality of the said grounds to the Respondent's case, I hereby reproduce the cited grounds verbatim.

a) Despite stating in the Arbitral Award that she had paid heed to the letter dated 3rd July 2017 and its purported termination of the Agreement, the Arbitrator proceeds to disregard the import of the date when the said letter was actually delivered to the Applicant herein, thereby rendering the contractual practice in Kenya and in particular the requirements of notice susceptible to the non-observance of important customs and explicit provisions, rendering issuance of notices unpredictable and uncertain to the detriment of the contracting parties therein and ultimately to the

public at large.

b) The Learned Arbitrator despite finding unequivocally that the Applicant had dutifully confirmed its ability to complete the transaction vide its various letters prior to the Respondent's purported rescission and the Respondent had executed the required forms to finalise the transaction prior fails to accede that such conduct estopped the Respondent from claiming breach of contract of the Agreement especially since the Respondent's purported rescission vide its letter dated 3rd July 2017 was only delivered to the Applicant on 4th September 2017 which is grossly in conflict with public policy in Kenya.

37. Where an Objector challenges the recognition and enforcement of an Arbitral Award on grounds of public policy, the court has jurisdiction to substantively interrogate the said award in order to confirm if it is consistent with Kenyan law, justice and morality. In fact, arbitrability and public policy are closely related. Arbitrability relates to the legality of an arbitration agreement or process, while public policy refers to the laws or standards that either the agreement or the award might contravene. Arbitrability and public policy thus overlap in arbitration practice.

38. The basic tenet of the provision on public policy is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement of the award is sought from being harmed by such recognition and enforcement. A violation of public policy, may render an agreement in arbitrable. Courts often refer to "public policy" as the basis of the bar. Thus, if the court feels that an issue falls in the scope of public policy, the court may intervene only, to protect the benefit of the public. An obvious example is criminal law, which is generally the domain of the national courts. The criminal case involves the violation of good morals affecting the public; therefore, the parties' autonomy is restricted and the court will decline to enforce the award.

39. The Arbitration Act does not provide a definition of "public policy." In the words of Lord Truro in Egerton v. Brownlow (Earl) public policy is "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law." Or to use the legendary expression of Burrough J in Richardson v. Mellish public policy is "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

40. In Deutsche Schachtbau v. National Oil, the English Court of Appeal clarified the notion of public policy in the context of enforcement of arbitral awards as follows: “Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. … It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.”

41. As noted in prominent commentary on the English Arbitration Act, the public policy exception is “where the two principles come to clash head on: the notion that an arbitral award is final, and should not be reopened in anything except the most extreme circumstances; and the notion that the enforcing court’s fundamental norms of public policy should not be violated.” Generally, public policy is used to describe the imperative or mandatory rules that parties cannot exploit. Public policy is outside and beyond the scope of arbitration and stays within exclusive judicial jurisdiction, and it also can be the obstacle to the arbitration of certain disputes. The concept of public policy often is used to describe the imperative rules of each country. Public policy serves as the rationale on which a domestic court may refuse the enforcement of an arbitral award, which is contrary to the laws or standards of the court's jurisdiction. If the court feels that enforcement of an award would violate the basic notions of morality and justice, the court may vacate such award.

42. Domestic public policy is expressed by legislative enactments, constitutional constraints, or judicial practice within individual states. Hence, public policy is a legal principle founded on the concept of public good. It can be used to protect the morale of a country or justify a court's intervention where an agreement is considered harmful to the public welfare. Even though such public policy will disturb only one part of community, the court should weigh the whole of the community in applying public policy considerations if it believes that such actions may impact their own public good and morale. Public policy has three distinct levels: domestic, international, and transnational. Domestic public policy is when only one country is involved in arbitration, the parties come from the same country, and thus the laws and standards of that country's domestic public policy apply. Domestic public policy generally is seen as being the fundamental notions of morality and justice determined by a national government to apply to purely domestic disputes within their jurisdiction. These mandatory rules of public policy are found in a State's laws and are designed to protect the public interests of that State, not of any particular private individual or entity.

43. The main case regarding public policy in England is Deutsche Schachtbau-und Tiefbohrgesellschafl MB.H (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil). In this case, the court reasoned that in order for an English court to set aside the award on the public policy defense, the claiming party must prove that there is "some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised. In addition, it was not contrary to public policy of England if the arbitrator used common principles underlying the laws of the various nations to govern contractual relations, especially when the parties failed to specify which system of law would apply. The English court confirmed that it had to violate a particular existing justified interest of the English public to be a public policy exception. The court must see that such recognition and enforcement of award may endanger the interest of the state's citizens by executing its public authority. Thus, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of state's public will not be considered as a bar to recognize or enforce the award.

44. Colman J sounded a word of caution in Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. and others when he warned that the defendants “should not be permitted to reopen under the public policy exception … the issues of fact already determined by the arbitrators.”

45. A review of all the grounds propounded by the Respondent in support of the plea that the award or portions thereof offend public policy leave me with no doubt that the applicant has not satisfied the tests laid down in the above cited case. First, the applicant did not cite a Constitutional provision or a statutory provisions or an enactments which have been offended by the award. It follows that there is nothing to show that the award is contrary to law. Second, the party alleging breach of public interest must prove beyond doubt how the recognition and enforcement of the award would damage public good or how it would be clearly injurious to the public good or, that possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised. There was no attempt to bring the grounds cited within this test.

46. Third, a reading of the two grounds cited leaves no doubt that the Respondent is challenging the Arbitrators findings on matters of fact which is impermissible and outside the purview of section 35 of the Act. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible,

rightly or wrongly. Errors of the kind mentioned (if at all it qualifies to an error,) have nothing to do with him exceeding her powers; they are errors committed within the scope of her mandate. To illustrate, an arbitrator in an arbitration has to apply the law to the facts but if he errs in his understanding or application of the law and the facts, the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law and fact are reviewable, which is absurd.

47. Fourth, the Arbitrator was required to determine the dispute between the parties, including disputes relating to the interpretation of the agreement, contested facts, and disputes of a legal, financial and technical nature, the procedural rules to apply and the laws of the Republic governing the agreement. In this regard the Arbitrator had to choose between two opposing contentions. In short, the arbitrator had to (i) interpret the agreement; (ii) apply the Kenyan law; (iii) construe the contract terms, and (iv) consider all the admissible evidence and arrive at his own findings. It follows that the contestation that she disregarded the import of dates or failed to consider that the Respondent intended to complete the agreement is an attack on the manner in which the arbitrator construed or failed to construe the facts which cannot amount to public policy nor is it a ground for this court to intervene.

48. If an arbitrator commits a factual error which leads the arbitrator to a wrong conclusion, that alone is not sufficient to render an arbitral award reviewable. An arbitrator's decision is not reviewable merely because it is wrong. Only where the mistake is so gross or manifest as to evidence misconduct, mala fides or partiality on the part of the arbitrator will the award be reviewable in terms of section 35. By determining the issues, the arbitrator acted within her mandate. The applicant's complaint lies with the result of the finding, rather than on the ground that the arbitrator exceeded his powers.

49. Sixth, in addition, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate. A reading of the two grounds shows that the Respondent is challenging factual findings, hence, inviting this court to exercise appellate jurisdiction. Seventh, on the contrary, a reading of the pleadings and the award leaves me with no doubt that the Arbitrator remained within the area ordained to her under the reference to Arbitration.

50. Eight, even if the arbitrator had either misinterpreted the agreement, the facts, or failed to apply the law correctly, or had regard to inadmissible evidence, it does not mean that she misconceived the nature of the inquiry or her duties in connection therewith. In my view, it only means that she erred in the performance of her duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the words of Hoexter JA:

"It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court."

51. The arbitrator understood clearly that her duty was to interpret the agreement and that she had, in this regard, to choose between the conflicting contentions tendered by the parties. She understood particularly well that she had to determine the meaning of the contract with reference to its true construction and that she could only have regard to admissible evidence.

52. In Telcordia Technologies Inc v Telkom SA Ltd the Supreme Court of Appeal of South Africa stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. Arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator will be binding on the parties. The arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are to be determined. The Respondent cannot now purport to rewrite the contract by attempting to free itself from the arbitration outcome which is binding upon the parties by hiding behind the concept of public policy.

53. Thus, in my view, the scope of the public policy ground of refusal applies only to the fundamental core questions of morality and justice which enliven this particular statutory exception to

enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defense of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies. This approach also ensures that due respect is given to contract-based awards as an aspect of the product of freely negotiated arbitration agreements entered into willingly between parties.

54. Flowing from my analysis and determination of the issue under consideration, the conclusions is irresistible that the Respondent's application seeking to set aside the award is totally unmerited. Having so found, I find no need to address the submission my Mr. Lusi that the Respondent's application is fatally incompetent.

55. I now turn to the applicant's application seeking to enforce the award. Mr. Lusi relied on KEBS v Geochem Middle East and Capture Solutions Ltd v Nairobi City Water and Sewerage Company Ltd for the holding that for a domestic award to be recognized and adopted as a judgment of the court Section 36(2) of the Act requires that the claimant only needs to lodge an original or duly certified copy of the arbitral award and the arbitration agreement. He argued that he complied with this requirement and added that his application meets the legal threshold under section 36 of the Act and urged the court to grant the orders sought.

56. Mr. Komu in opposition to the applicant's application submitted that the Arbitral Award is in conflict with the public policy of Kenya. As a consequence, he argued that the Arbitral Award is unenforceable as per Section 37(1)(b)(ii). He urged the court to dismiss the application with costs.

57. One of the most crucial aspects of the arbitration process is the recognition and enforcement of the arbitral award, wherein the court grants the award the authority and legitimacy analogous to that of a judgment rendered in a court of law and capable of execution. The grounds for denying recognition and enforcement of an awards are provided in the Act. Indeed, the main premise of the Act is that awards are entitled to recognition as provided under section 36 of the Act except where any of the grounds listed in section 37 is demonstrated. None of the grounds listed in section 37 have been demonstrated to warrant refusal for recognition and enforcement. The Respondent's only ground, namely public policy collapsed for reasons earlier explained.

58. The language of section 37 of the Act, places the burden of proof upon the award debtor, who has to prove that it falls within at least one of the grounds listed therein to bar the court from

recognizing and enforcing it. The award must presumptively bind the parties, and the courts ought to regard the party resisting enforcement as having a significant and important burden which must be discharged.

59. I have evaluated the grounds cited by the Respondent in its opposition to the first application. I find no impediment, legal or equitable to the plea for recognition and enforcement. The upshot is that the application dated 6thJanuary 2021 is merited. I allow the said application and order that the arbitral award dated and published on 6th November 2020 be and is hereby recognized, adopted and enforced as an order of this court. I further order that leave be and is hereby granted the applicant Mr. Wilfred Ogot Lusi to enforce the arbitral award dated and published on 6th November 2020 as a decree of this court.

60. The second application dated 3rd February 2021 filed by Land layby Kenya Limited is dismissed for want of merit. I further order that the Respondent M/s Land layby Kenya Limited shall pay the costs of both applications to the applicant Mr. Wilfred Ogot Lusi together with interests thereon from date of taxation.

Orders accordingly

Signed, Dated and Delivered at Nairobi this **7th** day of April 2021

John M. Mativo
Judge
Delivered electronically via e-mail

SIGNED BY: HON. JUSTICE J. M. MATIVO

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT COMMERCIAL AND TAX
DATE: 2021-04-07 08:04:59+03