CASE LAW SUMMARY

HCCOMMMISC/62/2016
CONTINENTAL HOMES LIMITED V SUNCOAST INVESTMENTS LIMITED

Ruling Date: 25th May 2018.

SUMMARY OF FACTS

The parties to this case had contracted on three different occasions for construction projects. They later had a dispute over the performance of the contract, prompting them to approach an arbitrator to resolve the dispute as per their agreement. The arbitrator rendered an award in favor of the respondent, mandating the applicant to pay them 27,063,446.92 shillings. This award was inclusive of Value Added Tax (VAT). The arbitrator also deemed it fit to award interest to the respondent on top of the award. The award was opposed by the applicant who took the matter to court on two main grounds. Firstly, the applicant alleged that the arbitrator determined issues that were beyond the scope of matters that were referred to arbitration contrary to section 35 (2)(a)(iv) of the Arbitration Act. Secondly, the applicant asserted that the award was contrary to public policy under section 35 (2)(b)(ii). Since these constituted grounds for setting aside an award, the applicant claimed that the award ought not to be enforced.

In support of their first assertion, the applicants claimed that the arbitrator failed to consider the evidence tendered before him comprehensively. For instance, they claimed that the arbitrator found that there was no clerk of works present on site despite their evidence that one Mr. Simon Nyachore was acting as the clerk of works. They also alleged that the arbitrator failed to consider their list of defects. Lastly, they pointed fingers at the arbitrator for adding VAT to the award, as well as interest which they claimed to have never been discussed by the parties. Consequently, the arbitrator had supposedly included material that was outside his scope of determination. With regards to the second claim, the applicants stated that the arbitrator had violated public policy because his findings were based on illegalities and complying with the award would lead to the unjust enrichment of the respondent. The illegality was pleaded on the basis of lack of a right to fair trial. More specifically, they alleged that the arbitrator was biased because he considered evidence that was presented by the spouse to the respondent's director. They believed that her evidence should not have been accepted by the arbitrator. They also felt that the evidence that they had tendered before the arbitrator was not given the same weight as that of the respondent.

The respondent denied the assertions made, starting by affirming that the arbitrator was well within their jurisdiction in deciding to award interest, a power that is granted to them via section 32B of the act. The parties had also extensively canvassed the issue of VAT, and any award pertaining to VAT was not foreign to the applicant. On the issue of public policy, the respondent submitted that public policy requires a pro-arbitration policy that honors the finality of arbitral wards and their timely enforcement. If the applicant alleged that the award violated public policy, they had the burden of proving that the award disclosed an illegality, or that the award was contrary to the Constitution of Kenya or other laws. As per the respondent, none of these factors were manifest in the award, rendering the applicant's arguments as unsubstantiated.

ISSUES

The court set out for issues for determination as follows:

1. Whether the arbitrator acted ultra vires his jurisdiction and the pleadings.
2. Whether the arbitrator erred in finding that there was no clerk of works.
3. Whether the arbitrator erred in law and fact in finding that the contracts were performed on time.
4. Whether the arbitrator erred in fact and law by finding that there were no defects noted.

ANALYSIS AND DETERMINATION

In addressing the first issue, the court considered whether the award was contrary to public policy. For an arbitral award to be set aside on grounds of public policy, either of the following grounds must be present. First, the award must be inconsistent with the Constitution of Kenya or any other laws, written or unwritten. Second, the award must be inimical to the national interest of Kenya. Third, the award must be contrary to justice or morality. This last ground considers whether, inter alia, the award was issued on grounds of corruption or fraud, or whether the award was founded on a contract contrary to public morals. In the current case, the applicant failed to show how the arbitrator's award was contrary to public policy because it had not contravened any law, and there was nothing so abhorrent in the award to warrant setting it aside on grounds of public policy.

The court also canvassed the remaining three issues by considering whether the arbitrator went beyond the scope of matters referred to arbitration in each of them. For instance, the court maintained that the arbitrator was correct in finding that there was no clerk of works. This was because the person who was alleged to hold this position (Mr. Simon Nyachore) lacked the necessary qualifications and was unable to answer questions pertaining to that role. Further, he identified himself as a site worker in his signatures and his roles were very similar to that of a site worker. To that end, the court held that the arbitrator was right in holding that there was no clerk of works. In considering whether the contracts were performed on time, the arbitrator noted that the respondent had completed their end of the bargain. The delay was thus occasioned by the applicant who failed to hand over in good time owing to the absence of a clerk of works. The court found that the arbitrator was justified in holding that the applicant was at fault for non-performance of the contract. On the issue of defects, the arbitrator held that there was no list of defects because there was no qualified person, such as a clerk of works, to draw up the list. The court therefore concurred with the arbitrator's findings.

Having agreed with the reasoning and conclusions in the arbitral award, the court averred that arbitration is an end in itself. The decision of an arbitrator is always final, and no court can intervene in such a decision except under limited circumstances where the grounds of setting aside an award or refusing to enforce an award are present.

HOLDING

The court held that the application before them did not disclose any grounds for setting aside an award, and the respondent therefore had the right to enforce the award without any further challenge to it.

RATIONALE

The guiding factor in the court's decision was the test for setting aside an award on the grounds of public policy. The court noted that where an applicant claims that an award has violated public policy, the award must meet either of the elements in the disjunctive test for determining a violation of public policy. The court was also guided by the principle of finality of arbitral awards and a pro-arbitration policy in choosing to carefully examine the terms of the award without hurriedly setting it aside. After the court satisfied itself that the arbitrator was acting within the scope of their powers, it upheld the award. This demonstrates the court's willingness to refrain from judicial review of arbitral decisions, allowing arbitration to be an end in itself.

CASE RELEVANCE

1. Section 35 (2)(a)(iv) provides that an award may be set aside where an arbitrator deals with matters that are beyond the scope of issues that the parties referred to arbitration. However, for a party to succeed in pleading this ground, they must illustrate that the matters that they referred to the arbitrator for resolution are manifestly different from what the arbitrator included in the award.

2. Section 35 (2)(b)(ii) allows for a party to approach the High Court to set aside an award where it violates public policy. Nonetheless, they must prove that the award discloses at least one of the elements of violation of public policy which includes inconsistency with the Constitution of Kenya or other written or unwritten laws, harm to the national interest of Kenya or contrariety to justice and morality.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CAUSE NO. 62 OF 2016

IN THE MATTER OF THE ARBITRATION ACT, 1995 (AS AMENDED)

AND IN THE MATTER OF ARBITRATION BETWEEN

CONTINENTAL HOMES LIMITED .... APPLICANT

VERSUS

SUNCOAST INVESTMENTS LIMITED .... RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS CAUSE NO. 9 OF 2017

SUNCOAST INVESTMENTS LIMITED .... APPLICANT

VERSUS

CONTINENTAL HOMES LIMITED .... RESPONDENT

RULING

[CHAMBER SUMMONS DATED 6TH MARCH, 2017]

1. Through the Chambers Summons dated 6th March, 2017 brought under Articles 10 and 25 of the Constitution, Section 35 of the Arbitration Act and Rule 7 of the Arbitration Rules, the Applicant, Suncoast Investments Limited, prays for orders:

"1. THAT this application be certified urgent.

2. THAT this Honourable Court be pleased to grant stay of enforcement and execution of the award dated 27th October 2016 pending hearing and determination of this application and setting aside of the award.

3.THAT this Honourable Court be pleased to set aside the award dated 27th October 2016 and all consequential orders and substitute the same with its own orders.

4. THAT the cost of the application be in the cause."

2. The application is supported by the grounds on its face and the supporting affidavit sworn by Antonio Colleluori, a director of the Applicant.

3. Continental Homes Limited is the Respondent.

4. The Applicant's case is that the final arbitral award dated and delivered on 27th October, 2016 flagrantly contravenes public policy and Article 25 of the Constitution. It is Applicant's case that the arbitrator's findings were not contemplated by the parties and dealt with issues beyond the scope of the reference as the Respondent's memorandum of claim dated 13th April, 2015 sought reliefs for the sum of Kshs. 23,967,580.00 and costs of the arbitration but instead the Applicant was ordered to pay the sum of Kshs. 27,063,446.92 which was unjustified. Further, that interest and VAT were awarded to the Respondent although no such claim had been made in its memorandum of claim.

5. It is the Applicant's case that the arbitrator acted arbitrarily, irrationally and capraciously by deciding on matters not submitted to him. Also, that the arbitrator failed to analyse the evidence before him holistically and selectively applied the facts and the law thus greatly prejudicing the Applicant.

6. It is the Applicant's case that the award unjustly enriched the Respondent and was inimical to its economic interests.

7. According to the Applicant, the arbitrator failed to appreciate the evidence before him and selectively applied the facts in favour of the Respondent thereby exhibiting bias. Cited in support of this averment is the arbitrator's finding that Mr. Simon Nchore was never appointed or even qualified to act as clerk of works and there was no clerk of works to take over the responsibility of the clerk of works after the departure of Ms. Luisa Maschiantonio. It is the Applicant's case that this finding was in direct conflict with the facts as Mr. Nchore in his witness statement had clearly demonstrated that he was a qualified clerk of works; that Mr. Nchore had provided a membership certificate of the Institute of Clerks of Works; and that Ms. Luisa Maschiantonio worked in the construction site for only one month and was not qualified to work as a clerk of works and could not even speak English and that she only worked as an interior designer under the surveillance of the clerk of works; and that there were three certificates of practical completion issued by Mr. Nchore as clerk of works.

8. It was further contended that the arbitrator's finding that there was no clerk of works after the departure of Ms. Luisa Maschiantonio contradicted the Respondent's memorandum of claim in which it stated that on 11th February, 2014 Mr. Nchore prepared the final report meaning the Respondent expressly recognized Mr. Nchore as a qualified clerk of works. Also that Mr. Bilali, the director of the Respondent had confirmed the averments in the claim through his witness statement. Further, that Sara Centofanti had testified that despite the design issues the project was finished on time and she personally checked on the works **"with persons such as Stefano Sciommeri, Luisa Maschiantonio and clerk of works and Robert Mandina**" meaning that the arbitrator's finding was completely groundless and in conflict with the pleadings and evidence.

9. Another issue picked up by the Applicant to demonstrate the arbitrator's alleged biasness was the finding that the Respondent performed its contract according to the revised contracts. According to the Applicant the arbitrator relied on the evidence of the Respondent's witnesses namely Ms. Luisa Maschiantonio, Ms. Sara Centofanti, Mr. Bilal Chaudry and Mr. Moses Mwangi Mugo in reaching his decision on the issue. Firstly, it is the Applicant's case that the arbitrator ought not to have taken into consideration the evidence of Ms. Sara Centofanti who is the wife of Mr. Bilal Chaudry, the director of the Respondent.

10. Secondly, the Applicant contends that the testimonies relied upon by the arbitrator were false and contrary to the documentary evidence submitted to the arbitrator. It is the Applicant's case that the documentary evidence showed that on 14th February, 2014 the Respondent invoiced the Applicant three notices of handover informing the Applicant that the works would be completed on 15th February, 2014 which was outside the timelines provided by the agreement dated 15th November, 2013. The Applicant also states that since the Respondent admits that a site inspection was conducted on 11th February, 2014 when Mr. Nchore was present, then it means that he was available on 15th February, 2014 when the Respondent claims the works were completed. Further, that the Respondent admits that Mr. Nchore was the site supervisor meaning he had full authority for the handover of the project. Also, that Mr. Cullelouri was available in the country as proved by the stamps on his passport.

11. It is the Applicant's claim that the arbitrator erred in placing reliance on the evidence of Ms. Luisa Mashciantonio and Ms. Sara Centofanti stating that Sara Centofanti is the wife of the director of the Respondent and had a personal interest in the case whereas the statements of Maschiantonio as reported in the arbitral award were false and libellous.

12. The Applicant's case is that the arbitrator ascribed to Mr. Colleluori evidence that was not his and termed the evidence of the Applicant's witness, Nyaga Boore Kithinji to be hearsay only on the basis that he was not present during the carrying out of works.

13. The Applicant concluded on this issue by stating that there was conflict between the evidence of the Respondent's witnesses and the documentary evidence and the arbitrator ought not to have believed the same.

14. On the finding by the arbitrator that there were no defects during the handover, the Applicant contended that this holding was arrived at based on the sole evidence of Ms. Sara Centofanti. The Applicant averred that the arbitrator ought not to have relied on the evidence of the witness as she is the wife of the director of the Respondent and that the evidence was false. Consequently, the Applicant stated that the arbitrator was wrong in finding that it had not filed a list of defects and that at the handover there was no competent person to make such a list of defects.

15. The Applicant asked the court to conclude that the arbitrator did no carefully analyse the facts hence resulting in miscarriage of justice.

16. The Respondent, opposed the application through a replying affidavit sworn on 6th February, 2018 by its Managing Director, Bilal Chaudry. The Respondent's starting point is that the application is solely made by the Applicant for the purpose of circumventing the payment of the money awarded and the application is thus baseless and misleading. According to the Respondent, Clause 35.1 of the three identical building contracts entered between them and the Applicant provided for referral of any dispute to arbitration and that the decision of the arbitrator would be final. The Respondent avers that the said term was in tandem with the provisions of Section 10 of the Arbitration Act as read with Section 32A which provides for the finality of arbitral awards. It is the Respondent's position that the Applicant is seeking to set aside the award on matters of law and fact which is not contemplated by Section 35 of the Arbitration Act.

17. Turning specifically to the Applicant's claim that the arbitrator exceeded his jurisdiction by determining the claim on VAT, the Respondent pointed out to various correspondences and the submissions showing that the issue of the VAT was extensively canvassed before the arbitrator and at no point did the Applicant raise an objection to the issue being addressed by the arbitrator. Further, that the Respondent had captured the VAT claim in paragraph 17 of its memorandum of claim.

18. It is therefore the Respondent's case that the arbitral award is entirely in line and within the terms of the reference and does not contain decisions on matters beyond the scope of arbitration as alleged by the Applicant.

19. As for the issue of award of interest, the Respondent states that Section 32C of the Arbitration Act provides for an arbitral award to include simple or compound interest.

20. In the Respondent's view, the Applicant's application is an appeal disguised as an application to set aside the award and the Applicant is merely seeking a second opinion from this court.

21. The Respondent asserts that the Applicant's application is defective under Section 35(2)(a)(iv) of the Arbitration Act as the Applicant's pleadings indicates a dispute against part of the award yet the application seeks to set aside and review the entire award.

22. The Respondent contends that the Applicant has failed to demonstrate how the arbitral award is in conflict with public policy and inconsistent with Article 25(c) of the Constitution, the Fair Administration Action Act, 2015, the Architects and Quantity Surveyors Act, Cap. 525 and the Engineers Act, 2012.

23. In closing, the Respondent claims that the application does not reveal any element or instance of violation of the Constitution and the law; that no element of illegality has been demonstrated; and that there is no suggestion that the award is contrary to justice and morality.

24. It is the Respondent's final shot that the application is predicated on matters of law and/or facts and errors of law and/or facts on the part of the arbitrator are not grounds for challenging the award as being contrary to public policy. The Respondent's take is that public policy leans towards finality of arbitral awards.

25. The question to be answered in this ruling is whether the Applicant has met the conditions for setting aside the award or part

thereof.

26. Section 35(1) and (2) of the Arbitration Act, 1995 provides a window for a party to arbitral proceedings to approach this court for the purpose of setting aside an arbitral award. It states:

"35. Application for setting aside arbitral award

(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."

27. A perusal of the Applicant's pleadings shows that the application to set aside the award is anchored on Section 35(2)(a)(iv) and 35(2)(b)(ii).

28. Before proceeding to consider the submissions made by the parties, it is important to have a glimpse of the history of this matter.

29. The parties herein entered contracts in which the Respondent was to construct some hotel villas for the Applicant. Along the way, a dispute arose leading to the institution of Malindi High Court Civil Suit No. 13 of 2014. In a ruling delivered on 1st September, 2014, the suit was stayed and the matter referred to arbitration in accordance with Clause 35.1 of the building contracts entered by the parties.

30. The parties could not agree on the arbitrator and Stanley Kebathi was, again in accordance with Clause 35.1 of the building contracts, appointed to arbitrate the dispute by the Chairman of the Chartered Institute of Arbitrators, Kenya Branch. The Respondent herein was the Claimant in the matter and the Applicant was the Respondent.

31. On 27th October, 2016, the arbitrator issued his arbitral award determining that:

"From the foregoing, the amount of money payable to the Claimant by the Respondent is as follows in accordance to the decisions I have made above:

i)	**Villa Type A**	**6,110,072.16**
ii)	**Villa Type B**	**6,345,273.85**
iii)	**Urbanization**	**14,607,220.71**
iv)	**Total Amount**	**27,063,466.72**

i) Delayed payment on the Final Payment Certificate No. 5 (five) (Final) due to the Claimant amounting to Kshs. 27,063,466.72 payable by the Respondent to the Claimant.

ii) Interest on the above amount is payable to the Claimant by the Respondent from 15th March 2014 to 27th October 2016 the date of this Award. By my calculation interest at 18% is Kshs. 12,787,488.03 only.

iii) Claimant's costs in this arbitration are payable to the Claimant by the Respondent.

iv) Arbitrator's costs shall be paid by the Respondent.

v) Counterclaim fails in its totality.

From (i) and (ii) the amount payable is Kshs. 39,850,954.75 only."

32. The Applicant was aggrieved by the said award and moved this Court through Malindi HCC Misc. Application No. 9 of 2017 seeking the orders in this application.

33. Earlier, the Respondent had through Malindi HCC Misc. Application No. 62 of 2016 sought and obtained orders injuncting the Applicant from disposing the houses constructed under the building contracts. There is also pending an application by the Respondent seeking the execution of the arbitral award.

34. I consolidated the two matters on 14th December, 2017 with Malindi HCC Misc. application No. 62 of 2016 being the lead file.

35. I now turn to the determination of the application. The Applicant framed four issues for the determination of the court namely:

a) Whether the arbitrator acted *ultra vires* his jurisdiction and the pleadings;

b) Whether the arbitrator erred in finding that there was no clerk of works;

c) Whether the arbitrator erred in law and fact in finding that the contracts were performed on time; and

d) Whether the arbitrator erred in fact and law by finding that there were no defects noted.

36. In support of the submission by counsel for the Applicant that the arbitrator acted *ultra vires*, reference was made to Section 35(2), which is already cited, and Section 39 of the Arbitration Act. I will deal with Section 39 at this point. A reading of Section 39 clearly shows that the provision guides reference of certain issues to the High Court by consent of the parties to a domestic arbitration. That section is thus irrelevant to this matter as this is not a referral to this court by agreement of the parties.

37. Submitting that the arbitrator acted beyond the scope of his jurisdiction, counsel for the Applicant stated that the arbitrator went on a frolic of his own. Counsel pointed out that although the Respondent's memorandum of claim had sought reliefs for the sum of Kshs. 23,967,580 and the costs of the arbitration, the arbitrator had ordered payment of Kshs. 27,063,446.92 without any justification. Further, that there was no claim for VAT in the Respondent's memorandum of claim and the parties had not agreed

on payment of interest on the award.

38. It is the Applicant's contention that the arbitral decision contradicted a literal meaning of Clause 27.1 of the contracts which provided that the price would be inclusive of all duties namely customs, excise charges, tariffs, VAT and other taxes. It is submitted for the Applicant that by making findings on VAT and interest, the arbitrator was rewriting the contracts between the parties.

39. The Applicant cited the decision in **Cape Holdings Limited v Synergy Industrial Credit Limited [2016] eKLR** and asserted that no amount of construction of an arbitration clause can expand an arbitrator's jurisdiction. Further, that an arbitrator cannot rewrite the agreements between the parties through the award.

40. Citing **Airtel Networks Limited Kenya Ltd v Nyutu Agrovet Limited [2011] eKLR**, counsel for the Applicant submitted that an award can be set aside where an arbitrator delves into matters outside the agreement of the parties.

41. On the claim that the Applicant was condemned unheard, counsel submitted that the right to be heard which is a component of a fair trial is protected by Article 50 of the Constitution. According to counsel, the Applicant was not afforded an opportunity to respond to the matters which were outside the scope of the arbitrator's jurisdiction but were nevertheless considered by the arbitrator. Counsel relied on the decision in the case of **Cape Holdings Limited v Synergy Industrial Credit Limited [2016] eKLR** in support of the said assertion. Also cited in support of the submission is the decision in the case of **Rural Housing Estate Ltd v Eldoret Municipal Council [2009] eKLR**.

42. It was the assertion of the Applicant's counsel that as was held in **Kenya Tea Development Agency & 7 others v Savings Tea Brokers Ltd [2015] eKLR**, an arbitrator who travels out of the boundaries of the contract between the parties acts without jurisdiction. The Applicant claimed that the arbitral award was contrary to public policy as it sought to unjustly enrich the Respondent and was adverse to the economic interests of the Applicant.

43. Turning to the finding by the arbitrator that there was no clerk of works, the Applicant submitted that the said finding was contrary to the evidence adduced and the Respondent's memorandum of claim.

44. Counsel for the Applicant faulted the arbitrator's conclusion that the Respondent had performed its contract according to the revised contracts and that it was the Applicant who delayed the handing over due to the absence of a clerk of works. According to the Applicant, the arbitrator should not have believed the evidence of the witnesses especially that of the wife of the director of the Respondent. The Applicant accused the arbitrator of dismissing the evidence of its expert witness, Mr. Nyaga Boore Kithinji as hearsay without any justification. According to the Applicant, by dismissing the evidence of its expert witness, the arbitrator denied it an opportunity to a fair hearing. The Applicant termed the evidence of all the Respondent's witnesses as hearsay.

45. On the arbitrator's finding that there were no defects recorded, the Applicant asserted that the said finding was based on false testimony as the evidence of one of the Applicant's witnesses referred to three certificates of practical completion in which the defects were listed. Further, that the arbitrator erred in giving a lot of weight to the evidence of the wife of a director of the Respondent. According to the Applicant, the arbitrator's analysis of the evidence was careless and pedestrian hence resulting in miscarriage of justice.

46. Responding to the submissions by counsel for the Applicant, counsel for the Respondent submitted that the Applicant's claim that the arbitral award contravenes Articles 25(c), 47 and 50 of the Constitution is not backed by sufficient particulars of the alleged violations. Further, that the arbitrator had identified the issues for determination and the Applicant's application is an appeal disguised as an application to set aside the award. It is the Respondent's position that the Applicant is simply seeking a second opinion from the court.

47. Starting with the Applicant's assertion that it was never heard on the issue of VAT, the Respondent stated that the issue was canvassed, strongly defended and argued by both parties from the commencement of the arbitration proceedings to conclusion. Further, that the Respondent had captured the VAT element in its memorandum of claim and the Applicant had not sought any clarification from the arbitrator after the award was made. The Respondent therefore submitted that the award was entirely in line with and within the terms of the reference and did not contain decisions on matters beyond the scope of the arbitration as alleged by the Applicant.

48. It is the Respondent's position that the application does not reveal any element or instance of violation of the Constitution or any law. That no element of illegality has been demonstrated by the Applicant and neither has the Applicant suggested that the award is contrary to justice and morality. The Respondent's conclusion is that this application does not raise issues of contravention of the Constitution and public policy but is based on matters of law and/or facts.

49. Pointing to the arbitration clause in the contracts, the Respondent contended that the arbitrator never acted outside the terms of the contracts and his decision as agreed by the parties is final and binding upon them. The Respondent asserted that the Applicant had failed to establish any of the grounds for setting aside an award as provided by Section 35 of the Arbitration Act.

50. Insisting that the award was not contrary to the laws of Kenya, the Respondent submitted that the claim before the arbitrator was in respect of unpaid amounts for construction works carried out by the Respondent on the Applicant's property and the arbitrator made findings on whether the amounts were payable to the Respondent and this was as envisioned by the parties when they referred the matter to arbitration.

51. According to the Respondent, the arbitrator in arriving at his decision evaluated the evidence before him. Asserting that the decision in **Rural Housing Estate Ltd** (supra) is irrelevant to this case, the Respondent submitted that in the case cited by the Applicant the arbitrator had denied a party an opportunity to cross-examine the veracity of the other party's allegation.

52. It is the Respondent's assertion that this court lacks jurisdiction to re-evaluate the evidence tendered before the arbitrator as urged by the Applicant. The decision in **Samuel Kamau Muhindi v Blue Shield Insurance [2010] eKLR** is cited in support of the assertion. Also cited to buttress this point are the decisions in the cases of **APA Insurance Company Limited v Hon Chrysanthus Barnabas Okemo [2005] eKLR** and **Kay Construction Co. Ltd v A.G. & another Nairobi H.C. Misc. Civil Application No. 130 of 2011**. The finality of an award is stressed by the Respondent.

53. As to whether the award was contrary to public policy as alleged by the Applicant, the Respondent states it was not. Citing the definition of public policy in the cases of **Rwama Farmers Cooperative Society Ltd v Thika Coffee Mills Ltd [2012] eKLR** and **Christ for all Nations v Apollo Insurance Co. Ltd [2002] 2 EA 366**, counsel submitted that the award cannot be said to have contravened public policy. The Respondent's position is that public policy leans towards the finality of arbitral awards and errors of law and/or facts on the part of the arbitrator are not grounds for challenging the award. **Christ for all Nations** (supra) and **Anne Mumbi Hinga v Victoria Njoki Gathara, Civil Appeal No. 8 of 2009; [2009] eKLR** are cited in support of this assertion.

54. The Respondent concluded its submissions by asserting that all the matters addressed in the award were matters that had been raised in the Respondent's statement of claim and the Applicant's claim that the arbitrator dealt with a dispute not contemplated by the reference is without basis.

55. The role of the court in an application to set aside an arbitral award is limited. The grounds under which the award can be set aside are ring-fenced by the Arbitration Act. In **Samuel Kamau Muhindi** (supra), Kimaru, J appreciated the limited role of the court when he stated that:

"When parties enter into an arbitration agreement, they have essentially agreed that they will have autonomy in regard to how any dispute arising out of the agreement shall be determined. That autonomy excludes intervention by the court unless under the specific circumstances provided under the Arbitration Act. The Arbitration Act does not envisage that the court will be clothed with the jurisdiction to review in minute detail the arbitral award with a view to reaching a determination whether or not the award should be set aside."

56. In **Transworld safaris Limited v Eagle aviation Limited & 3 others, H.C. Misc. Application No. 238 of 2003** as cited in **APA Insurance Co. Ltd** (supra) it was stated that:

"An Applicant must strictly bring himself within S. 35 or fail. Awards have now gained considerable international recognition and courts, especially commercial ones, have a responsibility to ensure that the arbitral autonomy is safeguarded by the courts, as arbitral awards are surely and gradually acquiring the nature of a convertible currency."

57. He who desires to upset an arbitral award travels a narrow and well defined path. The route is illuminated by Section 35 of the Arbitration Act. Any application for setting aside an arbitral award which does not meet the conditions set out in the said section

will surely fail.

58. In **Christ for all Nations** (supra) Ringera, (as he then was) is cited by Ogola, J in **Evangelical Mission for Africa & another v Kimani Gachuhi & another [2015] eKLR** as defining public policy thus:

"I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition... an award could be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either: (a) inconsistent with the constitution or other laws of Kenya; written or unwritten, or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough... in the third category, I would, without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals."

59. In **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR**, the Court of Appeal also defined what public policy means by stating that:

"One of the grounds relied on to invite the superior court's intervention in not enforcing the award was that of alleged violation of public policy. Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised."

60. Earlier in the judgement the Court had stressed that:

"We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act."

61. It is agreed by the parties before this court that the arbitration award was final. The only circumstances under which this court can therefore intervene in the award are as provided under the Arbitration Act.

62. The Applicant rides on public policy as a ground for setting aside the award. The Applicant claims that the award is contrary to public policy. As already stated in the cited decisions, public policy demands that arbitral awards be final. Where parties have subjected themselves to the arbitral process, unless grounds for setting aside an award as provided by the Arbitration Act are established, the arbitral award should be final and not subject to interference by the courts.

63. In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator.

64. A reading of the instant application shows that the Applicant desires to have the award upset for breaching the Constitution and being contrary to public policy. In order to do justice to the parties before me, I need to look at the arbitral award in order to determine whether it contravenes the Constitution or was contrary to public policy.

65. The Applicant faulted the arbitrator for finding that there was no clerk of works asserting that this finding was contrary to the evidence adduced. Part of the arbitrator's finding on this issue was that:

"35.00 The Claimant offers the following to prove that Mr. Simon Nchore did not take over the position of Clerk of Works from Ms. Luisa Maschiantonio:

a) He was unable to explain why if he was the Clerk of Works he was signing off emails as the Site Inspector.

b) He was unable to produce the inspection notice as was required under the three (3) contracts.

c) He was unable to produce a programme drawn up by any Clerk of Works including himself.

d) He was unable to explain how the Respondent took possession before issuing the Certificate of Practical Completion.

e) He was unable to explain the genesis of the extra Agreement dated 15th November 2013 which gave rise to the Clerk of Works drawing up a new programme, production of drawings etc.

f) He was unable to explain whether there was electricity on the site or whether water connection was made and whether with such changes it was possible to work within the timelines.

g) He was unable to explain whether he drew, and actually wrote the Certificate of Practical Completion as the said Certificate were drawn in Italian (a language Simon never spoke) and English that was terribly drafted (by someone who is not educated in the language).

h) He was unable to explain how he would communicate with the Claimant as the Site Inspector but sign the Certificate of Practical Completion as the Clerk of Works yet six months later he again corresponded with the Claimant, as the Site Inspector – a demotion!

i) He was unable to substantiate his allegations of defects, omissions and variations.

j) He admitted that in the absence of a Clerk of Works, all the Contractor (the Claimant) had to do was handover to the Respondent which he did.

k) He admitted that in such instances upon handover, liability immediately transferred to the Respondent.

l) Simon was unable to produce the documents set tout in Respondent's Supplementary List and Index of Documents as he was not the maker of the said documents and the same remain expunged.

m) He was unable to clearly demonstrate which works were not finished, defects and or variations undertaken.

36.00 After the replacement of TECHNICAL DESIGN & CONSTRUCITON COMPANY LTD, by Ms. Luisa Maschiantonio on 15th November 2013 Mr. Simon Nchore took over and was assumed to be the Clerk of Works. But as I concluded elsewhere he was never appointed or even qualified to replace or act as Clerk of Works in terms of the contract between the two parties. My conclusion is that he did not qualify as the Clerk of Works in the terms of the contract and that there was no Clerk of Works to take over responsibility after the departure of Ms. Luisa Maschiantonio who resigned on the 10th day of January, 2014.

I did not see nor hear any convincing evidence that he was duly appointed as the Clerk of Works in the terms of the contract.

I therefore find for the Claimant on the issue of Clerk of Works."

66. As to whether the contracts were performed within the contract period, the arbitrator after analyising the evidence adduced concluded that:

"78.00 The tribunal considered the Claimants assertions, and noting that Mr. Kithinji was not present during the execution of the project and that he had been engaged to assist the tribunal in arriving at a decision, the tribunal took the view that his evidence was good in a real situation but it required somebody who was present during the construction to confirm or deny

the allegations by the Claimant. It therefore did not put in any weight on it where it considered evidence to be heresay.

79.00 From the evidence before me it is my conclusion that the Claimant performed its contract according to the revised contract and that the Respondent caused the delay in handing over due to the absence of a Clerk of Works and its inability to take over due to its absence from the site while outside of the country.

I therefore find for the Claimant on the issue for performance.

67. The arbitrator considered the question as to whether defects were recorded and whether they were rectified. He made findings as follows:

"84.00 During my visit to the site, I saw all the areas where the Respondent claimed that it did additional works. However, there was no clear indication of what the original design should have been and what was expected to be done. I formed the opinion that the Respondent did not have a valid list of defects which it would have proved that it rectified. No list was produced in evidence having been prepared in the Terms of this contract clause 31.1 which states:

"When it in the opinion of contractor the whole works are practically complete he shall do give a notice in writing to the clerk of works to that effect. The notice shall be accompanied by an undertaking to complete any outstanding works within a reasonable time or within such time as the Clerk of works may direct."

85.00 Since there was no list of defects given at attainment of completion and handover in accordance to the contract and since the Claimants evidence was not contravened by the respondent I am convinced that there were no defects at handover. Since there was no Clerk of Works on this project at this particular time there was not a competent person to make such a list of defects.

I therefore find for the Claimant on the issue of defects."

68. Another question considered and which the Applicant has taken issue with is the award of VAT to the Respondent. The arbitrator held that:

"91.00 When I asked for additional information from the parties I noted from the documents given to me that in each of the three contracts the signed appendix page indicates "+/- V.A.T. 16%".It meant that if there was any non vatable payments it would be without 16% VAT as clarified by the Claimant and where vatable, it would be added.

Considering the above facts, I am convinced that the parties did not include VAT in the contract price and agree with the Claimant therefore that VAT is to be added to the contract price and also concur that this amount is claimable.

I therefore find for the Claimant on the issue of VAT.

69. The arbitrator clearly identified each issue and stated the positions of the parties before analyzing the evidence and reaching a conclusion. He stated why he believed or did not believe the witnesses. The arbitrator did his job as was expected of him. He considered the issues placed before him by the parties. Were this court to interfere with the award, the court would be acting contrary to public policy which not only encourages alternative dispute resolution like arbitration, but also requires that arbitration should be an end in itself. The parties who subject themselves to arbitration must live with the outcome of the process so long as the same has been conducted in compliance with the law and the award adheres to the law.

70. The claim for VAT and interest were clearly pleaded by the Respondent in the memorandum of claim. It is also indeed correct that Section 32C of the Arbitration Act allowed the arbitrator to award interest. On the issue of award of interest, I find that the arbitral award was made in accordance with the memorandum of claim and the law.

71. There is no evidence placed before the court by the Applicant to show that the arbitrator denied him the right to fair trial. The fact that the arbitrator disbelieved the evidence of one witness over that of another witness cannot be said to amount to a breach of the right to fair trial.

72. An overview of the award made in this matter shows that the same complied with the law. There is therefore no basis for upsetting the award. The consequence is that the application to set aside the award fails. The Applicant's application is therefore dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT

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