IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMONDI, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL NO. E398 OF 2021

BETWEEN

CENTURION ENGINEERS & BUILDERS LIMITED ..... APPELLANT

AND

KENYA BUREAU OF STANDARDS ..... RESPONDENT

(Being an appeal from the entire ruling of the High Court of Kenya at Nairobi (F. Tuiyott, J.) dated 9th December 2016
in
HCCC No.506 of 2012)
****

JUDGMENT OF THE COURT

1. Kenya Bureau of Standards (KBS), being desirous of refurbishing its Biochemical Laboratories (Lab)s invited bids for building works under Tender No. KEBS/T054. The appellant, Centurion Engineers (Centurion), was among the bidders, and emerged successful. Centurion was the main contractor, but the refurbishment constituted other sub contracts with independent agreements. The main contract dated 27th April 2008 for the sum of Kshs.79,910,440/- was signed between KBS and Centurion, the contract period being 24 weeks from the date of signing until 3rd October 2009.

2. The works commenced but, at some point, variation to the works became necessary, and, on the request of KBS, a supplementary contract was signed providing for extra work, and incorporating the variation.

3. A dispute arose, which necessitated reference to arbitration as the parties had not agreed on the effect of the supplementary agreement, with KBS taking the view that the supplementary agreement had two components, one for extra works and the other constituting variation of the original contract. On the other hand, Centurion was of the view that the supplementary agreement was not as was suggested by KBS, and that any necessary variations upon completion of the project would be addressed accordingly. Centurion carried out the works, including the variations and completed the project in July 2010, and, upon completion, KBS declined to pay, resulting in Centurion filing suit in the High Court.

4. By an application dated 7th September 2012 by KBS, the suit in the High Court was stayed pending arbitration as provided for in their agreement.

5. A statement of claim was filed for a much higher sum despite a plaint having already been filed. KBS was of the opinion that the claim presented for determination by the Arbitrator was different and outside the scope of the dispute referred to him by the court.

6. The hearing proceeded, and the Arbitrator made an award dated 28th November 2013. KBS was aggrieved and moved to the High Court to set aside and/or vary the said award. In its ruling of 26th June 2014, the High Court allowed the application and remitted the matter to the arbitrator. It was after the second referral that the current award was made.

7. What was presented before the High Court (Tuiyott, J. as he then was) were two applications, one dated 9th June 2015, which sought to set aside the arbitral award, and the other application dated 10th August 2015 sought to have the arbitral award recognized and adopted as a judgment of the court. The learned Judge first determined the application dated 9th June 2015 seeking to set aside the award first, as its outcome would

substantially determine whether or not the High Court would enforce the award.

8. In a ruling dated 9th December 2016, the learned Judge was of the view that, in so far as an award upholds a variation which is contrary to statute, the same would be against public policy; that the duty of the court under section 35(2) (b) (ii) of the Arbitration Act (hereafter the Act) was to examine whether an award is in conflict with the public policy of Kenya, and that duty cannot be performed without the court scrutinizing the award in the context of any questions of public policy raised; and that, while there is deference to the Arbitrator's findings the court should not be bound by the Arbitrator's own finding that his decision was not against public policy.

9. The court also held that the court must subject the Arbitrator's finding to its own independent evaluation or else awards would never be subject to review under section 35(2) (b) (ii) of the Act; that when unlawful variations are made in respect of public contracts, there are two parties in the wrong, the officers of the procuring entity and the contractor; further, that, were it to

uphold such a breach on the argument that the contractor would suffer loss then routine and casual violation of procurement law would be the order of the day. Consequently, the High Court allowed the application dated 9th June 2015 and set aside the arbitral award, citing non-compliance with section 47 of the Public Procurement and Disposal Act (PPDA) (now repealed) as read with regulation 31 of that Act, in effect, dismissing the application dated 10th August 2015.

10. Aggrieved by the trial court's decision filed its memorandum of appeal challenging the judgment of the High Court on 10 grounds, but only addressed one ground, namely, whether the award was contrary to public policy. The relevant paragraph in contention contains the finding by the learned Judge that:

> ***"Given these set of findings by the Arbitrator...the inescapable finding of the Arbitrator would have been that the quantity variation of works that doubled the original Contract quantity was a bold violation of section 47 of the PPD Act as read with Regulation 31 (c) of the PPDA Regulations. This was because that substantial variation was not subjected to new procurement.....such a lenient stance would encourage Contractors to happily collude in the violation of the law, and then turn around to play victim so as to win the sympathy of the court. The***

Law on Procurement is on the side of the Kenyan Public and it must be strictly enforced."

11. Our mandate in a first appeal is as set out in ***Selle vs. Associated Motor Boat Co. of Kenya & Others*** *[1968] EA 123* wherein, it was stated:

> ***"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.***
> ***An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.***
> ***In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

12. The appellant contends that the variations and additional works were sought by the respondent through its project architect; and that there was no evidence that the appellant influenced the respondent to award it extra works, and yet the respondent

refused to pay for the additional work on account of being in violation of statute law.

13. The appellant further contends that it had instructions from the respondent to execute extra works at pages 934-937 of the record as well as the supplementary contract dated 17th December 2009; that the onus of complying with provisions of the Act was on the respondent, and that the appellant would not have refused to carry out the extra work, because its charges would have varied the original contract by more than 15%; and that, as such, it was the responsibility of the respondent to satisfy itself that it was not breaking the law when commissioning the appellant to execute additional work.

14. In support of this argument, the appellant refers to the case of ***Kenya Sugar Research Foundation vs. Kenchuan Architects Ltd [2013] eKLR*** for the proposition that, where a party alleges that the way in which an award was procured contrary to public policy, it is necessary to satisfy the court that some form of reprehensible or unconscionable conduct on the

part of the successful party, contributed in some way to the award being made.

15. The appellant further submits that the respondent did not at any one time raise the question of the Public Procurement and Disposal Act (PPDA), and nor did it seek guidance or inform the appellant that it would not pay any fee exceeding 15% of the original contract; that the court's ruling failed to find public bodies accountable and hide under the provisions of the PPDA to avoid fulfilling their contractual obligations, and that the respondent had been unjustly enriched as the appellant carried out works to completion, and the respondent has received the renovated premises and put them to use, but refused to pay the appellant for work done.

16. The appellant also submitted that, in his findings, the Arbitrator held that no evidence was tendered to demonstrate breach of section 47 of the PPDA; that the tender document did not make any reference to the PPDA, that the Supplementary Agreement did not prohibit variation beyond 15% by giving a fixed

maximum limit; and that the respondent, being fully aware that it was a public entity, nonetheless used a private document.

17. Urging us to set aside the decision by the learned Judge, the appellant also laments that the Judge failed to take into account the fact that the parties contractually agreed that, before final payment, final valuation of the whole project, including the supplementary agreement, was to be undertaken by the Ministry of Public Works, and that there was no rationale for the respondent to make an about-turn and disown it. Invoking the principle of ***quantum meriut*** as enunciated in the case of ***Stephen Kinini Wangondu vs. The Ark Ltd [2016] eKLR***, the appellant implores us to find that it is entitled to the claim, pointing out that the respondent has put to use, the premises that were constructed by the appellant, and for which the appellant had to take up loans to enable it fulfill its contractual obligations, but refused to pay for the value of the work done.

18. On the other hand, the respondent submitted that the arbitral award was in conflict with public policy, which defeated the contractual intention of the parties. The respondent argues that

the supplementary agreement exceeded 15% of the original contract, which was prohibited by section 47 and regulation 31 (c) of the PPDA. In this regard, the respondent invited us to consider the definition of public policy expounded by Ringera, J (as he then was), in the case of ***Kenya Shell Ltd vs. Kobil Petroleum Ltd*** when considering setting aside an arbitral award under section 35 of the Arbitration Act: -

> ***"...when it is shown to be inconsistent with the Constitution or other laws of Kenya, whether written or unwritten (b) inimical to the national interest of Kenya or (c) contrary to justice or morality"***

19. The respondent argues that it has never declined to pay the appellant its rightful dues for work done, but was opposed to the exorbitant amount in terms of interest, as it frustrates and thwarts the interest of the parties, by purporting to rewrite the total contractual sum payable, including the contested interest imposed against a public body, and which would be against public interest.

20. In this Court's view, the question to ask would be: was there any breach of statute? It is common ground from the

submissions by both parties that the PPDA prohibits payment of 15% more than the original contract sum.

21. The appellant contends that it is the respondent who ought to have known, and, made sure that the variation was not more than 15 % of the original contract, and that, in any event, the supplementary agreement could not exceed 15% as a maximum limit had been set in the said agreement. The respondent complains that the variation is more than 300%.

22. As this Court has severally stated, and now a longstanding principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. In ***National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 EA 503 (2011) eKLR at 507,*** this Court stated:

> ***"A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.***" See also ***Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Limited (2017) eKLR.***

23. In the House of Lord's decision in ***Brogden vs. Metropolitan Rly CO (1876-77) L.R. 2 APP CAS 66,*** Lord Blackburn held as follows:

> ***"I have always believed the law to be this, that when an offer is made to another party and in that offer, there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound."***

24. Having considered the record as put to us, the rival submissions, the pleadings and evidence as presented by both parties, it is clear to us that there was indeed a contract between the parties as evidenced by the instructions from the respondent to the appellant to carry out extra works as appears on pages 934-937 of the record, as well as the Supplementary Contract dated 17th December 2009 appearing on pages 1189-1190 of the record. This Court is persuaded that the variation was arrived at by mutual agreement and meeting of the minds. In ***Jiwaji vs. Jiwaji [1986] E.A 547*** this Court held:

> ***"where there is no ambiguity in an agreement it must (emphasis mine) be construed according to the clear words used by the parties."***

25. A reading of the supplementary agreement clearly shows that, indeed, there was a variation of the original contract in terms of additional works to the original contract, with the exact amount of each additional work indicated alongside it. The

Supplementary Agreement was also clear that, upon completion, the work would be measured and evaluated by the Ministry of Works, and that any necessary variations would be addressed accordingly.

26. Having considered the evidence, we are in agreement with the appellant's submissions that at no point did the respondent raise the provisions of the PPDA, and we hold the considered view that the respondent is estopped from raising the same too late in the day on appeal. Nonetheless, the respondent has raised the issue of the award being contrary to public policy and in contravention of the provisions and regulation in the PPDA. In this regard, the respondent relies on the case of ***Kenya Bureau of Standards vs. Geo Chem Middle East [2019] eKLR*** where the court stated that:

> ***"...an award that imposes liability on a State Corporation to pay from public funds over 1 billion Kenya shillings without proof of liability to pay, is clearly against public policy"***

27. In the case of ***(Deustsche Schachtbau-und Tiefbohrgesellschaft mbH vs. Ras Al Khaimah National Oil Company [1987] 2 All ER 769.),*** Sir Johnson Donaldson M.R. observed that ***'consideration of public policy can never exhaustively be defined, but they should be approached***

with extreme caution. Also, Burrough J. remarked in ***Richardson vs. Mellish***:

> ***"it is an element of illegality or the enforcement of the award would be clearly injurious to the public good or possible that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of public on whose behalf the power of state are exercised."***

28. Relying on the provisions of the PPDA at section 47 and regulation 31(c), the respondent asserts that the arbitrator's finding was contrary to the law as the extra works would vary the original contract by more than 15%. However, as correctly pointed out by the appellant, the Arbitrator held in his findings that there was no evidence tendered by the respondent to show breach of section 47 of the PPDA, that the Supplementary Agreement did not prohibit variation beyond 15 % as it gave a fixed maximum limit; that the tender document did not make any reference to the PPDA; and, finally, that the respondent being a public entity used a private document to enter into the contract. In this instance, it is not denied that the works were done, and that there is proof, and, to that extent, the scenario obtaining here is easily distinguishable from the case of ***Kenya Bureau of Standards (supra),*** where proof of liability to pay

was contested. In this instance, there is evidence of liability to pay, but with a rider of 'won't pay'.

29. Consequently, we hold that the issue as raised by the respondent on the contravention of the PPDA is a mere afterthought aimed at avoiding liability to fulfil its contractual obligations. It is not disputed that the appellant indeed carried out and completed the additional works as instructed, and handed over the project to the respondent, who has since taken possession of the premises for its day-to-day business without paying the appellant the contractual sums due. We agree with the appellant that it is indeed entitled to the value for work done under the contract as mutually agreed upon by the parties.

30. We are not persuaded by the respondent's argument that the Arbitrator's award was contrary to public policy, as it is on the record that the respondent being a public entity used a private document whilst engaging the appellant to undertake works for it. The respondent cannot be seen to hide under the provisions of the PPDA, yet it was never referred to in the contract between the parties. The respondent being a public body ought to have

governed itself as such and not at the last-minute try and turn tables.

31. The upshot of this is that the ruling of the High Court dated 9th December 2016 be and is hereby set aside. The Arbitral Award of Mr. Onesmus Mwangi Gichuri dated 5th May 2015 be and is hereby recognized as binding and shall be adopted as judgment of the Court.

32. The appeal is accordingly allowed with costs to the appellant.

Dated and delivered at Nairobi this 27th day of October, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original
signed

DEPUTY REGISTRAR