



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 1158 OF 2001

EXCLUSIVE ESTATES LIMITED.....PLAINTIFF/RESPONDENT

=VERSUS=

TELKOM KENYA LIMITED.....1ST DEFENDANT/APPLICANT

POSTEL HOUSING CO-OPERATIVE SOCIETY

LIMITED.....2ND DEFENDANT/RESPONDENT

AFTRACO LIMITED.....INTERESTED PARTY/APPLICANT

RULING

1. This Ruling is in respect of two applications filed by the 1st Defendant (hereinafter “**Telkom**”) and the Interested Party (hereinafter “**Afraco**”) respectively as well as the Plaintiff’s (hereinafter “**Exclusive**”) request for enforcement of an Arbitral Award published on 6th September 2019.

Background and Undisputed Facts

2. The undisputed facts arising from this matter are as follows: By an Agreement dated 19th January, 1993, the Kenya Posts & Telecommunications Corporation (“**KPTC**”) entered into an Agreement with the 2nd Defendant (hereinafter “**Postel**”) for the sale of 60 acres of Land Reference No. 7656 (Grant No. IR 8498) (hereafter “**the Suit Property**”) to Postel, for Kshs. 21,000,000/- and a covenant by Postel to use the suit property to develop houses for employees of Telkom, who were members of Postel (hereinafter referred to as “**Agreement A**”).

3. By another Agreement dated 28th January, 1993, Postel entered into an agreement with the Exclusive for the construction of houses on the suit property (hereinafter referred to as “**Agreement B**”). The housing project was however stalled by KPTC in the year 1995 and the sale never completed thereby resulting in the filing of HCCC No. 1477 of 1995 now HCCC No.1158 of 2001 (the present suit).

4. By a Deed of Assignment dated 15th January, 2009 executed during the pendency of this suit, Postel assigned its interest in the suit property to Exclusive. On 27th May, 2011, a Consent Order was recorded whereby parties agreed to refer this suit to arbitration to be conducted by Ms. Jan Mohammed, Advocate.

5. In the intervening period, on 5th July, 2011, Afraco entered into a sale agreement with Telkom for the suit property to be registered in the sole name of Afraco at a consideration of Kshs. 1,520,000,000/=. Pursuant to the Sale Agreement, Afraco paid the deposit of 10% of the purchase price being Kshs. 152,000,000/=. The Agreement was rescinded on 13th September, 2011 and this prompted Afraco to file HCCC No. 443 of 2011 which case was subsequently referred to Arbitration before A. F. Gross Advocate.

6. Upon being made aware of the dispute between Exclusive, Telkom and Postel regarding the suit property sold to it by Telkom, Afraco sought to be enjoined as an Interested Party in the court proceedings and by consent, parties allowed it to be enjoined as such in HCCC No. 1158 of 2001. In addition, on 30th April, 2013, Afraco filed an application seeking to be enjoined as an Interested Party in the arbitral proceedings before the Arbitrator Ms. Jan Mohamed and the same was allowed by consent of the parties.

7. On the conclusion of the arbitral proceedings before the Arbitrator Ms. Jan Mohammed, the Arbitrator by a letter dated 1st October, 2019

forwarded the Award to the Registrar of this Court for reading.

8. In the Award published on 6th September, 2019, the Arbitrator held, *inter alia*, that:

a) Agreement A was valid and enforceable:

b) Agreement B was valid and enforceable:

c) The assignment by Postel of its rights under Agreement A to Exclusive was valid and enforceable:

d) The Applicant shall have 90 days within which to sub-divide and transfer to Exclusive the suit property and in default, Exclusive may apply for an order to the High Court compelling the Deputy Registrar to execute any documents that will effect the transfer:

e) Exclusive shall pay Telkom Ksh. 21,000,000 together with interest at court rates from the date of filing the suit in the High Court which shall be paid within 30 days of receiving the completion documents from Telkom, failure to which the transfer shall be null and void: and

f) Telkom and Afraco shall bear the costs of the arbitration.

Telkom's Application dated 1st November, 2019

9. By an application dated 1st November, 2019 brought under **Section 3A and 59 of the Civil Procedure Act, Order 46 Rules 16 and 17, Order 51 Rule 1** of the **Civil Procedure Rules 2010, the inherent powers of the court and all other enabling provisions of the law**, Telkom sought orders to set aside the arbitral **Award published on 6th September, 2019** together with costs of the application. The Application is premised on the grounds set out on the face of it and supported with the Affidavit of **WANGECHI GICHUKI**, Telkom's Head of Legal, sworn on even date.

10. In the Affidavit, it is deposed that the Award was procured through misconduct on the part of the Arbitrator in view of the following circumstances or factors:

Ignoring or Disregarding Evidence

11. It was averred that the Arbitrator deliberately failed to consider material placed before her that was determinative of the dispute she was required to resolve. That for instance, although Clause 3 of Agreement A clearly provided for a two part consideration for the Suit Property, the Arbitrator deliberately and falsely asserted that the consideration consisted only of the payment of the sum of Kshs. 21,000,000/= which was a serious omission as the said amount was only one part of the consideration agreed upon by the parties.

Unjust enrichment

12. It was contended that the deliberate exclusion of the undertaking or covenant that Postel would build houses for employees of Telkom as part of the consideration resulted in illegal changing of the character of the obligations agreed to be discharged by Postel under Agreement A. In the result, through the Award, the Arbitrator improperly and illegally conferred upon Exclusive a benefit by awarding it property worth more than Kshs. 6 Billion for a consideration of only Kshs 21,000,000.00. It was argued that when the Arbitrator found that the Deed of Assignment was valid and that pursuant to it, Postel had transferred its rights and obligations under Agreement A to Exclusive, she had no power or authority to excuse Exclusive from performing part of the obligation placed upon Postel by Clause 3 of Agreement A.

13. It was contended that in view of the alleged anomalies, the Arbitrator arrived at a decision that was manifestly unjust, amounts to unjust enrichment, constitutes illegal conferment of a benefit on a party at the expense of another and abuse or misuse of the power conferred to her upon her appointment as Arbitrator. In Telkom's view therefore, these matters constitute misconduct, vitiate the Award and render it null and void *in limine*.

14. Further, according to Telkom, the other aspect of the unjust enrichment arises from the finding by the Arbitrator that Postel's rights in Agreement A were capable of being assigned to Exclusive without the consent of KPTC or Telkom. It was argued that the effect of that finding was to hoist a third party that was not in Telkom's contemplation in the agreement. Telkom argued that the misconduct occasioned is twofold in that:

a. The obligation to construct houses under Agreement A envisaged that the same was for the use of the employees of KPTC who were members of Postel. It follows that under the agreement, the party with the obligation to construct and to pay the Kshs. 21,000,000/= needed also to be the one whose members would occupy those houses. As such, the designation of Postel could not be assigned to Exclusive since Exclusive's members were not envisaged under the agreement and therefore its substitution for Postel would not result in the performance of Agreement A as envisaged.

b. Further, it was stated that the agreement was clearly incapable of assignment without Telkom's consent. This is especially so in view of the fact that the performance of the obligations set out in Agreement A could only be performed by Postel on behalf of its members for the benefit of the employees of KPTC.

Rewriting the contract

15. It was deposed that at paragraphs 126 to 133 of the Award, the Arbitrator made the positive finding that at the crux of the dispute between the parties was the construction of the terms of Agreement A. It is argued that whereas it is plain and clear from Agreement A that its purpose was the construction of houses for the use and benefit of the employees of the defunct KPTC, the Arbitrator, in her Award, improperly converted the purpose of Agreement A to one of enabling Postel to acquire the suit property for the consideration of Kshs. 21,000,000/-. It is on that basis that she ordered Telkom to transfer the same to Exclusive. That by changing the character or purpose of Agreement A, the Arbitrator committed serious misconduct that renders the Award in excess of her jurisdiction and powers and therefore liable to be set aside *in limine*.

Illegality

16. Telkom faulted the Arbitrator for deliberately failing to deal with the issue of illegality of Agreement A for being contra statute despite the fact that it was raised in its pleadings and was specifically listed as issue for determination No.1 on the agreed issues for determination before her. It is averred the illegality referred to herein arises as follows:

a. On 19th January, 1993 when Agreement A was entered into, the relevant statute governing the operations and powers of KPTC was the Kenya Posts and Telecommunication Corporation Act (the "KPTC Act"). Of relevance to these proceedings was Section 14 (4) & (5) which clearly stipulated that KPTC could not dispose of any of its assets including land by way of transfer or otherwise without the consent of the Minister for Transport and Telecommunication.

b. It is clear from the pleadings filed by the parties and Agreement A itself that the consent by the Minister was not granted prior to the execution of Agreement A. In the absence of that consent, Agreement A was illegal, unenforceable, null and void and could not confer any rights on Postel or its assigns.

c. In any event, since KPTC was a state corporation, its power to assign or dispose of any of its assets was also limited by the provisions of the State Corporations Act, which at Section 13 required the consent of the Minister and Treasury. In this case, no such consent was produced so as to prove the legality of Agreement A and therefore the validity of the alleged assignment to Exclusive.

d. At paragraphs 116 to 123 and 132 of the Award, the Arbitrator acknowledged that the issue of illegality had been raised. That once she was made aware of possible illegality or breach of law, the Tribunal was under a positive obligation to enquire into the issue and satisfy itself that there was no breach of law or other illegality before proceeding with the hearing of the dispute.

e. In this case, the Arbitrator chose to only deal with such aspects of illegality that she could dispose of in favour of Exclusive and Postel (see paragraphs 116 to 123) and completely ignored those that would have automatically vitiated Agreement A.

f. By failing to deal with the question of whether Agreement A was in conformity with the provisions of Section 14 of the KPTC Act. The Arbitrator ended up enforcing an illegality contrary to the well-established principle of law that no court or tribunal ought to give succor or benefit on the basis of an illegal transaction or document that is contra statute. In the circumstances, the Award is bad in law as a result of misconduct on the part of the Arbitrator and ought to be set aside *in limine*.

17. Further, it was contended that the second element of misconduct in relation to illegality arises from the findings by the Arbitrator regarding the interpretation of the term "**capital works**" under Section 12 of the KPTC Act. It is averred that the Arbitrator's interpretation of the said phrase was deliberately false and amounted to refusal by the Arbitrator to apply the law as enacted. According to Telkom, the error arises as follows:

a) The Arbitrator rightly acknowledged that there was a stipulation in Section 12 of the KPTC Act that any capital works for the purposes of the corporation (KPTC) of which the estimated costs exceeded Kshs. 5 Million required the consent of the Minister.

b) The Arbitrator then proceeded to identify the definition of capital works as including building and engineering works that create an asset "for the purposes of the corporation". She also found that the capital works must be in relation to the building of assets which would eventually belong to KPTC.

c) Despite warning herself of the requirement for consent of the Minister if the disposal of the suit property was for the purposes of capital works for the benefit of KPTC, the Arbitrator then proceeded to make the finding that Agreement A did not offend the provisions of Section 12 (d) of the KPTC Act because the sale of the suit property would not result in an activity or asset for the purposes of the Corporation. This finding was contrary to the clear wording of Agreement A.

d) Clause 3 of Agreement A set out the purpose of the sale agreement as being "*to develop the said portion with houses of the staff of the vendor (read KPTC) who shall be members of Postel.*"

e) This requirement meant that the purpose of the agreement was to create assets (read houses) for the benefit of KPTC. As such, the finding by the arbitrator regarding Section 12 (d) of the KPTC Act was without any foundation which amounts to misconduct on her part.

f) It is clear that if the Arbitrator had read the full provisions in Clause 3 of Agreement A, she would have arrived at the inevitable conclusion that the consent of the Minister was a prerequisite to the execution of Agreement A. The failure to do so resulted in the Arbitrator making a wrong finding and conferring a benefit on Exclusive and Postel on the basis of an agreement that was tainted by illegality. This was misconduct vitiates the Award.

Unsupported findings

18. Further, it was contended that the other misconduct on the part of the Arbitrator relates to the findings she made that were not based on the material and evidence adduced before her.

19. It is averred that an instance of this misconduct is evident from paragraphs 166 and 170 of the Award where the Arbitrator indicated that there was an express term of Agreement A that both parties independently and consciously reserved for themselves the privilege to assign their rights under the agreement and that this was an express and negotiated term. It was averred that a perusal of Agreement A however shows that there was no such express term in the Agreement

20. The deponent avers that in the entire Agreement A, the only part where the word "assigns" is used is in the recital of the parties where the names of the parties are indicated as including successors and assigns, which is different from saying that the parties consciously entered into an agreement by which they expressly reserved the right to assign. It is contended that if the intention of the parties was that the obligations and rights in Agreement A could be assigned to third parties, they would have inserted a clause setting out the circumstances under which such assignment could be permitted and whether it could be done with or without the consent of the other party which is not the case herein. In Telkom's view, the reference by the Arbitrator to an express agreement permitting assignment is not borne out by the contents of Agreement A hence her finding was null and void.

21. It was averred that a related misconduct on the part of the Arbitrator relates to her treatment of the Deed of Assignment. That in the said agreement, the parties wrongly stated that the agreed price for the suit property was Kshs. 21,000,000/= which amount was just one part of the agreed consideration. The Arbitrator deliberately made no reference to the second part of the agreed consideration, namely, construction of houses for the benefit or purposes of KPTC hence this was misconduct on her part.

22. Further, that the Deed of Assignment wrongly makes an obvious false statement that the assignor (Postel) had duly performed and fulfilled its obligations under Agreement A and was therefore entitled to be registered as proprietor yet to date, Postel has never fulfilled the covenant requiring construction of houses for employees of KPTC. Further, that there is no covenant on record by Postel or Exclusive that the land shall be used only for construction of houses for members of Postel. As such, the Deed of Assignment was unenforceable, null and void. The finding by the Arbitrator that the same was enforceable on its terms thus constitutes misconduct on her part.

23. Additionally, it was averred that the other misconduct complained of on the part of the Arbitrator relates to her treatment of Agreement B. It was contended that the Arbitrator's finding that Postel had pledged the suit property to Exclusive is not borne out by Clause 6 of Agreement B since that Clause only stated that Postel could raise money by borrowing from banks against a charge over the land. That, the agreement did not make reference to any pledge of the land in favour of Exclusive hence it is clear that the Arbitrator refused to read the actual wording of Clause 6 and 7 of Agreement B which amounted to misconduct that vitiates the Award.

24. It was also contended that the Arbitrator misconducted herself by determining matters outside the scope of the consent order dated 27th May, 2011 which referred the suit herein to arbitration. That the Arbitrator failed to determine the suit which had been referred to arbitration, but instead determined a wholly different claim subsequently introduced by Exclusive by amendment in the course of the Arbitration. It was averred that by so doing, the Arbitrator deprived Telkom of the right to be heard on the actual dispute referred to arbitration.

25. On the same breadth, it was argued that the Arbitrator misconducted herself by addressing issues which had not been raised by parties for determination. That at paragraphs 73 to 77 of the Award, the Arbitrator proceeded to deal with the question of proper parties to represent the interests of the Suit Property and the legal effect of vesting orders, whereas the said issue was not identified by the parties in the Agreed Issues for Determination nor was it pleaded in the parties pleadings.

26. Furthermore, Telkom contended that the Arbitrator misconducted herself by applying different standards in relation to the parties which buttressed the bias and partiality in the manner in which she handled the arbitration. In its view, the said bias arises as follows:

a. At paragraph 76 of the Award, the Arbitrator deals with the issue of Telkom's capacity to transfer the suit property on account of lack of clarity in respect of the vesting orders. Indeed, the Arbitrator makes the positive finding that it is unclear whether at some point the suit property had been vested in some other person. After conceding that based on the material before her, she then proceeded to state that she would assume that the land had been properly vested in Telkom even in the absence of any evidence to that effect.

b. She accepted an assumption that parties were satisfied of the legal competence of the corrigenda changing the size of the property from 19 to 79 acres, which assumption was in favour of Exclusive. It is on the basis of the assumption aforesaid that the Arbitrator ultimately ordered Telkom to transfer the land to Exclusive

c. When it came to the issue of illegality pleaded by Telkom, she applied a totally different standard. At paragraphs 154, 155 and 156 of the Award she rejected the claim of illegality on the basis that she required strict proof of the allegations made by Telkom and refused to make any assumptions in relation to the said allegations. The introduction of the requirement for strict proof in relation to Telkom as contrasted with her eagerness to make assumptions in favour of Exclusive and Postel amounted to treating the parties before her differently which is an instance of clear mishandling of the arbitration and therefore misconduct on her part.

27. Telkom complained that the Arbitrator further misconducted herself by acting unfairly and in a biased manner when she invalidated the letter of offer and the sale agreement dated 5th July, 2011 between Telkom and Afraco on the grounds that it violated the doctrine of *lis pendens* but failed to apply the same principle to nullify the Deed of Assignment between Exclusive and Postel dated 15th January, 2009 which was similarly entered into during the pendency of the suit.

Inconsistent and irreconcilable findings

28. It is argued that the Award contains serious inconsistencies and irreconcilable findings. That for instance, while the Arbitrator accepted

the consent between the parties which joined Afraco in the proceedings of 7th March, 2013 and permitted it to participate throughout the hearing before her, she then takes up *suo moto* the issue of whether Afraco was properly before her in the Award. In the end, she makes the strange finding at paragraph 92 of the Award that Afraco did not have any sufficient interest in the arbitration. It is contended that this finding directly contradicted her acceptance of the consent admitting Afraco into the proceedings and her decision to allow Afraco to participate in the proceedings which renders the Award perverse hence it should be set aside.

29. It was averred that once the Arbitrator made the finding that Afraco was not properly before her, the option available to her in law was to down her tools in relation to the Afraco by not making any orders or findings for or against it.

30. It was further contended that the other misconduct on the part of the Arbitrator relates to the improper manner in which she applied the doctrine of *lis pendens*. That while she found that the doctrine of *lis pendens* did not prevent parties from negotiating and entering into agreements but only prevented actual consummation of those agreements during the pendency of proceedings, she applied the doctrine in a discriminatory manner as between the parties. It was reiterated while in relation to the letter of offer and the Sale Agreement dated 5th July, 2011 between the Telkom and Afraco, the Arbitrator made the finding that the doctrine of *lis pendens* rendered those agreements null and void for having been entered into during the pendency of this suit, she applied different standards in relation to the Deed of Assignment between Exclusive and Postel which was entered into during the pendency of this suit by finding that it was enforceable.

31. The deponent averred that the misconduct is made clear by the fact that in both of the instances set out above; none of the agreements had been registered or consummated. She failed to apply her finding that parties are at liberty to negotiate and to contract to deal with any property which may be part of subsisting court proceedings but are only prevented from presenting such agreements for registration in relation to the agreement between Telkom and Afraco.

Afraco's Application dated 31st October ,2019

32. Afraco's application is brought under **Article 10, 159 and 165 of the Constitution of Kenya 2010, Order 46 Rule 16 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law**. It also seeks orders to set aside the Arbitral Award of 6th September, 2019 together with costs and any other orders that the court may deem necessary to serve the cause of justice. The application is based on the grounds on the face of it and supported by the Affidavit of **SALIM SADRU**, a Director of Afraco, sworn on even date.

33. He averred that after a full adjudication of the dispute between Afraco and Telkom before Arbitrator A. F. Gross Advocate, the parties by consent entered into an agreement to settle the dispute. He deposed that all the parties herein and the Arbitrator, Ms. Zehrabanu Janmohamed, were at all times aware of the proceedings over the same subject matter before A. F. Gross Advocate and that Telkom actually filed an Application seeking to consolidate the two arbitral proceedings. He stated that upon being enjoined to the arbitration proceedings before Ms. Janmohammed, Afraco filed pleadings and participated in the arbitral proceedings up to the publication of the award but the Arbitrator failed to consider Afraco's position while writing the award.

34. He deposed that in the arbitral proceedings, Postel fraudulently concealed that it had pleaded in its Defence **in HCCC No. 1158 of 2001** that the agreement between Telkom and itself was void and an illegality in law and could therefore not be enforced. That Postel did not at any point in time withdraw or amend its Pleadings in **HCC No. 1158 of 2001** and as such its different position before the arbitral proceeding was meant to mislead the arbitrator.

35. He stated that in 2009, Exclusive and Postel fraudulently and secretly entered into a consent and executed a Deed of Assignment on the very same agreement that Postel had repudiated which instrument was then used to compel Telkom to comply with the terms therein.

36. Further, it was contended that the Award published by the Arbitrator, Ms. Zehrabanu Janmohamed, is the end product of misconduct by the arbitrator and is in breach of the Constitution and the laws of the land, and is also against the public policy of Kenya in the following manner and style:

- a. It is in total contravention of Article 10 of the Constitution.
- b. The Award was made solely on the Arbitrator's whims and liking and is completely a unilateralist construct of the dispute between the parties.
- c. The Award has no correlation or affinity to the pleadings of the parties as filed before the Tribunal.
- d. The legal matrix of Arbitration and adjudication are totally lacking in the Award and it contravenes Article 50 of the Constitution.
- e. The Award is not based on any analysis of the law and is wishy washy in form and in substance.
- f. The Arbitrator zoomed into a preferred decision pre-determined and pre-conceived without establishing whether or not Exclusive proved its case, discharged the burden of proof and did not bother whether or not the burden and standard of proof were met and discharged.
- g. The Arbitrator falsely ruled that Afraco had withdrawn its pleadings and was not interested in the proceedings which in essence show that she did not accord Afraco a fair hearing and abrogated the very essence of the arbitration process by disqualifying Afraco in a preliminary manner.
- h. The Arbitrator wrote a brand new contract between the Respondents, set the term of the same and enforced the terms in the award,

a scenario that was not even remotely within the contemplation of the parties to the proceedings.

i. The Award is “a cut and paste” of case law quoted out of context and submissions filed before the Tribunal by Exclusive and has no remote semblance to the dispute before the Tribunal.

j. The Arbitrator unilaterally expanded the scope of the Arbitration proceedings and thereby delivered an award on matters completely outside her mandate and beyond the contemplation of the parties.

k. The Award and prayers granted by the Arbitrator are unknown in Kenya's legal system, contravenes the Constitution and goes against the public policy of Kenya.

l. The Award makes heavy weather of Afraco's status as an Interested Party in a very prejudicial manner and in a constitutional case context and imports the same to the peculiar circumstances of the Arbitration. The use of locus and status were dealt with preliminarily and in consensual matter. The same was not an issue for determination before the Tribunal.

m. The Award is principally about Afraco's participation in the Arbitral proceedings which was consensual at all times.

n. The Arbitrator was biased against Afraco and concealed her bias during the trial but brought it out in full in the Award. This was principally due to a letter written to her by Afraco's Advocates on record.

o. In the Award, she deliberately misconstrued and held wrongly and falsely that her hands were tied by the decisions in *Civil Appeal No. 135 of 2013, Exclusive Estates Limited vs. The Registrar of Titles & 5 Others* and *HC Judicial Review Case No. 69 of 2016; Afraco Limited vs. Exclusive Estate & 5 Others*.

p. The Arbitrator creates norms and legal principles that are unknown to our laws and subverts the laws of the land especially as it relates to the caveat, the temporary removal of the caveat and the events that occurred during the time when the caveat was removed.

q. The Award in its entirety deals with disputes not contemplated by the parties and outside the terms of the reference as defined and delineated by the pleading hence beyond the scope of reference to the arbitration.

r. The Arbitrator having made a finding in law that Postel failed to perform its bargain of an agreement entered into in the 1980s was wrong in law to have ordered for its specific performance thirty (30) years later and obviously this was beyond the mandate of the Arbitrator.

s. When the Arbitrator ordered specific performance of the contract, she consummated a contract in a manner outside the contemplation of the parties.

t. The Arbitrator totally misconstrued the Deed of Settlement between Exclusive and Postel and in the process relied on principles that are unknown to Kenyan law and in breach of Kenya's public policy.

u. The Arbitral Award is in conflict with public policy in Kenya specifically in the following manner:

(i) It is against the laws of Kenya and contrary to public policy not to give a fair hearing of the case to a party and decide issues of locus and standing when this was not before the Arbitrator.

(ii) The issue of specific performance of contract was not an issue before the Arbitrator and it was not within the contemplation of the parties that the Arbitrator will enforce a contract that was not part of the arbitration matrix.

(iii) It is against the public policy in Kenya to falsely enrich a party with property worth billions when he/it is not entitled to the same.

(iv) The Arbitrator falsified precedents of the High Court and the Court of Appeal.

(v) The very substratum of the Award is littered with phantom issues and addresses matters that were outside the jurisdiction of the arbitration. She in the process dealt with matters, issues, alleged disputes that were never contemplated by the parties.

(vi) The Award in essence is praised on a skewed and insidious analysis of facts and law and that the only conclusion intended and ultimately arrived at by the Arbitrator was to find in favour of Exclusive and as against Afraco and Telkom.

37. In view of the foregoing, it was averred that the award is unjust, totally misconceived and an affront to Afraco's rights. Thus, it was deposed that Afraco will suffer great loss if the award is not set aside and completely invalidated.

Exclusive's Replying Affidavit sworn on 21st November 2019

38. In response to the two applications, Exclusive filed a Replying Affidavit sworn by its director **FRANCIS MBURU MUNGAI** on 21st November, 2019.

39. As regards Telkom's application dated 1st November, 2019, it was averred that the Supporting Affidavit of Wangechi Gichuki in support of the application is at complete variance with her 4-page Witness Statement filed on 1st September, 2016 before the arbitral tribunal in terms of content and evidence. It was deposed that the said witness statement can be summarized as follows as regards the following material facts:

- (a) Paragraphs 6 to 8 - Telkom acknowledged the Agreement for Sale dated 19th January, 1993.
- (b) Paragraph 9 - the transfer was stopped by Exclusive through court orders.
- (c) Paragraphs 10 to 15 - the purchase price had not been paid.
- (d) Paragraphs 16 to 18, 28 - Telkom sought to renegotiate the agreement on account of passage of time.
- (e) Paragraphs 19 to 24 - challenged the Deed of Assignment.
- (f) Paragraphs 25 and 28 - Telkom contended that Exclusive and Postel should pay the current market price if the agreement were to be enforced.
- (g) Paragraphs 29 to 32 - reference is made to the arbitration proceedings before A.F Gross.

40. He summarized Wangechi Gichuki's testimony during cross-examination in the Tribunal by Exclusive's advocates on 22nd June, 2018 as follows:

- a. The witness admitted that the payment of the purchase price of Kshs. 21 million could only be effected after the transfer had been registered.
- b. All consents for the subdivision of the suit property had been granted.
- c. She confirmed that she had no documents to explain why the transfer was not effected.
- d. There was no clause in the sale agreement that prevented the assignment of the land from Postel to Exclusive.
- e. Telkom had never varied the sale agreement.
- f. Telkom rescinded the sale agreement with Afraco because of the caveat and pending litigation.
- g. The witness was surprised that the issue of limitation had not been raised by Telkom.

41. It was averred that Telkom failed to adduce any evidence in support of the grounds of alleged misconduct on the part of the Arbitrator. The deponent specifically responded to each of the grounds as follows:

Ignoring or Disregarding Evidence

42. He averred that the arbitrator strictly applied the terms of the agreement as executed by the parties. That Wangechi admitted during her cross-examination that the payment of the purchase price was only after registration.

Unjust Enrichment

43. He stated that Telkom failed to provide any evidence to support the current market value of the suit property which was not addressed in its submissions dated 22nd August, 2018 in any case. It was averred that the issue of set off was also not addressed in the said submissions and as such, the argument is an afterthought. Further, that all the allegations related to this are novel and strange as they were not contained in the deponent's evidence in chief. This amounts to fabricating evidence after judgment.

Rewriting the contract

44. It was averred that the agreement for sale was expressly clear that the purchase price was payable upon successful registration of the transfer to the purchaser. Thus, the arbitrator cannot be guilty of misconduct for interpreting a contract and appreciating the legal submissions on points of law.

Illegality

45. It was also averred that the averments regarding the position in the various statutes are baseless and never arose in the pleadings, list of issues or submissions as regards any alleged illegality under various Sections of the KPTC Act. These are new issues being raised after the delivery of the Award and cannot be a ground for setting aside the Award for alleged misconduct as parties are bound by their pleadings. He stated that the issue of developing the houses was addressed by Exclusive's witness in the arbitral proceedings including the consents he had obtained. That the issue of ministerial consent was not raised in Wangechi's witness statement or the pleadings and is a red herring to fabricate imaginary acts of alleged misconduct without any legal basis in law.

Unsupported Findings

46. It was averred that the legal interpretation of "assignment" cannot possibly amount to misconduct and that in any case, Wangechi admitted during her cross-examination that a party could assign its rights. The deponent reiterated that Wangechi alleges various acts of misconduct in relation to this allegation which are not set out in her witness statement and testimony during her examination in chief and cross examination. In Exclusive's view, all the allegations in this regard are deliberately meant to create the false impressions in support of imaginary acts of misconduct which are being raised for the first time. It was deposed that it is against the rule of evidence and pleadings for a party to raise new grounds on appeal that were not in issue at the trial.

Inconsistent and irreconcilable findings

47. It is contended that the allegation as regards Afraco under this are strange because Telkom is approbating and reprobating. It was noted that Wangechi admitted during her cross examination that Telkom rescinded the contract with Afraco and cannot now turn around to plead a case for Afraco. Further, that Wangechi deliberately failed to refer to the consent dated 6th August, 2018 between Afraco and Telkom before the Arbitrator A. F. Gross where both parties terminated the dispute.

48. Further, it was deposed that Wangechi unfortunately accuses the arbitrator of misconduct over her finding against Afraco when in fact Wangechi, during cross examination, was asked to read the portion of Hon. Lady Justice of Appeal H. Okwengu's judgment in Civil Appeal No. 135 of 2013: Exclusive Estates Ltd v Chief Lands Registrar & Others where the judge found as a fact that both Telkom and Afraco tried to steal a march on Exclusive by having the caveat lifted and quickly entering into a sale agreement.

49. It was also averred that Telkom's averments on *lis pendens* as canvassed are novel and not raised in any manner whatsoever in the submissions it filed in the tribunal.

50. Further, it was stated that Telkom's claim that the Arbitrator sowed seeds of confusion by forwarding the Award to court is a gross misrepresentation of facts. He reiterated his confirmation that pleadings were amended pursuant to the consent of the parties and the joinder of Afraco was with the consent of the parties who recorded the consent in court.

51. It was finally deposed that it is unfortunate to accuse the arbitrator of sowing seeds of confusion by acting within the ambits of the law in forwarding the Award to court as the arbitration was referred by the judge within the ambits of Order 46 of the Civil Procedure Rules.

52. As regards Afraco's Notice of Motion dated 31st October, 2019, it was averred that Afraco has no *locus standi* to make the application to set aside the Award for the following reasons:

- a. Afraco filed its Defence and Cross-Claim dated 16th September, 2014.
- b. On 26th September 2014, it wholly withdrew its cross-claim against Telkom.
- c. During the hearing of the Arbitral proceedings, its witness, Salim Sadru testified that Afraco was not making any claims in the Arbitration as it had a claim before A.F. Gross.
- d. Salim Sadru, produced the consent terminating the arbitral proceedings before A.F Gross dated 6th August, 2018. Of material importance however is that this fact that was never brought to the attention of the parties herein.
- e. This material suppression is crucial to demonstrate that both Telkom and Afraco are acting in bad faith by purporting to accuse the Hon. Arbitrator Janmohamed of misconduct by finding that Afraco had no legal interest to purchase the property by operation of law.
- f. The Court of Appeal in Civil Appeal No. 135 of 2013: Exclusive Estates Ltd vs Chief Lands Registrar & Others reinstated the caveat. It is on the basis of the reinstatement and the doctrine of *lis pendens* that Telkom rescinded the sale agreement with Afraco that is no longer subject to any dispute before A.F Gross.
- g. Afraco is a total stranger and busy body to the present dispute as it has no interest in the suit property whatsoever and has no legal basis to purport to challenge the Award that does prejudice it in any manner whatsoever.

53. It was contended that Afraco cannot now scandalize the arbitrator and accuse her of bias especially when it has materially failed to disclose the following documents:

- a. Exclusive's advocates letter dated 18th May, 2019 pointing out that the alleged whistleblower is a fugitive as reported by the Sunday Nation of 6th May, 2018.
- b. The arbitrator's letter wrongly dated 19th April, 2018 directing Afraco's Advocate to file an application for her disqualification by 23rd May, 2019.
- c. Afraco's advocates' response dated 23rd May, 2019 declining to file any application as directed.

54. The deponent reiterated that the grounds upon which the application is based do not raise any issue of misconduct or corruption by the Arbitrator, neither do they make any tangible averment that there was material non-disclosure of any fact(s) by any party that would warrant the setting aside of the Award.

55. Finally, it was deposed that no grounds for setting aside the arbitral Award under **Order 46 rule 16 of the Civil Procedure Rules, 2010** have been set out. That no evidence whatsoever has been produced to prove any bias, misconduct or corruption on the part of the arbitrator. Additionally, that the reliefs granted by the arbitrator were in accordance with the reliefs sought by Exclusive for specific performance which is in accordance with equity as enshrined in **Article 10 of the Constitution**. The court was also informed that Telkom and Afraco have over the years variously contributed to the delay in having the arbitration concluded expeditiously. In the circumstances, it was urged that both applications should be dismissed with costs and the Award adopted as decree of the court.

Postel's Replying Affidavit sworn on 18th November 2019

56. Postel filed a Replying Affidavit sworn by its secretary, **JOSEPH MUTUGI**, on 18th November, 2019 in response to the two applications.

57. As regards, Telkom's Application dated 1st November, 2019, it was deposed that the grounds upon which Telkom seeks to set aside the Award are devoid of merit for the following reasons:

- a. The Arbitrator did not misconduct herself either as claimed or at all;
- b. The dispute has been before the Arbitrator since 1st August, 2011 but Telkom has never raised any issue of biasness or partiality against the Arbitrator;
- c. All parties were given ample time and opportunity to present their case before the Arbitrator;
- d. Agreement A which was subject of the proceedings provided that the suit property was sold for Kshs. 21,000,000/=. The Arbitrator cannot re-write a contract for parties hence the issue of unjust enrichment does not arise. In any event, it was not an issue before the Arbitrator; and
- e. There has never been any complaint lodged by Telkom on the manner in which the Arbitrator conducted the Arbitral proceedings.

58. It was deposed that contrary to Telkom's allegation, there is no evidence that was either disregarded or ignored by the Arbitrator. The deponent averred that whereas clause 3 of Agreement A has two parts, the second part on construction of houses for employees of the then KPTC was not a pre-condition for the transfer of the property.

59. He averred that Pursuant to the provisions of Special Condition (b) of the Agreement, the construction of the houses was to be undertaken at the cost and expense of Telkom who made a plea for proportionate adjustment of the purchase price of the property. That however and as held by the Arbitrator at paragraph 162 of the Award, Telkom did not provide any basis for the alleged variation in the purchase price. In Agreement A, Telkom agreed to sell the suit property to Postel for Kshs. 21,000,000. These terms have never been varied by the parties and therefore the Arbitrator could not make a finding outside the terms of the Agreement. In any case, Telkom did not produce any valuation at the hearing demonstrating that the suit property is now valued at Kshs. 6Billion as claimed.

60. It was averred that the Arbitrator did not make any finding in the Award that excused any party from performing its obligations under Agreement A as claimed or at all and thus Telkom's averments in that regard are incorrect and misleading. He denied Telkom's averment that the Arbitrator's decision was manifestly unjust and stated that Postel agreed that houses would be constructed for the benefit of its members and reached a compromise with Exclusive in relation to the agreement. He argued that Telkom has not demonstrated how the enforcement of the agreement for sale amounts to unjust enrichment or constitutes illegal conferment of a benefit on a party at the expense of another as claimed.

61. Further, he deposed that contrary to Telkom's allegation, the correct position is that the recital to Agreement A describes Postel Housing Co-operative Society Limited to include its successors and assigns. As such, Postel had no obligation under the Agreement to seek consent from Telkom and this was well captured by the Arbitrator at paragraph 176 of the Award. He held the view that the obligation placed upon Postel in the agreement after transfer of the property, was to covenant to develop the property and the obligation to finance the development of the property was placed upon Telkom. In the premises, Telkom cannot now seek to shift this obligation to other parties.

62. It was further averred that contrary to Telkom's averment, the purpose of Agreement A was to sell and transfer the suit property to Postel. It was then upon Postel to facilitate construction of the houses after the transfer but at the cost and expense of Telkom. That the construction aspect was aptly captured in Agreement B and not Agreement A as claimed by Telkom. He deposed that it was upon the transfer to Postel that the other terms of Agreement A were to take effect and as such, in its view, the claim that the Arbitrator has changed the character of the purpose and effect of the agreement has no basis.

63. He stated that in any event, the use and occupation of the property was to be for the benefit of members of Postel and, there was no averment or pleading by any party that the covenant to develop houses in terms of Agreement A had been breached hence the Arbitrator could not therefore make a finding on an unpleaded issue.

64. Moreover, it was averred that contrary to Telkom's allegations on illegality, Postel raised the issue of Agreement A being contra-statute at paragraph 8 of the Defence to the Further Amended Statement of Claim and Set off. It was stated that the Arbitrator robustly addressed the points of law raised by Telkom in this respect at paragraphs 116 - 122 of the Award hence it is misleading to say that the Arbitrator failed to

address the points of law raised by Telkom. Further, that Telkom did not raise any issue relating to Section 14(4) and (5) of the KPTC Act to enable the parties respond to it or the Arbitrator to address her mind to it. It cannot therefore seek to raise it at this point under the guise that the Arbitrator failed to address it.

65. It was also argued that the alleged misinterpretation of Section 12 of the KPTC Act by the Arbitrator cannot amount to misconduct as claimed by Telkom. Without prejudice to the aforesaid, it was averred that since the purpose of Agreement A was for the benefit of members of Postel and not Telkom as claimed by Telkom, no ministerial consent was required prior to execution and implementation of the terms of Agreement A.

66. Postel contended that the Arbitrator's interpretation of the word "assigns" as appears in the recital in Agreement A cannot be termed to as an unsupported finding and neither can it amount to misconduct as claimed by Telkom. It was averred that Postel assigned its rights and obligations in Agreement A to Exclusive. There was no averment before the Arbitrator that Exclusive had breached any of the obligations set out in Agreement A hence the Arbitrator therefore did not need to address an issue that had not been pleaded by any of the parties.

67. Further, it was averred as that:

- a. The Deed of Assignment was between Exclusive and Postel and did not in any way affect the rights and obligations of Postel under Agreement A.
- b. The obligation to construct houses for the benefit of Postel members under the special conditions was placed on Telkom.
- c. Postel's covenant to construct houses for the benefit of its members is contained in Agreement A, contrary to the claims by Telkom.
- d. The Deed of Assignment is valid as between Exclusive and Telkom.
- e. The finding that the Deed of Assignment is enforceable is an issue of interpretation of the terms of the Assignment, as against what Telkom would have liked the Arbitrator to find. This cannot be termed to as a misconduct as claimed by Telkom.

68. Postel stated that the alleged misinterpretation of clauses 6 and 7 of Agreement A cannot amount to misconduct on the part of the Arbitrator. Without prejudice to that, it was averred that: Agreement B only affected the rights of Exclusive and Postel and not Telkom; Agreement B was executed on the basis that Telkom had already sold its interest in the suit property to Postel hence the provisions of the KPTC Act would not be applicable on charging of the property as is claimed by Telkom; Postel confirms that it had pledged the property to Exclusive for the provision of services.

69. According to Postel therefore, it is clear from the above that the Arbitrator considered all the relevant clauses in Agreement B. There is no demonstrable misconduct on the part of the Arbitrator as claimed or at all.

70. The allegations that the Arbitrator misconducted herself by determining matters outside the scope of the consent order dated 27th May, 2011 are a deliberate attempt to paint the Arbitrator in bad light without any basis. That upon appearing before the Arbitrator, Exclusive requested for leave to amend its claim. Telkom did not oppose this request and it was also granted leave to file an Amended Defence to the amended claim hence the allegation that Telkom was deprived of its right to be heard is an afterthought and vexatious claim

71. It was noted that Afraco withdrew its claim during the course of the proceedings. Exclusive and Postel challenged Afraco's claim on the property. The Arbitrator properly addressed Afraco's position in the proceedings.

72. A further contention was that the Arbitrator conducted the proceedings with impartiality and was not biased against any party. Specifically, that none of the parties raised any issue with the corrigenda and the Arbitrator made a finding that the property was properly vested in Telkom. It was argued that despite Telkom's claim that the Arbitrator was biased by requiring strict proof of a pleaded illegality, Telkom conveniently refuses to point out that at paragraph 153 of the Award the Arbitrator laid a basis for her finding in the following words "***The tribunal cannot, suo moto and without more make any finding of illegality when the viva voce evidence adduced by the Postel's witness in this matter suggests otherwise.***"

73. The deponent argued that whereas Agreement A allowed assignment of rights and obligations, the doctrine of *lis pendens* does not allow a party to sell property that is the subject of litigation. As such, upholding the law as it is cannot be termed to as misconduct as Telkom claims.

74. He deposed that:-

- a. The Interested Party entered into Agreement A with the Plaintiff over the suit property during the pendency of the proceedings.
- b. Upon joinder, Afraco filed a Defence and Counterclaim but withdrew its claim during the hearing. It was therefore important that the Arbitrator determines Afraco's position in the proceedings.
- c. Afraco entered into an agreement with Telkom which agreement was part of the documents adduced during the hearing. Afraco's witness testified extensively on the Agreement hence it was proper that the Arbitrator makes a determination on all the relevant evidence produced at the hearing.

d. Afraco participated in the proceedings, the law is, costs follow the event. Making a determination on evidence produced at a hearing and ordering a party to pay costs does not amount to misconduct by the Arbitrator.

75. Further, he stated that contrary to Telkom's allegation regarding the Arbitrator's misapplication of the doctrine of *lis pendens*, at paragraph 104 and 105 of the Award, the Arbitrator quotes the finding of the Court of Appeal in Civil Appeal No 135 of 2013: Exclusive Estates Ltd vs Chief Lands Registrar & Others, where the court made a finding that Telkom and Afraco were engaged in a conspiracy to interfere with the rights of litigating parties. On the contrary, the Deed of Assignment did not interfere with any right of any litigating party hence the doctrine of *lis pendens* did not apply.

76. In addition, it was averred that Telkom's allegation that the Arbitrator sowed seeds of confusion in this matter forcing it to approach the court under Order 46 are as a result of a misapprehension of the law and are therefore erroneous in view of the following: this dispute was referred to Arbitration through an order of the Court by Justice Muga Apondi on 27th April, 2011; Both Agreement A and Agreement B do not have Arbitration clauses; The Arbitrator did not order parties to file new pleadings. The Claimant made an application to amend its claim and the other parties sought leave to file amended Responses to the claim; and Afraco was joined into the proceedings by a consent filed in Court. That it was/is therefore clear to Postel that the Arbitration was conducted pursuant to the provisions of the Civil Procedure Act and Rules.

77. It was contended that in view of the foregoing, it is evident that the application by Telkom does not raise any issue that amounts to misconduct on the part of the Arbitrator. The application does not meet the threshold set out under Order 46 Rule 16 of the Civil Procedure Rules and should be dismissed with costs.

78. As regards Afraco's Application dated 31st October, 2019, Postel reiterated the averments by Exclusive that Afraco no longer has any identifiable stake or legal interest in these proceedings for the following reasons and thus its Notice of Motion should be dismissed *in limine* with costs. Without prejudice to the same; it was deposed that the grounds upon which the application is based do not raise any issue of misconduct or corruption by the Arbitrator, neither do they make any tangible averment that there was material non-disclosure of any fact(s) by any party that would warrant the setting aside of the Award. It was noted that the Agreement for Sale between Telkom and Afraco has been declared null and void. The application for consolidation of the arbitral proceedings was dismissed both by the High Court and the Court of Appeal.

79. It is deposed that the pleadings filed in the HCCC 1158 of 2011 were part of the documents produced and considered by the Arbitrator. That in fact, Postel's pleadings were considered by the Arbitrator at paragraph 155 of the Award hence the allegations that Postel concealed what it had pleaded in its Defence filed in the High Court case has no basis.

80. Further, it was contended that contrary to Afraco's allegation that Exclusive and Postel fraudulently and secretly executed a Deed of Assignment in 2009, the correct position is as follows: Postel exercised its rights under Agreement A, negotiated with and assigned its rights and obligations under the Agreement to Exclusive. The Deed of Assignment was entered into in 2009 and was filed in Court. There was nothing secretive or fraudulent about the assignment as claimed by Afraco. Telkom was not compelled to comply with the terms of the Deed of Assignment as claimed by Afraco but with the terms of Agreement A.

81. As regards Afraco's allegations that the award goes against the laws of the land and public policy, it was deposed that:-

a. Afraco has not shown or demonstrated how the Award contravenes national values and principles or governance as enshrined under Article 10 of the Constitution;

b. The award is a result of interpretation of the pleadings filed by the parties and evidence tendered by the parties and not the Arbitrator's whims as claimed by Afraco;

c. The Award directly corresponds to the pleading: filed by the parties, contrary to the averments by Afraco that have no evidence;

d. Afraco has not shown which legal matrix of Arbitration is lacking and how it correlates to the right to a fair hearing under Article 50 of the Constitution;

e. The Award is based on sound analysis of legal principles and evidence;

f. The averment by Afraco that the award was pre-determined and/or pre-conceived has no basis or tangible evidence;

g. On 24th November, 2014, Ms. Asli, Advocate while appearing before the Arbitrator, indicated that Afraco had withdrawn its cross claim through a letter dated 26th July, 2014. This position was confirmed during the hearing by its witness Mr. Salim Sadru;

h. The Award aptly captured the dispute between the parties as contemplated in both agreements;

i. The prayers granted by the Arbitrator were prayed for by Exclusive and are based on the law.

j. The Arbitrator aptly analysed Afraco's position in the proceedings.

k. The averment that the Arbitrator was biased has no basis. Afraco never filed any application for disqualification of the Arbitrator despite threatening to do so on 30th October, 2014. This claim of biasness should therefore be dismissed.

l. The contention that Arbitrator deliberately misconstrued the High Court and Court of Appeal decisions are a misapprehension of the law because decisions of the said courts are binding upon lower courts and tribunals. The Arbitrator was therefore correct in holding that the decisions of both Courts were binding upon her.

m. Afraco does not with specificity indicate which norms are these that it claims the Arbitrator created in relation to caveats. This allegation has no basis.

n. This case was originally filed in 1995, it is Telkom who failed to honour the terms of Agreement A.

o. Specific performance was pleaded and prayed for in Exclusive's Further Amended Statement of Claim.

p. Afraco does not state how and in which manner the Arbitrator misconstrued the Deed of Settlement hence the allegation has no basis.

q. Afraco has not demonstrated or shown how the Award is against public policy. In particular:

i. The allegation that Afraco was not given a fair hearing is not true or correct. Afraco was heard; its witness testified and was cross examined. Its position on the proceedings was well captured in the one page submissions filed.

ii. Specific Performance was pleaded by Exclusive contrary to the allegations by Afraco;

iii. Ordering specific performance of a contract does not amount to unjust enrichment as claimed by Afraco;

iv. Afraco has not shown or demonstrated how the Arbitrator allegedly falsified precedents of the High Court and court of Appeal.

82. Further, it was averred that the complaints registered by Afraco do not meet the threshold set out under **Order 46 rule 16 of the Civil Procedure Rules, 2010** for setting aside an Award. According to Postel therefore, the Application lacks any basis either in law or fact and thus should be dismissed with costs.

Telkom's Further Affidavit sworn on 24th January, 2020

83. In response to the Replying Affidavits filed by Exclusive and Postel, Telkom filed a Further Affidavit sworn on 24th January, 2020 by **WANGECHI GICHUKI**, its Head of Legal.

84. As regards Exclusive's Replying Affidavit, it was contended that Exclusive has not set out the purported depositions in Telkom's Supporting Affidavit that are at variance with its Witness Statement hence the allegation lacks merit.

85. She averred that Exclusive's account of her oral evidence in the arbitral tribunal is deliberately intended to mislead and is based on specific excerpts from the transcript and not in the context of the question posed or the contracts or documents filed before the tribunal.

86. She averred that it is evident from Exclusive's responses on the allegations of misconduct that it has misunderstood the term "misconduct" as a ground for setting aside an arbitral award and reiterated the specific circumstances in which the alleged misconduct arose on the part of the Arbitrator.

87. She stated that the averments by Exclusive that the Arbitrator strictly applied the terms of the agreement as executed by the parties is not true since at paragraph 7 of her Witness Statement filed on 1st September 2016, she stated that in addition to the purchase price, Postel covenanted to develop on the property houses for the staff of KPTC who were to be members of Postel. Further, that during her cross examination on 22nd June, 2018, she clearly stated that the reason the property was not transferred to Postel was because Postel was yet to begin construction of the houses which was the specific reason the agreement was entered into.

88. She deposed that Exclusive's contention that Telkom failed to provide evidence to support the current market value of the Suit Property is similarly false in view of the following:

a) At paragraphs 16 and 17 of her Witness Statement, she confirmed that Telkom had in the year 2004 informed Postel that it would no longer be bound by the Agreement for Sale as it stood unless it was renegotiated owing to passage of over 10 years and the change in property values. This was informed by the fact that time was of the essence in the performance of Agreement A.

b) The appreciation in the value of the property was also noted by Telkom at paragraph 15 of its submissions dated 22nd August, 2018.

c) In acknowledgement of the appreciation in the value of the property, Exclusive produced a valuation report dated 2nd November, 2011 by Camp Valuers which estimated the value of the property at Kshs. 6 Billion.

89. It was also her contention Exclusive has clearly misunderstood Telkom's argument on unjust enrichment in view of the following:

90. THAT the matters at paragraph 13-17 of Telkom's Supporting Affidavit were pleaded at paragraphs 15-25 of her Witness Statement filed in the arbitration proceedings.

91. She averred that the allegation that the issue of illegality was not pleaded is not true and reiterated that the issue was raised in Telkom's pleadings, submissions and the List of Agreed Issues filed in the arbitral tribunal.

92. On Exclusive's contention that the allegations of misconduct relating to unsupported and irreconcilable findings did not arise from Telkom's witness statement or oral evidence, she stated that the said allegations relate to how the Arbitrator considered and analyzed the pleadings and the evidence in her Award hence its arguments on this issue lack merit.

93. As regards Postel's Replying Affidavit dated 18th November, 2019, she reiterated that misconduct as a ground for setting aside an Award is not limited to bias or partiality but envisages other actions by the Arbitrator.

94. It was contended that the fact that the sale of the property was for a specific purpose is buttressed by special condition (b) which states that the construction was to be at the cost and expense of KPTC.

95. She stated that it is not correct as alleged that only Postel (and not KPTC/Telkom) had an interest in the construction of houses for its members and its successor. She reiterated that in view of the significant capital outlay envisaged by the stipulation that KPTC had to meet the construction cost, a Ministerial consent was required prior to entering into the Agreement A in accordance with Section 12 of the KPTC Act.

96. Further, it was averred that although the issue of the claim being statute barred under Section 109 of the KPTC Act was expressly pleaded at paragraph 4 of Telkom's Defence to the Further Amended Statement of Claim and Set off, the Arbitrator did not make a finding on it.

97. She averred that in any event and without prejudice to the foregoing, even if the issue of compliance with Section 14 (4) and (5) of the KPTC Act was not expressly pleaded, since the issue was raised in the course of the hearing, the Arbitral Tribunal had and now this Court has a duty to enquire into the said illegality and pronounce itself on it.

98. She reiterated that misinterpretation of a provision of statute amounts to an error of law which constitutes misconduct and is thus a ground for setting aside an arbitral award.

99. It was also deposed that Postel had no right or legal basis for purporting to charge the suit property since the same was still registered in the name of KPTC and no transfer had been effected at the time Agreement B was entered into. To that extent, Agreement B was not capable of enforcement.

100. Additionally, it was contended that Postel's interpretation of the judgment in *Civil Appeal No. 135 of 2013 (Exclusive Estates Limited v Chief Land Registrar & Others)* is incorrect. That in the said judgment, the Court of Appeal confined itself to determining whether the Registrar of Titles followed the procedure set out in Section 57 of the Registration of Titles Act in removing the caveat placed on the suit property by Exclusive. The Court of Appeal categorically stated that "it was not available for the Court in Judicial Review to determine the conflicting facts relating to the background information", which included the validity of the Deed of Assignment and the consent entered into between Postel and Exclusive. It was argued that the Court of Appeal did not make any finding with respect to validity or otherwise of the Deed of Assignment but confined itself to the process of removal of the caveat.

101. Further, that in any event, the findings by the Arbitrator at paragraphs 104 and 105 of the Award on *lis pendens* do not relate to the Deed of Assignment as alleged by Postel but to the Letter of Offer and Sale Agreement between Telkom and Afraco.

Submissions

102. This matter was canvassed by both written and oral submissions.

THE 1ST DEFENDANT'S (TELKOM) SUBMISSIONS

103. Telkom's Advocates filed two sets of submissions dated 3rd February, 2020 and 21st May, 2020. It submitted that the main issue arising for determination from the pleadings filed by the parties is whether the Award is vitiated by misconduct on the part of the Arbitrator. It was submitted that misconduct as a ground for setting aside an award does not connote personal turpitude on the part of the arbitrator but refers to conduct by the arbitrator that compromises the integrity and legitimacy of the Award. In this regard it relied on the explanation by the Court of Appeal in the case of *Nyangau v Nyakwara [1985] eKLR* (citing with approval the holding in *William v Wallis and Cox (1914) 2K.B. 468*, at pages 484 and 485) that:

"Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, "misconduct" in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside.."

104. Telkom submitted on the various aspects of misconduct as below:

a) Re-writing the contract

105. It was submitted that the parties having voluntarily negotiated and agreed on the said condition, Postel had no power to unilaterally and blatantly disregard the same by purporting to assign the Suit Property to Exclusive for use for purposes other than the purpose contemplated in Agreement A. In Telkom's view, no assignment was contemplated in Agreement A and neither could it be implied into the contract to further private interests or hoist a third party that was not in the contemplation of Telkom in the said Agreement. Thus, it was submitted that by finding that Agreement A was assigned to Exclusive, the Arbitrator re-wrote the Agreement of the parties and thereby misconducted herself by departing from the source of her jurisdiction and authority. It submitted that in dealing with a similar issue, the Supreme Court of India in Associated Engineering Co. Vs. Government of Andhra Pradesh and Another (1991) AIR 1992 SC 232 held as follows: -

“The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. ...An arbitrator who acts in manifest disregard of the contract acts without jurisdiction... A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may be tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.”

b) Ignoring or disregarding evidence

106. On this it was submitted that the failure by the Arbitrator to consider, deal with or even mention the covenant by Postel to develop the suit property with houses for the employees of KPTC was a deliberate refusal to consider and evaluate important material placed before her. Telkom submitted that this was not an option available to the Arbitrator because she had a duty to consider and pronounce herself on the same as it had the potential to be relevant to the outcome of the case. Telkom argued that her refusal to do so was in the words of Associated Engineering Co (supra) *“a conscious disregard of the provisions of the contract which vitiates the award”*

c) Failure to determine all the issues in dispute

107. Telkom further reiterated that the Arbitrator failed to determine some aspects of illegality pleaded in respect of Agreement A, Agreement B and the Deed of Assignment which was a live issue in the arbitration proceedings. It submitted that at a minimum, the Arbitrator ought to have dealt with the question of whether KPTC had the necessary legal capacity to enter into Agreement A and the issue of validity of Agreements B and the Deed of Assignment.

108. Telkom was emphatic that once any form of illegality is found, the court or tribunal must down its tools and resolve the issue of illegality first to avoid lending succor to parties engaged in an illegal, unlawful, or improper venture. Reliance was placed on the case of Josephat Waweru Miano & Another v Samuel Mwangi Miano & Another [1997] eKLR where the Court of Appeal held as follows: -

“The basis of this award is unexplained, and it is apparent on the face of it that the real issue in controversy between the respondents and the appellants was not adjudicated upon by the arbitrators.”

“It would appear to us therefore that failure by the arbitrators to adjudicate the real dispute before them amounted to misconduct in the hearing of the matter they had to decide and that entitled the appellants to have the arbitration award set aside.” (Emphasis added)

109. It was further submitted that in Nyangau v Nyakwara (supra), the failure by the Arbitrator to deal with the question of illegality was described as misconduct that rendered the Award liable for setting aside.

110. In addition, it was submitted that although the issue of whether KPTC as a State Corporation had power to assign or dispose of any of its assets by way of an agreement such as Agreement A had not been specifically pleaded, it ought to have been considered. In this regard, Telkom relied on the case of Mapis Investment (K) Ltd v Kenya Railways Corporation [2005] eKLR where the Court of Appeal stated as follows: -

“...Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense and expresses a clear and well recognized legal principal which is not confined to indicate offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the Court ought not to assist him” (Emphasis added)

111. It was submitted that Agreements A, B, and the Deed of Assignment which were placed before the Arbitrator were all tainted by illegality and could not be enforced or even recognized by the Tribunal. The failure by the Arbitrator to so find renders the Award an exercise in furtherance of an illegality and therefore vitiated. In support, it relied on the holding by the Indian Supreme Court in the case of Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd (2003) 5 SCC 705 (*‘Saw Pipes case’*): -

“The aforesaid interpretation of the clause (v) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. Principle is - there cannot be any wrong without a remedy. In M.V. Elisabeth and others v. Harwan Investment & Trading Pvt. Ltd. [1993 Supp. (2) SCC 433] this Court observed that where substantive law demands justice for the party aggrieved and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. Similarly, in Dhanna Lal v. Kalawatibai and others [(2002) 6 SCC 16] this Court observed that wrong must not be left unredeemed and right not left unenforced. Result is - if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.” (Emphasis added).

d) Misapplication of the law and misconstruing evidence

112. Telkom further submitted that the Arbitrator misconducted herself by importing the power to assign into Agreement A contrary to various statutory requirements. Reliance was placed on the decision of the High Court of South Africa in the case of **Swart v Mutual & Federal Insurance Co Ltd (10352/2004) [2009] ZAWCHC 107** where it applied the case of **Reigate -Vs- Union Manufacturing Company (1918) L.R. 1 K.B. 592** in which it had stated as follows:-

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it such a term that can comfortably be said that if at the time the contract was being negotiated someone had said to the parties “What will happen in such a case” they would have replied “of course so and so will not happen, we did not trouble to say that; it is too clear”. Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.” (Emphasis added).

113. Further, Telkom argued that even assuming that Postel had the right to assign its interest in Agreement A, the terms of the Deed of Assignment itself render the Deed unenforceable, null and void since the parties were entering into that agreement on the understanding that Postel had “fulfilled all its obligations under Agreement A” and is thus entitled to be registered as the proprietor of the suit property.

114. It was argued that had the Arbitrator considered the effect of the above misleading statement in paragraph 4 of the Deed of Assignment, she would have arrived at the inescapable conclusion that the Deed was at best premature and at worst invalid and unenforceable. Telkom relied on the case of **Arosan Enterprises Ltd vs Union Of India & Anr (1993) (2) ARBLR 328 Delhi** where the court stated as follows:-

“... if an award is based (sic) by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator...” (Emphasis added).

e) Unjust enrichment

115. It was contended by Telkom’s contention that if Agreement A was capable of being revived, it would have to be renegotiated and the purchase price adjusted to reflect the current value of the Suit Property. Telkom was emphatic all parties were in agreement that the value of the Suit Property had escalated to Ksh 6 Billion as at July 2013 in view of a Valuation Report produced in evidence by Exclusive and submitted thus that Exclusive is estopped from asserting that the Suit Property had not appreciated that much in value. Telkom reiterated that in the circumstances, the arbitrator misconducted herself by deliberately assigning the value of Kshs. 21,000,000 to the suit property which was essentially conferring a benefit to Exclusive a negligible fraction of the property’s true value.

116. Moreover, it was submitted that at paragraph 3 of the Deed of Settlement, Postel gave Exclusive its equitable interest in the Suit Property as security for its professional fees for services rendered under Agreement B. In the course of the hearing, the value of the said services was indicated as Ksh 50 Million. However, instead of the Deed of Settlement providing for payment of the Ksh 50 Million by Postel to Exclusive, it is Exclusive that covenanted to pay the said amount to Postel. Telkom faulted the Arbitrator for failing to make any findings in relation to this strange provision in the Deed of Assignment which conferred on Postel a right it did not have under Agreement A.

117. In the alternative, it was submitted that by permitting the purported assignment of the suit property valued at Kshs. 6 Billion to Exclusive in settlement of alleged fees of Kshs. 50 Million, the Award was clearly perverse and constituted unjust enrichment, and as such against the public interest and unenforceable.

f) Unsupported findings

118. Further, Telkom was emphatic that the Arbitrator can only make findings within the confines of the pleadings and issues referred to her by the parties for determination. It was thus submitted that by wandering outside the same, the Arbitrator exercised a jurisdiction she did not have and committed serious misconduct which vitiates the Award.

g) Bias

119. Telkom further submitted that the instances of outright bias on the part of the Arbitrator deprived it of the benefit of a fair hearing. It argued that looking at all the circumstances of this case, the Arbitrator was not only actually biased, but the manner in which she conducted the Arbitration disclosed a real likelihood of bias which vitiates the Award. In support of this, it relied on the case of **Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited [2016] eKLR**; where the Court held that bias includes what the court looks at as impression which would be given to other parties.

h) Contractual obligations cannot be assigned

120. Further, it was submitted that the contract was clearly executory in nature with obligations on the part of both parties and thus the purported assignment of obligations was of no legal effect since the contract was incapable of assignment. It submitted that it is a trite principle of law that a party cannot assign its obligations under a contract without the consent of the other and reliance was placed on the cases of **Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1993] UKHL 4 (22 July 1993)**, **Lounsbury Company Limited v. Duthie and Sinclair [1957] SCR 590** and **Tolhurst v Associated Portland Cement Manufacturers [1900] Ltd: 1902 2 KB 660**.

121. Telkom submitted that the above position has been long accepted as the law in Kenya in **Middle Africa Acceptances & Another v Peter Njoka [1998] eKLR**, where the High Court emphatically stated that:-

‘The question that arises here is whether B can assign the obligation that rests upon him by virtue of his contract to a third party “C” so that the contractual liability is effectively transferred from him to “C”. Can he substitute somebody else for himself as obligor. The law has unhesitatingly answered this question in the negative.’

122. Further, it was submitted that the Arbitrator committed a grave error of law when she held that Agreement A could be assigned without the consent of KPTC or Telkom. In its view, this is a form of misconduct and a ground for vitiating an award as held in the case of **Kenya National Assurance Co Ltd v Kimani & Another [1987] eKLR** where Apaloo JA, stated as follows: -

“That an error of law on the face of an award amounts in law to misconduct, justifying the intervention of the court, seems to be legal position in this country. (See Rashid Moledina & Co v Hoima Ginners Ltd [1967] EA 645).”

123. Telkom also relied on the reasoning of the Supreme Court in **Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR** at para 71 as follows:-

“Thus, our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.” (Emphasis added).

i) Frustration of Purpose

124. It was also submitted that the learned Arbitrator committed another error of law by finding that Agreement A was still alive as at 15th January, 2009 and therefore capable of assignment when the purpose of Agreement A had by that date ceased to exist. It argued that at the time Agreement A was entered into, to wit, 19th January, 1993, KPTC was a state corporation which had been established under Section 3 of the Kenya Posts and Telecommunication Corporation Act Cap 411 (“KPTC Act”). One of KPTC’s responsibilities under Section 13(2)(l) of the KPTC Act was to *provide houses and other accommodation for employees of the Corporation*. The stipulation that the Suit Property would be used for the purposes of construction of houses for occupation by employees of KPTC was therefore in furtherance of the functions of KPTC. However, KPTC ceased to exist with effect from 15th of February, 1999 when The Kenya Information and Communication Act, Cap 2 of 1998, (“KICA”) repealed the KPTC Act and vested the assets of KPTC on the Postal Corporation of Kenya and the Communication Authority of Kenya as stipulated in the Third Schedule of KICA.

125. It was argued that as such, it cannot be disputed that KPTC ceased to exist before the Suit Property was transferred to Postel and also before the Deed of Assignment between Postel and Exclusive was entered into. In Telkom’s view therefore, the effect was that Agreement A became void by reason of frustration of purpose with effect from the 15th February, 1999 and its initial purpose could no longer be achieved. It argued that thus, if Agreement A is to be performed in the manner directed by the Arbitrator the effect would be that Exclusive, which was not a party to the original agreement, would acquire the suit property for its own purposes and not for the purposes envisaged and identified by KPTC and Postel. It relied on **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR** where the Court of Appeal cited with approval the findings in **Davis Contractors LTD -vs- Farehum U.D.C. (1956) A.C. 696**, Lord Radcliffe at page. 729 as follows:

“...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. “Non haec in foedera veni”. It was not what I promised to do”.

126. It was argued that while the learned Arbitrator noted the dissolution of KPTC, she failed to deal with the issue of the effect of the dissolution of KPTC and its effect on Agreement A. Further, that the learned Arbitrator committed a substantial error of law when she found that a void contract was capable of assignment and as a result made an Award that was so unjust and contrary to the law. According to Telkom, this is the type of error that the Supreme court in the **Nyutu Agrovet case** described as;

“...specific errors of law, which if left alone would taint the process of arbitration.”

j) Misconstruing the contract

127. Further, Telkom reiterated that the Arbitrator misconstrued evidence by finding that Agreement A expressly permitted assignment when the word assign does not appear anywhere in the operative or binding parts of Agreement A but only in the description of parties. This argument was supported by the case of **Raindrops Limited v County Government of Kilifi [2015] eKLR** where Justice Chitembwe held as follows:

“It is clear that recitals do not create binding obligations....”

128. In addition, it was argued that the question of whether or not a party could assign its rights under Agreement A was a legal issue whose conclusion was to be drawn from the document and that Wangechi Gichuki’s answer to a question during cross examination was immaterial and could not change the said issue of law.

129. Moreover, it was reiterated that the covenant to build the houses referred to in Agreement A could not be omitted without the consent of KPTC. It was also submitted that the reference to financing by KPTC meant that the Agreement A was not an outright sale of land but that KPTC retained an interest in the suit property because it was to gain the assets, being the houses for its staff. That is why it agreed to fund the construction after transfer. As such, Postel's right to the Suit Property was limited to utilizing it for the agreed purpose and not for its own purposes. Telkom submitted that the error of law in this case is so obvious and its consequences so dire that as observed by the Supreme Court in the Nyutu case (supra) this Court must intervene to ensure consistency in law and to maintain confidence in arbitration.

130. In totality, it was submitted by Telkom that the grounds establishing the Arbitrator's misconduct have been proved to the required standard and the court was urged to allow the Telkom's Application dated 1st November, 2019 as prayed.

131. In his oral submission, learned counsel **Mr. Karuri** for the Party added that once an arbitral award is set aside under Order 46 Rule 16 and 17 of the Civil Procedure Rules, the court shall proceed with the suit. Counsel reiterated the position taken by Telkom in its Written Submissions. He added that under Agreement A Postel as a Sacco whose membership were from KPTC was in essence entering into an agreement for the benefit of the members of Postel who were employees of KPTC and was not to use the land as it wished. That KPTC was a public institution and the suit property was and still is public land to be used for public purposes. Mr. Karuri faulted Postel for purporting to transfer public land or construction of houses for civil service to Exclusive which is a private entity through the Deed of Assignment. He faulted the Arbitrator for misconduct in view of her finding that Postel was entitled to assign its rights to Exclusive who would then become the owner of the suit property upon payment of 21 million shillings only, without the obligation to construct houses for the employees of KPTC (now Telkom).

132. He reiterated the moment KPTC ceased to exist on 15th February, 1999, the purpose of the Agreement A was naturally was defeated.

The interested party's (Afraco) submissions

133. Afraco commenced its submissions by arguing that, even through the Application is primarily brought pursuant to Order 46 Rule 16 of the Civil Procedure Rules and all other enabling provisions of the law, certain provisions of the Constitution of Kenya 2010 hover over its application and have profound influence and impact in the determination of the same. It submitted that Order 46 must be read and interpreted with these constitutional provisions in context and in contest.

134. It was contended that by virtue of **Section 7** of the **Sixth Schedule** of the **Constitution**, this Court is mandatorily required to read **Order 46 of the Civil Procedure Rules** with the Constitution in mind. Sections 7(1) reads:

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution”.

135. Afraco contended that since **Articles 165(6)** and **Article 10** of the **Constitution** are imported to the substantive laws of the country by **Section 7(1)** of the **Sixth Schedule**, it's of paramount importance that this Court must never lose sight of the constitutional imperative that guides it even as it decides on an issue within the four corners of **Order 46** of the **Civil Procedure Rules**. It was submitted that the importance of the national values in **Article 10** take center stage in the matter before the court, principally because the Arbitrator deliberately executed a scheme that she designed to shut out Afraco and denied it a hearing, to subvert the entire process and grant Exclusive the property contrary to the evidence and the law. Reliance was placed on the case of **Evangelical Mission of Kenya and Another v Kimani Gachuhi and Another [2015] eKLR** where Ogolla J. pronounced himself on the applicability of Article 10 of the Constitution by judicial officers and arbitrators in deciding disputes before them. Afraco also relied on the case of **Independent Electoral and Boundaries Commissions (IEBC) v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR** where the court the Court of Appeal addressed the justiciability and enforceability of Article 10 of the Constitution at length.

136. With that basis, Afraco submitted that **Order 46 Rule 16(1)** of the **Civil Procedure Rules** sets out two ways to impeach the award by an Arbitrator but the current application is only concerned with the first one being the arbitrator's misconduct. It was submitted that the meaning the courts have given to the word “misconduct” is elastic, expansive and liberal and this includes any procedural or substantive shortcomings on the part of the arbitrator that invalidate his/her decision. Reliance was placed on the definition of misconduct of an Arbitrator in **Halsbury Laws of England** where it is stated that:

“[622] It is difficult to give an exhaustive definition of what may amount to misconduct on the part of the arbitrator or umpire. The expression is of wide import, for an arbitrator's award, unless set aside, entitles the beneficiary to call on the executive powers of the state to enforce it, and it's the court's function to ensure that the executive powers of the court is not abused...he will be guilty of misconduct if he makes an award which on grounds of public policy ought not to be enforced...however, on one or the other of these grounds the expression includes on the one hand that which is misconduct by any standard, such as being bribed or corrupted, and on the other hand mere “technical” misconduct such as making a mere mistake as to the scope of the authority conferred by the agreement of the reference. That does not mean that every irregularity of procedure amounts to conduct. But misconduct occurs, for example: (1) if the arbitrator or umpire fails to decide all the matters which were referred to him, (2) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference...(3) if the award is inconsistent, or is uncertain or ambiguous, or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt, (4) if there has been irregularity in the proceedings...(5) if the arbitrator or umpire has failed to act fairly towards both parties...”

137. Afraco also relied on the case of **Nyang'au v Omosa Nyakwara [supra]** and the case of **Josephat Murage Miano & Another v Samuel Mwangi Miano & Another [1997] eKLR**, where the court therein while elucidating on what constitutes misconduct by an arbitrator stated:

“The basis of this award is unexplained and it is apparent on the face of it that the real issue in controversy between the

respondent and the appellants was not adjudicated upon by the arbitrators...it would appear to us therefore that the failure by the arbitrators to adjudicate the real dispute before them amounted to misconduct in the hearing of the matter they had to decide and that entitled the appellants to have the arbitration award set aside”

138. The case of **Francis Maina Mathi v Peter Nguru Bedan [1997] eKLR** was also cited on the basis that it explains the wide latitude courts give to the expression “misconduct” as follows:

“The crucial aspect of this appeal is that the panel of arbitrators proceeded to give and make the award in favour of the respondent on the alleged factual basis that the appellant’s father has sold the land in question to the respondent as the appellant’s father needed money for medical treatment. The fact of the matter however remains that the panel of arbitrators, without there being any evidence to that effect, found that the appellants’ father purported to sell the land to obtain school fees for the children of the appellant’s father. When the issue of the alleged need for payment of school fees was never canvassed before the panel of arbitrators, it was quite wrong for the arbitrators to decide the issue of such basis. The crux of the appeal therefore is and must be that the arbitrators misconducted themselves when they decided that the appellant’s father must have sold the land for the sake of school fees. These factors alone, to our minds, is sufficient to say that the arbitrators’ panel misconducted itself.”

139. Further, Afraco relied on the case of **Modern Engineering (Bristol) Limited v C. Miskin & Sons Ltd, Lloyds Reports, [1981] Vol 1 at 137** where Lord Denning brought out the proper perspective in appreciating the relevant misconduct, which is not about the personal aspect but rather the legal mistakes and shortcomings of the arbitral process that constitute misconduct, when he stated:

“I would not suggest-no one has suggested-that the arbitrator misconducted “himself”. But what is said is that he misconducted the “proceedings”. It is as plain as can be hat he misconducted the proceedings. He decided a case against a party without having heard the submissions in the case. He made a formal award against Modern Engineering without having heard counsel on their behalf. This is clearly a breach of natural justice”.

140. In light of the above authorities, it was submitted that the arbitrator in this case is guilty of a wide range of issues that singularly and collectively constitute gross Misconduct which necessitate the setting aside of the award. Afraco enumerated the various incidents of the alleged misconduct as follows:

Ground (a) The arbitral award is incomplete

141. It was submitted that in Paragraph 67 of the award, the Tribunal gave notice that it seeks to address a number of important but peripheral issues which are not “**dispositive of the matter**” but which “the Tribunal views has a material effect on the determination of the matter” before it comes back to the “**dispositive**” issues and then determine the dispute between the parties. According to Afraco, the Tribunal was of the view that the “**dispositive issues**” will constitute the *Ratio decidendi* of the award while the other important matters that were to be highlighted were *Obiter dictum* of the award.

142. It was submitted that the “several subjects that the Tribunal designated as having material effects on the determination of this matter” are: (1). The Binding nature of the Court of Appeal and the High Court Subsisting Orders, Rulings and judgments; (2). Proper parties and Legal Effect of Vesting Orders; (3). Afraco: Interested party (third party in proceedings); (4). *Lis Pendens* and Telkom/Afraco Agreement for sale; (5). Agreements and the parties; (6). Agreement A-Claims and defences; (7) Agreement A and sale of 60 acres; (8) Agreement B; (9) The Security Pledge; (10) The Alternative relief; (11) Costs; and (12) Final Award.

143. It is argued that the Arbitrator addressed these issues at Paragraphs 68 to paragraph 198 of the award and made a number of determinations on all these issues but the Award ends without the arbitrator going back to the “**dispositive issues**” as promised in paragraph 67 of the award. Afraco contended that the observation made is important in the following ways: First, it shows that the award rendered by the Tribunal is incomplete and is entirely premised on preliminary or peripheral issues that are not dispositive of the dispute; and second, the “**dispositive issues**” that were to determine and dispose of the matter are not captured in the award.

Ground (b) The arbitrator in determining the dispute between the parties and in making the award does not show how the pleadings and the evidence adduced by the parties led to the determinations she made

144. It is submitted that there is no single paragraph between paragraphs 66 to 197 on the “Determination” portion of the Award where the arbitrator analyses the Respondents’ pleadings as foundation of the claim and the evidence adduced by Exclusive to show how the same will inevitably lead to the award she makes. Afraco contended that the award as summarized in paragraph 197 is not the direct and consequential results of the Respondent’s pleading and the evidence adduced during the trial, rather, it is a unilateral construct of the Arbitrator.

145. Further, Afraco set out to analyse the manner in which the arbitrator considered and determined the twelve issues she singled out in order to see whether the same were deconstructed with the pleadings and evidence in mind.

(1) The Binding nature of the Court of Appeal and the High Court Subsisting Orders, Rulings and judgments.

146. Afraco contended that the Arbitrator made her own fallacious conclusions that have no basis in law and in fact as regards this issue at paragraphs 68 to 72 of the award. It argued that the Arbitrator did not base her determination on the facts and evidence adduced by the parties or the pleadings before the Tribunal.

(2) Proper parties and Legal Effect of Vesting Orders.

147. It was contended that this is an irrelevant issue as it was not pleaded thus the tribunal was not seized of a dispute that touched on the vesting orders and who the proper parties to the dispute are.

(3) Afraco: Interested Party (third party in proceedings).

148. It is submitted that the issues that the Arbitrator addressed in regard to this resulted from a misguided and unilateralist misadventure on her part as it is not grounded on the pleadings or the evidence adduced at the trial before her.

(4) Lis Pendens and Telkom/Afraco Agreement for sale.

149. It is argued that the Arbitrator reproduced large portions of legal case law that had little relevance to the matter herein at paragraphs 94 to 111 and falsified the judgments of the High Court and the Court of Appeal regarding the matter. It was noted that for instance at paragraph 98, the Arbitrator falsely claims that **“The court of Appeal order to the High Court and to this Tribunal is to treat the caveat registered... as having had an uninterrupted existence on the register to date to treat the intervening removal as a nullity. Any purported interest said to have been acquired in a manner inconsistent with the registered interest is, consequently a nullity”**. In Afraco’s view, this false attribution to the Court of appeal is evidence of bias and prejudice on the part of the Arbitrator against it.

150. Further, Afraco contended that the Arbitrator, in paragraphs 112-180 of the Award, addressed issues which were neither pleaded nor placed before the tribunal for determination namely: (5) *Agreements and the parties*, (6) *Agreement A-Claims and Defences* (7) *Agreement A and sale of 60 acres and* (8) *Agreement B*.

Whether or not Exclusive Estate Limited had discharged the burden of proof to the required standard of proof

151. It was submitted that the burden of proof in the arbitral proceedings lay on Exclusive who was required to prove its case on a balance of probabilities. Afraco contends that the Arbitrator misconducted herself by failing to make a specific determination on the twin issues of burden and standard of proof which makes the Award untenable. It was noted that **Halbury’s Laws of England** captures the essence and important of the burden of proof as follows:

“The Legal burden is the burden of proof which remains constant throughout the trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. 14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court and tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is as essential of his case. There may be therefore be separate burdens in cases with separate issues”.

152. Afraco also stated that **Section 107** of the **Evidence Act** Cap 80 Laws of Kenya Section provides as follows regarding the burden of proof:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist”.

153. It was submitted that an award that is rendered without a judicial determination of whether the Claimant has discharged the burden of proof and standard of proof as required by law is worthless. If the issues of burden of proof and standard of proof are not addressed and a determination made by the tribunal then it means a legal determination of the dispute has not been made at all. In Afraco’s view, the absence of such determination by the Arbitrator must have been a deliberate suppression of an obvious determination that she consciously realized that indeed Exclusive had failed to discharge the statutory and excused it from the same when she made a finding in its favor.

154. As regards the standard of proof in civil cases, Afraco relied on **“Phipson on Evidence” 2005 Sweet & Maxwell, London**, where it is stated that:

“The standard of proof in civil cases is generally proof on the balance of probabilities. If, therefore, the evidence is such that the tribunal can say “we think it more probable than not”, the burden is discharged, but if the probabilities are equal it is not.

155. Afraco also cited ***Re H (Minors) (1996) A.C. 563*** where Lord Nicolls addressed the matter of balance of probability as follows:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind the factor, to whatever extent is appropriate in the particular case, that is more serious the allegation the less likely it is the event has occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is an issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on balance of probability, its occurrence will be established.”

156. It was contended by Afraco that since the Arbitrator failed to analyze the law and the evidence adduced and to test the same against the required burden and standard of proof as mandatorily required by the Evidence Act, Cap 80, Laws of Kenya, that the award cannot stand the test of this court's scrutiny.

Ground (d) The Arbitrator in making the award made the arbitral tribunal answer all the legal and factual issues raised for the benefit of Exclusive Estates Limited. In the other words and as evidence of hidden bias, the Arbitrator stood up for the said party.

157. It is contended that the Arbitrator thrust the tribunal into contested facts and law only to make determinations favorable to Exclusive according to her personal views. The following example was highlighted:

“Paragraph 68, “The Tribunal accepts...” Paragraph 73, “The tribunal has examined the documents presented...” Paragraph 75, “The Tribunal’s attention has been drawn...,” Paragraph 76,” ...The tribunal has to accept the assumption...” Paragraph 77, “The Tribunal was also not made aware....” Paragraph 83, The Tribunal has been compelled... “, Paragraph 89, “Assuming that this Tribunal was inclined...” Paragraph 91, “...there is a further caution that the Tribunal is required to warn itself of...” Paragraph 92, “The above Supreme Court confirms the Tribunal finding’s...” Paragraph 94, “...the Tribunal finds that there is only a narrow...” Paragraph 99, “The Tribunal notes that no entry was ever registered with regard to the purported transfer...” Paragraph 103, “The Tribunal understands the law...” Paragraph 106, “The tribunal is obliged...” Paragraph 107, “The Tribunal accepts...paragraph 108, “The Tribunal as a matter of factual determination of the facts in this arbitration... Paragraph 112, “The tribunal now...Paragraph 113, “The Tribunal finds that Telkom has conflated agreement A...” Paragraph 114, “The Tribunal takes the view that Agreement A...” Paragraph 127, “The Tribunal is obligated to respect the intention of the parties...” Paragraph 135, “The Tribunal does not accept that Postel paid the purchase price...” Paragraph 136, “...The tribunal funds that if it was intended that the check-off deductions were intended...” Paragraph 137, “The Tribunal accepts the position...” Paragraph 156, “The Tribunal also concludes that if it was Telkom’s intention...Finally, the Tribunal takes note of the rather peculiar relationship.” Paragraph 159, “In the end it is the Tribunal’s findings that...” Paragraph 166, “However, it is the Tribunal’s understanding that the rights...paragraph 172, “The Tribunal accepts that this is a proper case to compel specific performance...Paragraph 170, “The Tribunal notes...” Paragraph 190, “The Tribunal would readily prefer...””.

158. Further, it was noted that in prayer C of its Further Amended Statement of Claim dated 21st February, 2013, Exclusive sought the following prayer: *“an order directing the 1st respondent to sub-divide L.R No. 7656 and thereafter transfer 60 acres from the subdivision to the Claimant and in default therefore the Deputy Registrar of the High Court be authorized to sign documents and deeds to effect the subdivision of L. R No 7656 and therefore transfer 60 acres from the subdivision to the plaintiff”*. It is contended that from the aforesaid prayer, Exclusive did not state the contract it was basing this prayer on. Afraco complains that at paragraph 172, the Arbitrator addressed the issue of whether this was a case for specific performance of the contract instead of determining which contract was to be specifically performed.

159. It was stated that at paragraphs 135 and 136 of the Award, the tribunal made determined that the contract between the Telkom and Postel died a stillborn death due to the failure by KPTC to pay the 10% deposit as stipulated in the agreement. This determination is of critical importance to both the prayers the Arbitrator grants and some subsequent determination she makes.

160. It is argued that although the tribunal spent a lot of times in analyzing the two contracts namely Agreement A and B, the pleading filed by Exclusive paint a different picture. It is submitted that contrary to the assertions and finding of the Arbitrator, Exclusive did not claim in its pleadings that it had a right or claim in either of the agreements. It is argued that the Further Amended Statement of Claim grounds the cause of action entirely on the purported agreement dated 28th January, 1993 between Telkom and Postel Housing Co-operative Society Limited to develop houses for the staff of KPTC. Afraco faulted the Arbitrator for dedicating paragraphs 112 to 172 of the Award to agreement A which it claims was not pleaded by Exclusive as the basis of its cause of action. It submitted that this is evidence of glaring misconduct on the part of the Arbitrator. In its view, the Arbitrator knew too well that Telkom had entered into an agreement with Afraco for the sale of the suit property and that the same was no longer available but decided to bring in Agreement A with a view to bestow on Exclusive favors it never sought from the tribunal.

Ground (e) The Arbitral tribunal made deliberate misdirection of what she called the “Binding nature of the Court of Appeal and High Court subsisting orders, Rulings and Judgments”, when there was nothing of the sort

161. On this, it was submitted that the Arbitrator’s assertion that her hands are tied by “subsisting order, ruling and judgment of the court” is false and only meant to justify the decision reached in the award. Afraco referred the court to paragraph 68 of the Award where the Arbitrator stated that:

“The Tribunal accepts, and it does not have any choice in that regard that orders, rulings and judgments made by the Court of Appeal and the High Court are binding in absolute terms not only upon the Tribunal but also on all parties in the arbitration”.

162. It was submitted that this was baseless statements since nowhere in the Award has the Arbitrator indicated the paragraphs of the judgments of the court she was referring to. I is further argued that in any event, Exclusive had not pleaded the findings of the courts as basis of its cause of action. The court is also referred to paragraph 70 of the award where the Arbitrator stated as follows:

“By reason of the Court of Appeal judgment the Tribunal in giving full deference to the Court of Appeal has no option but to accept that at all times the caveat was in place as if it had never been removed. This has clear implications in this arbitration because some of the parties have made submissions that appear to contradict or ignore this judgment. Any actions undertaken during this intervening period when the caveat had been irregularly removed are, accordingly, also null and void for purposes of this Tribunal”. (Emphasis added).

163. In Afraco's view, this was false as the Court of Appeal simply allowed an appeal from the High Court decision. It argued that the Court of Appeal actually denied the prayer for prohibition sought by Exclusive and held that it was simply untenable since the only right Exclusive had was the caveat and its unprocedural removal by the Registrar.

Grounds (f), (g) and (h): (f). The Arbitrator removed the Afraco as an interested party when that was not an issue before her for determination. (g) The arbitrator made the prejudicial determination that the Afraco "withdrew" its pleadings and that the tribunal has nothing before it to consider. (h). Afraco was consciously denied a fair hearing by the arbitrator.

164. It is contended that these three amalgamated grounds jointly and severally point to a tribunal that was so biased against Afraco that it conjured all kind of reasons and excuses not to accord it a hearing or allow its participation in the proceedings. Afraco argues that this occasioned a miscarriage of justice and as such this court must set aside the award in its entirety. It stated that the Arbitrator was so determined to do so that she spent most of the award dismissing or shutting out Afraco. It is alleged that at paragraphs 68 to 72, the Arbitrator slanted the decisions of the courts on matters peripheral to the arbitration and gave the impression that Afraco lost big time in the court cases. It is also alleged that at paragraphs 78 to 93, the Arbitrator unilaterally questioned why Afraco was participating in the proceedings before her, cast negative aspersions against it and even ridiculed it despite the fact that its participation in the proceedings was mutually agreed by consent of all the parties. Further, it is alleged that Exclusive specifically amended the claim to plead against the agreement between Afraco and Telkom.

165. Referring to paragraphs 84 to 86 of the Award, Afraco submitted that the following are warranted and proper deductions and conclusions that can be made with regard to its callous treatment by the Arbitrator:

- i. She addressed at a great length a matter that was not before her.
- ii. The Arbitrator took upon herself the need to make the determination that was superfluous in the circumstance of the matter. Usually such a determination as to the legal status of a party isn't made at the tail end of the process but at the start and since the parties agreed by consent, the arbitrator was wrong to make the determination at the award stage;
- iii. The determination was a preemptive strike. This is a clear case of denial of a hearing;
- iv. The arbitrator was biased against Afraco and didn't even want to look into the merits of the defence and evidence adduced before the tribunal;
- v. She falsely states that Afraco had withdrawn its pleadings when it only withdrew a counterclaim and maintained a defence that answered robustly the claim by Exclusive; and
- vi. Contrary to the arbitrator's assertion, Afraco was not in contempt of court.

Ground (i) The award is incomplete, shallow, inconsistent, incoherent and so ambiguous that it must be set aside

166. Afraco contends that the Arbitrator is guilty of misconduct as she wrote an award that is difficult to comprehend. In its view, the Arbitrator wrote the Award as though she was an advocate for Exclusive.

Ground (j) The award has as its foundation and pillars issues not pleaded or prayed for by Exclusive but granted gratuitously by the tribunal.

167. Afraco reiterated that the award bestowed on Exclusive favors that it did not seek in its pleadings. It is submitted that the most egregious award made by the arbitrator is to first, create a new contract for the parties and second to specifically force the performance of such a contract. That this aspect of the award is contrary to the pleadings filed by Exclusive before the tribunal and was not even in the contemplation of the parties and is too radical a proposition.

168. Afraco submitted that the prayers granted in paragraphs 197(a), (b) and (c) were not prayed for by Exclusive. It reiterated that the scheme undertaken by the arbitrator was to give the contested land to Exclusive but only after building a structural foundation for such an order. In its view, this was a blatant case of misconduct.

169. Afraco cited the case of **Charles C. Sande v Kenya Co-Operative Creameries Limited, Civil Appeal Number 154 of 1992**, where the court held as follows:

"We would endorse the well-established view that a judge has no power to decide an issue not pleaded before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a judge. In our view, the only way to raise issues before a judge is through pleadings and so far as we are aware, that has always been the legal position. All the rules of pleadings and procedure are designed to crystalize the issues which a judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are."

170. Reliance was also placed in the case of **Bhang Bhari v Medhi Khan (1964) 2 EA 94**, where the court stated as follows:

"The rules of procedure are designed to formulate the issues which the court has to determine and to give fair notice thereof to the parties. Were it not that the judge seems fit to determine a number of issues which were never raised in the originating summons, I should not have thought it necessary to state that a judge has no power to determine an issue which was not before

him”.

171. Further, it relied on the case of *Captain Harry Gandy v. Caspar Air Charters Ltd (1956) 32 EACA 139*, where the court held that:

“...Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issues on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course”

172. It was submitted that when a court or tribunal grants orders like those granted by the Arbitrator in the Award, an obvious breach of the right to a fair hearing arises. Afraco argues that when prayers are granted gratuitously, the other party that had no notice of the same, is greatly prejudiced in the process. It cited the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR*, where the Court of Appeal held as follows:

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which is has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

173. It is submitted that a Court or Tribunal has a similar limitation or inhibition in that it cannot go beyond the confines of the parties’ pleadings and address issues that are outside the structure of the party’s case as it plead. In this regard, Afraco cited the case of David Sironga Ole Tukai (supra)

174. Afraco reiterated that it is clear that the Arbitrator granted reliefs and prayers that were never sought by Exclusive. This had the net effect of creating rights that were non-existent during the trial of the case and the orders granted have the net effect of bestowing a new claim and rights on Exclusive.

175. In totality, Afraco submitted that the misconduct on the part of the Arbitrator appears on the face of the award and thus it is in the interest of all the parties including the Arbitrator that it be set aside.

176. In oral submission, learned Senior Counsel, **Mr. Ahmed Nassir** reiterated the written submissions. He noted that Afraco cannot close its eyes to the outright misconduct by the Arbitrator in this case. He urged that the award should be set aside and the case be allowed to proceed to full hearing

The Plaintiff’s/Respondent’s submissions

177. The Plaintiff (Exclusive) filed two sets of submissions dated 17th February, 2020 and 25th March, 2021. The first set was in opposition to the two applications for setting aside while the second set was in support of its request for enforcement of the Award published on 6th September, 2019. The issues formulated by the Plaintiff for determination can be summarized as follows:

a. *Whether the Applicants have set out sufficient grounds to warrant the setting aside the Arbitral Award published on 6th September, 2019 or the converse, Whether the Court should adopt the Award published on 6th September, 2019 as an order of the Court?*

b. *Whether the Interested Party has locus standi and whether it was granted fair hearing?*

(a) Whether the Applicants have set out sufficient grounds to warrant the setting aside of the Arbitral Award published on 6th September, 2019 or the converse, Whether the Court should adopt the Award published on 6th September 2019 as an order of the Court?

178. It was submitted that **Order 46 Rule 18** of the **Civil Procedure Rules, 2010** states as follows:-

“(1) The court shall on request by any party with due notice to other parties enter judgment according to the award—

b. when no application has been made within the time allowed by rule 17; or

c. when an application under rules 13, 14 or 16 has been heard and determined and no other application has been made within the time allowed by rule 17; or

d. When an application under rules 14, 15 and 16 has been heard and refused and no leave to appeal against such refusal has been granted within fourteen days of that refusal.

(2) Upon the judgment so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in

excess of, or not in accordance with the award.

(3) Order 49, rule 2 shall apply to the entry of judgment under subrule (1).”

179. Exclusive submitted that where parties opt for arbitration in the course of litigation, then **Order 46** of the **Civil Procedure Rules** is applicable and **not** the Arbitration Act. To support this position, it relied on the case of **John Kaniu v Jason Bundi Gitari [2015] eKLR** and the case of **Vadag Establishment v Y.A. Shrettav & Another [2014] eKLR** where the courts held similar views.

180. Further, it is submitted that the ground alleged by Afraco that the Award is contrary to public policy is only available in an application brought under Section 35 of the Arbitration Act and thus would not be applicable in these circumstances.

(a) Misconduct of the arbitrator.

181. On this, Exclusive relied on the threshold on what constitutes misconduct of an arbitrator as set out in **M/s Cochin Shipyard Ltd vs M/s Apeejay Shipping Ltd SLP(C) No. 34309 of 2014** and in **Nyangau v Nyakwara [supra]** cited by both Telkom and Afraco.

182. It was submitted that where an arbitrator fails to arrive at a particular decision, the same cannot be cited as misconduct on the part of the arbitrator. In support, Exclusive relied on **Nairobi Golf Hotels Ltd v Linotic Floor Company Ltd [2015] eKLR** where the Court of Appeal held:

“From the foregoing, it is clear that failure by the arbitrator to arrive at a particular decision is not and cannot be a ground for setting aside an award. Difference in interpretation of the law, or the facts cannot amount to misconduct under the above provisions either”

183. Exclusive submitted that Telkom has not presented any evidence that would impeach the court’s competent jurisdiction nor any proper basis for interfering with the award which was properly published and thus enforcement of the same by this court under Order 46 of the Civil Procedure Rules 2010 has accordingly matured. Reliance was placed on the case of **Peter Wanjama v Kenya Breweries Limited [2017] eKLR**, where the Court cited the case of **Rashid Moledina & Co. (Mombasa) Ltd & Others v Hoima Ginners Ltd [1967] E.A 645**, in support of when an Award can be set aside on grounds of an Arbitrator’s misconduct.

184. Exclusive further relied on the decision in **Air East Africa v Kenya Airports Authority [2001] eKLR** cited with approval the dicta in **Pioneer Shipping Co. Ltd & Others v. B.T.O. Tioxide Ltd [1982] A.C. 724**.

185. It reiterated that the award was properly rendered, it did not offend any applicable laws, and there are no intrinsic or extrinsic factors that would impeach the purity of the award. This alone should move this court to enforce the award. Further, that the parties chose their own tribunal and they must, generally speaking, accept the result whether it is right or wrong. In addition, it was contended that the circumstances in which the court will intervene are the exceptions to that general rule and no evidence has been tendered to impeach the purity of the award. It is for these reasons that Exclusive urged this Court to adopt the award published on 6th September, 2019 as an order of the Court.

186. The plaintiff further submitted that based on the Court of Appeal judgment in **Civil Appeal No. 135 of 2013 Exclusive Estates Ltd v The Registrar of Titles & Others**, a finding has already being made that two parties stole a march on the company by entering into a sale agreement after the caveat was lifted and with the reinstatement of the caveat, only the Exclusive arbitration lawfully addressed the aspect of specific performance. The Arbitral Tribunal took this into account at paragraph 69 of the Award.

187. Exclusive cited the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** where the court had this to say on the application of equity in dispute resolution under Article 10 (2) (b) of the Constitution of Kenya [Paragraph 25]:-

“Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others...”[See page 26 of the Authority at page 20 to 27]”

188. It submitted that having found that the contract was valid and enforceable, the Arbitrator rightly ordered specific performance as an equitable relief hence it is in the interests of justice that the Court adopts the award in line with Article 10 of the Constitution of Kenya.

189. Exclusive submitted on the alleged actions and omissions that that the Applicants claim constitute misconduct on the part of the Arbitrator as hereunder.

Ground I- Re-writing the contract between the parties

190. On this, Exclusive submitted that the Arbitrator took into account the two separate agreements which formed the dispute between the parties namely the Agreement for sale dated 19th January, 1993 between **KPTC** and **Postel** (referred to as Agreement A in the final award) and the Agreement dated 28th January, 1993 between **Postel** and **EEL** (referred to as Agreement B in the final award. It was argued that the Arbitrator was alive to the fact that the two agreements were separate and distinct and this is evident at paragraph 114 of the award where she states:

“The Tribunal takes the view that Agreement A and Agreement B are not interdependent, are supported by separate and different considerations and are to be performed in distinct and separate ways. Agreement A does not make reference to the

transaction between EEL and Postel; it is bare contract with a singular purpose of transferring 60 acres of NRL from KPC to Postel. In that regard, the Tribunal will analyze and interpret Agreement A and Agreement B as individual and separate contracts.”

191. Exclusive submitted that the Arbitrator did not re-write any contract and was well aware of the legal principle that it cannot re-write a contract between parties. It stated that the tribunal looked at the two agreements as separate and distinct from each other and in the end made a separate determination on each of the contract as is seen from Paragraphs 197 (a) and (b) of the award. In its view, it is evident that Telkom holds a different view from what the Arbitrator held on both agreements which cannot be a basis for setting aside the award.

Ground II- Ignoring or Disregarding Evidence

192. It is submitted that contrary to Telkom and Afraco’s allegations, the Arbitrator highlighted the parties’ submissions as per their pleadings and evidence tendered from pages 6 to 19 of the final award and thereafter proceeded to issue her determination under heading F of the award. It denied the Applicants’ claims that the arbitrator failed to show how the pleadings and the evidence adduced by the parties led to the determination and submitted that the Arbitrator strictly applied the terms of the agreement as executed by the parties.

Ground III- Failing to determine the issues in dispute.

193. It is submitted that the issue of illegality raised by Telkom is novel as it never arose in the pleadings before the tribunal or in the agreed list of issues before the Arbitrator dated 24th April, 2013. It is argued that it is a trite principle in law that parties are bound by their pleadings and cannot introduce foreign issues that were not placed before the Court or Tribunal for determination after a decision has been rendered. relied on the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR** where it was held:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded”

194. It is further submitted is a trite principle in law that parties are bound by their pleadings and cannot introduce foreign issues that were not placed before the Court or Tribunal for determination after a decision has been rendered. Exclusive also relied on the case of **Chuka Igambang’ombe Development Association v County Government of Tharaka Nithi County & another; Njuri Ncheke Council of Elders – Meru South & 2 others (Intended Interested Parties)** where it was held that this is important for the sake of certainty and finality.

195. Further, it also reiterated that the averment by Telkom that Postel could not assign its rights under Agreement A was dealt with during the cross- examination of Telkom’s witness where she admitted that there was no clause in the contract that prevented Postel from assigning its rights to other parties. According to Exclusive therefore, the Arbitrator rightfully determined all the issues that were placed before the Tribunal.

Ground IV- Misapplication of the Law and Misconstruing Evidence.

196. The 1st Defendant submits that the Arbitrator misapplied the law in finding that Section 12(d) of the KPTC Act did not apply. The said section provides:

“The Minister may

(d) In consultation with the Minister responsible for finance, approve any individual capital work, for the purposes of the corporation, of which the estimated cost exceeds five million shillings or other such term as the Minister may determine.”

197. On this, it was submitted that the Arbitrator’s determination at paragraph 122 of the award regarding the applicability of Section 12(d) of the KPTC Act was logical and the mere fact that Telkom disagrees does not warrant setting aside the award. In support of this submission, it cited the case of **Air East Africa v Kenya Airports Authority [2001] eKLR** where the court cited with approval a dicta in **Pioneer Shipping Co. Ltd & Others v. B.T.O. Tioxide Ltd [1982] A.C. 724** where similar views were expressed.

198. Exclusive reiterated that Telkom has failed to prove how the Arbitrator misapplied the law and the evidence in arriving at the Tribunal’s determination.

Ground V- Unjust Enrichment.

199. As regards, Telkom’s position that the Arbitrator has unjustly enriched Exclusive by allegedly failing to hold that the suit property has appreciated in value since the time of entering into Agreement A in 1993, it was submitted that the Arbitrator gave a logical reasoning on this at Paragraph 167 of the Award where she held:

“To allow a re-valuation of the purchase price is to invite this Tribunal to replace the provisions of a negotiated contract, which is not allowed in law.”

200. It is argued that this is in line with Telkom’s submission that the Arbitrator has no authority to re-write a contract between parties. That

there is no supplementary agreement between the parties where the consideration was varied to reflect the current market value of the property. Further, it was reiterated that in any event, Telkom failed to provide any evidence to support the current market value of the property.

Ground VI- Unsupported Findings.

201. It was reiterated contrary to Telkom's averment that the Arbitrator made an unsupported finding that parties consciously reserved themselves the privilege to assign their rights under the agreement, its own witness admitted during cross-examination that there was no express clause in the agreement that prevented the parties from assigning interests to other parties. It was argued that the Arbitrator was therefore right to assert that the parties were at liberty to assign their rights to third parties.

202. On consideration, it was submitted that the same was plain and simple as per Agreement A where it was agreed as Kshs. 21 Million and this is the position that was upheld by the Arbitrator. It is reiterated that the Arbitrator's findings were based on the pleadings and evidence placed before her and she did not at any time wander off the same.

Ground VII- Alleged bias of the Arbitrator.

203. It is further submitted that the allegations of bias claimed by the Applicants has not been proved. Exclusive submitted that **Section 109** of the **Evidence Act** provides that the burden of proof as to the existence of a particular fact lies on the person who alleges that fact. In its view, both Applicants have failed to discharge this burden.

204. Exclusive submitted that Afraco in its affidavit has produced as an exhibit a personal statement by Meshack Dihay wherein it is alleged that the Arbitrator is a good friend of the Claimant. It was argued that the origin of the document and the veracity of the averments therein have not been put to question and its deponent is a stranger to this Court. As such, the document cannot be relied by this Honourable Court. It was submitted that the High Court in **Mumias Sugar Company Limited V Mumias Out growers Co. (1998) Limited [2012] eKLR** was called upon to make a determination on an application seeking to remove the Interested Party's counsel in this matter as an arbitrator on account of perceived bias. The Court held:

“A Judge or an Arbitrator is not expected to demonstrate at all times that he is not biased. The judicial function by its very nature allows and intends an element of elementary bias which enables a judicial officer to give direction to his thoughts. This elementary bias is controlled by the Judge throughout the proceedings. It allows the Judge to prod into the issues before the court in order to prevent any miscarriage of justice. It allows the Judge to comment on the matters before him and give particular directions in the interest of justice. This kind of bias does not go into the decision of the Judge”

205. It was argued that in this case, the Applicants have failed to prove that the Arbitrator was prejudiced in making her determination on the dispute between the parties and thus, this ground fails and does not warrant the setting aside of the arbitral award.

Ground VIII- The Arbitral Award is incomplete.

206. Further, it was submitted that Afraco's averments that the Arbitrator in the Award dwells on several subjects without going back to dispositive issues is not factually accurate. It was argued that from the onset, the Arbitrator has the power to look at other factors or issues that might have an impact on the determination that the Tribunal arrives at. The Arbitrator thereafter proceeds to deal with all the issues that were agreed upon by the parties.

207. It was also submitted that the Arbitrator looked at the Court of Appeal judgment of 11th March, 2016 where it was held that the action by the Chief Land Registrar captured in his letter of 27th June, 2009 purporting to remove from the register a caveat lodged by EEL was a nullity in law and ordered the Registrar to immediately reinstate the caveat. According to Exclusive, it was important for the Arbitrator to consider the Court of Appeal judgment as the parties before her had made submissions that contradicted and/or ignored the judgment of the Court of Appeal. Further, it was stated that the High Court had ordered that there shall be no consolidation of the two arbitration proceedings, that is the one that led to the final award now before this Honourable Court and the other between Telkom and Afraco. As such, the Arbitrator had to make reference to this decision as Telkom and Afraco made repeated reference to the issues before the other tribunal.

208. Exclusive argued that it was extremely important that the Arbitrator takes note of the two decisions in arriving at her determination. Ignoring the existence of the decisions and their impact on determination of the dispute herein would amount to negligence on the part of the arbitrator. In addition, it noted that the Arbitrator in looking at the two decisions was guided by the principle of *stare decisis* and judicial consistency where it is required that the arbitrator shall not depart from previous decisions from other courts that are binding on the arbitrator.

(b) The Locus Standi of the Interested Party and its right to a fair hearing.

209. Exclusive reiterated that whereas Afraco was enjoined in the arbitral proceedings by consent of the parties, as the matter progressed to hearing, it was discovered that it had no legal interest in the matter. Its own witness Mr. Salim Sadru admitted on cross-examination that the company was making no claims at all in the arbitration and had withdrawn its cross-claim. It is argued that in the circumstances, the Tribunal could not ignore this pertinent legal question before it even though it did not form part of the agreed issues or the fact that the introduction of a party was by consent. It was noted that parties cannot consent on an illegality.

210. It was submitted that the law on the role of an Interested Party in legal proceedings has been well settled by Courts. Exclusive stated that an Interested Party is a person with an identifiable stake or legal interest in the proceedings at hand and relied on the following cases in this regard: **Edgar Kipsase Choge & Others v China Overseas Engineering Group Co. Ltd & Others** and **Kenya Medical Laboratory**

Technicians & Technologies Board & Others v AG Petition No. 49 of 2017.

211. It is reiterated that the one-page submissions filed by Afraco before the Arbitrator and barely touching on the issues before hand is conclusive proof that it had no identifiable stake or legal interest in the proceedings.

212. As to whether Afraco was denied the right to a fair hearing, it was submitted that despite the fact that it was clear that Afraco had no identifiable legal interest in the proceedings, the Arbitrator allowed it to produce evidence and make submissions which were considered by the Tribunal in making its determination. The above shows that Afraco was nevertheless granted the opportunity to be heard despite having no interest in the arbitral proceedings.

213. Finally, Exclusive submitted that it has complied with all required steps under Order 46 Rule 18 and is therefore entitled to an enforcement of the award as a matter of course once the application to set aside the award is dismissed. It relied on the case of **Y.A. Shretta v Leisure Lodges Ltd [2015] eKLR** where it was held that:-

“Order 46 Rule 18 of the Civil Procedure Rules makes it abundantly clear that the Applicant was entitled to have judgment entered in his favour after the dismissal of the applications that had been filed to set aside parts of the award or the award in its entirety.”

214. The Plaintiff thus urged that the applications dated 31st October, 2019 and 1st November 2019 be dismissed with costs and the Award dated 6th September, 2019 be adopted as an order of the Court and judgment be entered accordingly to lay to rest this dispute which has been pending for over 2 decades.

215. The above submissions were reiterated by learned counsel for the Plaintiff, Mr. Gichuhi during the oral highlighting of the same. Counsel urged that the two applications be dismissed with costs consequent which the court should admit the Award as a judgment of the court.

THE 2ND DEFENDANT’S (POSTEL) SUBMISSIONS

216. Postel submitted that the grounds set out in both applications, though crafted as grounds to set aside the Award, are essentially grounds of appeal. It also took the view that there is an attempt by both Telkom and Afraco to re-draft their pleadings through the applications and submissions which are misplaced in law and should be dismissed. It submitted as follows regarding the specific allegations of misconduct.

Re-writing the contract and Ignoring or Disregarding evidence

217. It was submitted that Telkom’s claim that the Arbitrator re-wrote the contract by failing to consider “the 2nd part of the consideration” involving construction of houses is an attempt to mislead the Court. Postel submitted there was no pleading, complaint or issue set out by the parties that either Excusive or Postel had breached the agreement dated 19th January, 1993 and as such, the Arbitrator could not make a determination on an issue that was not raised by any of the parties. It is also submitted that the purported covenant under Clause 3 of the agreement was already made within the terms of the agreement.

218. Without prejudice to the foregoing, it is submitted that it is clear that Telkom takes issue with the manner in which the Arbitrator interpreted sections of the Agreement which cannot be regarded as misconduct on the part of the Arbitrator. Postel relied on the case of **Equity Bank Ltd vs Adopt a Light Limited (2014)eKLR** where the court therein while quoting with approval the decision in **Christ for All Nations vs Apollo Insurance Co. Ltd (2002)EA 366**, held that:-

“I also do not accept the Applicant’s contention that the award is contrary to justice. To accept the Applicant’s contention would be tantamount to accepting a most dangerous notion that whenever a tribunal adopts an interpretation of a contract contrary to the understanding of one of the parties thereto, injustice is perpetrated. Justice is a double edged sword. It sometimes cuts the Plaintiff and other times the Defendant. Each of them must be prepared to bear the pain of justice cut with fortitude and without condemning the law’s justice as unjust.

In my Judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by involving the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law of construction of statute or contract on the part of an arbitrator cannot be by any stretch of legal imagination, said to be inconsistent with the public policy of Kenya”.

219. Further reliance was placed on **Mahican Investments Limited v Giovanni Gaidi & 80 Others** where the court held that a court will not interfere with the decision of arbitration even if it is apparently a misinterpretation of contract, as this is the role of the Arbitrator and the case of **Associated Engineering Co vs Government of Andhra Pradesh and Another (supra)** where the court observed that if an Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. In addition, Postel relied on the decision of the Court of Appeal in **Nairobi Golf Hotels Ltd vs Linotic Floor Company Ltd (2015) eKLR** where the Court held similar views.

Failure to determine all the issues in dispute

220. It was submitted that Telkom’s complaint that the Arbitrator failed to determine issues raised regarding the illegality of Agreement A, Agreement B and the Deed of Assignment were raised is misleading. Postel submitted that in the Award, the Arbitrator aptly dealt with all the issues of illegality raised by Telkom.

221. Further, Postel stated that Telkom did not raise any issue either in its Defence, evidence or submissions relating to Sections 13 (1)(c), 14 (4) and (5) of the KPTC Act as claimed in its submissions. As such, it cannot now at this stage purport for the first time, to apportion blame on the Arbitrator for not addressing them and claim misconduct on the part of the Arbitrator. Postel reiterated that the Arbitrator in rendering an Award is limited by Pleadings and evidence adduced by parties and whatever was not raised before her cannot be considered. In support, it relied on the Court of Appeal decision in the case of Erwen Electronics Limited & 3 others v Radio Africa Limited & another [2018] eKLR where the court rejected an issue that was being raised for the first time on appeal noting that its mandate was limited to interrogation of matters that were considered and determined by the trial court.

Misapplication of the law and/or misconstruing evidence

222. On this, Postel reiterated that the Arbitrator cannot be accused of misconduct merely because he or she adopted an interpretation that is contrary to the understanding of one of the parties. It was also argued that Telkom's interpretation of the terms of Agreement A constitute a great departure from the evidence adduced before the Arbitrator and an attempt by Telkom to rewrite the terms of Agreement A.. It reiterated that the terms of the said Agreement were specific that the property was to be sold to Postel for its own and its members benefit. It submitted that Telkom was not a member of Postel and the Agreement was not a joint venture where Telkom was to retain a legal interest in the property.

223. Further, Postel submitted that Telkom was merely dissatisfied that the pendulum of construction and interpretation of the term "Assigns" as used in Agreement A did not swing in its direction. It is further submitted that Telkom's claim that the Arbitrator misconducted herself in failing to address her mind to the fact that Postel had not met a condition precedent of the Agreement by not paying the purchase price is a case of misrepresentation of facts. It is argued that Clause 3 of the Agreement for sale stipulated that the purchase price was to be paid upon successful registration of the transfer in the name of the 2nd Defendant. It is therefore, incorrect to claim that Postel breached the agreement by failing to pay the purchase price.

Unjust enrichment

224. It was reiterated that Agreement A in which parties agreed that the property would be sold/purchased for Kshs. 21,000,000/= had never been varied hence the reason why the Arbitrator declined to consider Telkom's pleas for a price that is reflective of the appreciation of the land.

225. Additionally, Postel submitted that the Arbitrator cannot be faulted for failing to interrogate the terms of the Deed of Assignment because the said terms were recorded as part of a consent in this matter and a partial decree extracted. It is contended that this was a compromise between the parties and the issue was sufficiently and properly addressed by the Arbitrator.

Unsupported findings

226. Postel reiterated that Telkom failed to state that the Arbitrator observed that the Telkom's witness conceded on cross examination that the Agreement was capable of being assigned and thus its claim in that regard is unfounded. It is also noted that Telkom's averment that the Arbitrator made a finding that Postel had performed its obligations under Agreement A is misleading as the Arbitrator categorically noted that the Tribunal does not accept that Postel paid the purchase price as it alleges. It its view therefore, all the findings made by the Arbitrator were on the basis of evidence adduced at the hearing.

Bias

227. Postel submitted that the nature of the adversarial system of litigation is that one party must emerge victorious. It is therefore understandable when the party that has lost cries foul and alleges bias on the part of the umpire. It submitted that Telkom was given ample opportunity to present its case, call a witness and make submissions and thus cannot now turn back after publishing of the award to allege bias as was held in Kibutha vs Kibutha [1984]eKLR.

228. Postel also submitted on each of the allegations of bias raised by Afraco as follows:

The Arbitral Award is incomplete.

229. Postel submitted that this is an attempt by Afraco to introduce a new ground in its submissions. It stated that a cursory perusal of the grounds in support of the application to set aside the Award and the Supporting Affidavit of Salim Sadru, shows that no such complaint was made by Afraco in its application hence it is an afterthought at best.

230. Further, it was noted that Afraco does not set out which material issues were raised by the parties and have not been addressed by the Arbitrator, in order for the Award to be said to be incomplete. It submitted that the Award tackles, *in extenso*, all the issues submitted by the parties for determination and therefore the allegation of its incompleteness does not hold water.

There is no correlation between the Award, pleadings and evidence

231. Postel submits that this ground has no basis at all. It argues that at paragraphs 30 - 40 of the Award, the Arbitrator sets out Exclusive's case in terms of the Statement of Claim, Witness statement and submissions filed. At paragraphs 41 – 55 of the Award, the Arbitrator captures the position taken by Telkom in its Statement of Defence, Witness Statement and Submissions filed. Paragraphs 56 – 59 sets out Postel's case as set out in its Statement of Defence, Witness Statement and Submissions filed. Afracos position is set out at paragraphs 60 – 65 of the Award. The Arbitrator states at paragraph 61 that Afraco's case is made out in its Defence, Witness Statement and oral testimony at trial. At paragraph 66, the Arbitrator states that she has read the pleadings, submissions and the List of Agreed issues and set out the main

points in contention. From paragraph 66 – 195 of the Award, the Arbitrator robustly analyses the pleadings and evidence in reaching various findings. There is therefore a clear correlation between the Arbitrator’s findings and the pleadings filed.

Failure to make a determination as to whether the Plaintiff had discharged its burden of proof

232. It is contended that this ground is an attempt by Afraco to challenge the form instead of substance of the Arbitral Award and thus has no merit. Postel submitted that from the Award, it is clear that the Arbitrator aptly considered the evidence adduced by the parties and made a decision on the basis of the pleadings and evidence.

Bias

233. Postel noted that Afraco’s submissions that the Arbitrator answered all legal and factual issues raised, for the benefit of Exclusive is false, misleading and unfair to the Arbitrator. It submitted that in the Statement of Claim, Exclusive pleaded about the Deed of Assignment and its entitlement to have the property transferred to it as a consequence of the same. The Deed of Assignment was produced in evidence and related to the Agreement A. In addition to the foregoing, that Postel in its Statement of Defence set out the terms of the agreement and made a case for the transfer of the property to Exclusive. This was the basis of the grant of prayer C. Further, Postel stated that the Arbitrator made an observation that the dispute between it and Exclusive relating to the Agreement dated 28th January, 1993 had been compromised through the Deed of Settlement, consent and partial decree.

234. Further, it is submitted that Afraco misconstrues the terms of the Award by stating that the Arbitrator made a finding that the Agreement dated 19th January, 1993 “died a still born death due to failure by Postel to pay the 10% deposit as stipulated in the agreement.” Postel faulted this statement as false since there was no term in the agreement dated 19th January, 1993 for Postel to pay 10% of the purchase price and further, the Arbitrator aptly captured the position of the parties at paragraph 137 of the Award when she held that *“The Tribunal accepts the position that it was the clear intention of the parties that the purchase price would be paid upon the successful registration of the transfer and not otherwise.”*

235. It is submitted that it is clear from the pleadings filed that parties agreed that the validity and/or enforceability of the Agreement dated 19th January, 1993 was an issue that needed to be determined by the Arbitrator. They adduced evidence and extensively submitted on it hence it was only proper that the Arbitrator pronounces herself on the same. This submission was supported by a similar holding by the Courts in **Housing Finance Company of Kenya v J. N. Wafubwa [2014] eKLR** and **Rwama Farmers’ Co-operative Society Limited vs Thika Coffee Mills Limited [2012] eKLR**. Postel thus submits that, had the Arbitrator failed to interrogate and make a determination on whether or not the Agreement dated 19th January, 1993 was valid/enforceable, she would have fallen into error.

Misdirection on Binding nature of High Court and Court of Appeal decisions

236. Postel argued that it is worth noting that prior to the Court of Appeal setting aside the decision of the High Court in case No. **Misc App JR No. 69 of 2011**, Afraco took the position that the decision of the High Court had determined the rights of the parties before the Arbitrator and that, since the Arbitral Tribunal was an inferior tribunal and the decision was binding on it. This, Postel submits, is the correct position. It was thus argued that Afraco cannot approbate and reprobate and it is dishonest for Afraco to now claim that the Arbitrator misconducted herself in confirming this correct legal position in the Award.

237. Further, Postel submitted that Afraco’s claims that the issue of the binding nature of the High Court and Court of Appeal decisions was not raised before the Arbitrator is misleading since in the list of Agreed issues filed before the Arbitrator, the parties specifically listed an issue as to whether the decision in **JR No. 69 of 2011** was binding upon the Arbitrator. This ground therefore must fail.

The Arbitrator removed the Applicant as an Interested Party when the issue was not before her.

238. It was argued that as indicated hereinabove, Afraco initially filed a Statement of Defence and Cross Claim. Later on it withdrew its cross claim and remained with its Defence. Postel submitted that the Arbitrator did not strike out (remove) Afraco from the proceedings but determined its interest in so far as the suit property was concerned. Further, Postel stated that Afraco’s allegations that it was not allowed to participate in the proceedings is misleading. That at one point in the Arbitral proceedings, the hearing was to commence on 23rd July, 2013 and parties were ready to proceed but Afraco filed an application a day before the hearing seeking to terminate the proceedings, arguing that the issues in contention had already been determined by the High Court. The Arbitrator adjourned the hearing to enable Afraco ventilate its position. In addition to this, Afraco, through its Advocates, cross examined all the witnesses that were called by different parties. Afraco also presented evidence through Mr. Salim Sadru. In the circumstances, its allegation is clearly false.

Form of the Award

239. Postel submitted that Afraco’s attack on the Award as shallow, incoherent and ambiguous is without substance and cannot be a ground for setting aside the Award.

240. In totality, Postel submitted that it is clear that the two applications seeking to set aside the Award are misplaced and lack any merit whatsoever. It therefore urged that applications be dismissed with costs.

241. Learned counsel, Mr. Anzala for the Party too, reiterated the arguments enumerated in the written submissions and concluded that the grounds raised by Telkom and Afraco are grounds of appeal and not grounds for setting aside of the award. He urged that the Award be enforced.

Analysis and determination

242. To begin with, it is important to note that in determining these applications, the court will not consider the merits or otherwise of the dispute that was referred to arbitration by the parties herein. The court's only concern is whether the complaints made by the applicants meet the threshold for setting aside the arbitral award. (See **Century Oil Trading Company Limited V Kenya Shell Limited [2008] eKLR**)

243. Postel submitted that the issues raised by Telkom and Afraco are grounds for appeal rather than grounds for setting aside the award. The Applicants invoked Order 46 of the Civil Procedure Rules which empowers the court to set aside an award on two grounds. To that end, I find that on a *prima facie* basis, their applications are not appeals in the strict sense. They deserve the attention of the court, and the court to consequently determine them on their merit.

244. Before delving into the specific grounds raised by the Applicants, I find it necessary to consider whether the applications for setting aside the Award under Order 46 Rule 16 were made within the timeline envisaged by the law. **Order 46 Rule 17** provides for the same as follows:

“An application may be made under rules 13, 14, 15 and 16 within thirty days of receipt by the applicant of notice of the filing of the award under rule 10 or, where a date for reading the award has been fixed by the court under rule 11 within thirty days of that date.”

245. The applications by Telkom and Afraco were filed on 1st November, 2019 and 31st October, 2019 respectively. The arbitration award herein was published on **6th September, 2019** and issued to parties on **20th September, 2019**. In the premises, I find that the two applications were made within the timeline provided by the law.

246. **Order 46 Rule 16(1)** of **Civil Procedure Rules** sets out the conditions under which an award can be set aside. It provides as follows:-

“16. (1) The court may set aside an award on the following grounds only—

(b) corruption or misconduct of the arbitrator or umpire; or

(c) that either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.”

247. **Order 46 Rule 16(2)** of the **Civil Procedure** also requires an application based on Order 46 Rule 16(1) of the Civil Procedure be served upon the arbitrator or umpire.

248. Telkom and Afraco's applications are founded on allegations of misconduct on the part of the Arbitrator. They have both raised various complaints which the court will endeavor to consider in determining whether misconduct has been established. Before the court embarks on the same however, it is important to note that **Order 46 Rule 16** of the **Civil Procedure** Rules does not envisage the setting aside of an award for being against public policy. I concur with the Plaintiff's submissions that the said ground falls under Section 35 of the Arbitration Act and as such, the court will not delve into the issues raised in that regard by Afraco.

249. Misconduct is defined in the **Black's Law Dictionary (8th Edition)** as follows:

“Any unlawful conduct on the part of a person concerned in the administration of justice which is prejudicial to the rights of parties or to the right determination of the cause...The term is also used to express a dereliction from duty, injurious to another, on the part of one employed in a professional capacity.”

250. The Supreme Court of India in the case of **M/s Cochin Shipyard Ltd vs M/s Apeejay Shipping Ltd SLP(supra)** pronounced itself as follows regarding what constitutes misconduct of an arbitrator:

“Misconduct, as has been laid down, does not always have a moral connotation. To elaborate, it may not have any connection with the individual/personal conduct of the arbitrator. The said conduct would be in sphere of moral misconduct. As far as legal misconduct is concerned, as the authorities would demonstrate, the same must be manifest or palpable from the proceedings before the arbitrator. To elaborate, a person urging the ground of legal misconduct has to satisfy the court from the records of the arbitral proceedings that there has been a legal misconduct on the part of the arbitrator as a consequence of which the award gets vitiated”

251. In **Nyangau v Nyakwara [supra]** the Court cited with approval the holding in **William v Wallis and Cox (1914) 2K.B. 468**, at pages 484 and 485) where it was stated that:

“Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, “misconduct” in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside..” (Emphasis added)

252. Similarly, in the case of **Rashid Moledina v Hoima Ginners Ltd (supra)**, Spry J.A stated that:

“Under the statute law, an award can only be set aside for misconduct on the part of the arbitrator and that has been extended by

interpretation (subject to an exception not relevant to these proceedings) to include an error of law apparent on the face of the award?.”

253. In my considered view, most of the grounds raised by Telkom and Afraco do not constitute misconduct of the Arbitrator. They relate to the Arbitrator’s interpretation and analysis of the evidence tabled before her. Indeed, it is not this court’s role to micromanage the Arbitration process. For that reason, the court will only consider the allegations of misconduct which will have a direct impact on the court’s finding namely:

a. *Rewriting the Contract*

b. *Unjust Enrichment*

c. *Bias*

Rewriting the Contract

254. There is no doubt that Agreement A was between Telkom and Postel. It was specific under the Agreement that the benefit in the contract was on construction of the housing project for the members of Postel some of whom included employees of Telkom. Agreement B, was between Postel and Exclusive whose crux was on construction of the housing project. The Agreement did not at all envisage a transfer of proprietary interests or rights in the land to Exclusive.

255. However, in the Award, the Arbitrator purported to include other terms of the Agreement B by stating that in its enforcement Postel was to assign the ownership of the land. That was never the intention in the agreement of the parties. The role of Exclusive was purely to construct the houses and hand over to Postel. In doing the contrast, there is no doubt that the Arbitrator undertook to rewrite the contract.

256. In the case of **Jiwaji vs. Jiwaji [1968] E.A. 547**, the East African Court of Appeal held that:

“Where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties.”

257. Further and as was stated in **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (2002) EA 503**, a court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. Similarly, an arbitral tribunal has no powers or authority to rewrite a contract between parties unless the aforesaid factors are established.

258. It is trite that in a contract, one party cannot transfer either the burden or benefit or both to a third party without the consent of the other contracting party. To do so, ultimately is tantamount to re-writing the contract. That is exactly what the Arbitrator did, an act that amounted to misconduct. See the case of **Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd (supra)** where it was held that:

“It is trite law that it is, in any event, impossible to assign the ‘contract’ as a whole, that is including both burden and benefit. The burden of a contract can never be assigned without the consent of the other party to the contract in which event such consent will give rise to a novation.”

259. Similarly, in **Tolhurst v Associated Portland Cement Manufacturers [1900] Ltd: 1902 2 KB 660**, the Court held as follows: -

“It is I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three and involves the release of the original debtor...”

There is however, another class of contracts where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person”.

260. In **Lounsbury Company Limited v. Duthie and Sinclair [1957] SCR 590**, the Supreme Court of Canada made reference to **Anson’s Law of Contract, 20th ed., p. 262**, and opined as follows:

“A promisor cannot assign his liabilities under a contract. Or conversely, a promisee cannot be compelled, by a promisor or by a third party, to accept any but the promisor as the person liable to him on the promise. The rule is based on sense and convenience, for a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract.”

261. In the instant case, the Arbitrator went on her own expedition and purported to be innovative by assuming what would have been the end result of the contract by ordering an enforcement of the same in terms that the parties never agreed upon. Again, she lost in her mind that a contract is a willing buyer willing seller agreement and an Arbitrator is called upon to interpret it in a manner that gives effect to the intention of the parties rather than cause confusion in its implementation. She perfectly fitted in the latter by giving a totally different interpretation than what the parties intended. That again, can be described in no better terms than that she miscondacted herself

Unjust enrichment

262. This allegation was raised by the 1st Defendant. Unjust enrichment is defined in **The Black's Law Dictionary, 10th Edition** as:

"1. The retention of a benefit conferred by another, who offered no compensation, in circumstances where compensation is reasonably expected. 2. A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."

263. It is common ground that Agreement A was entered into on 19th January, 1993 between Telkom (formerly KPTC) and Postel but the sale was never completed. That the value of the suit property has greatly appreciated since then is rather obvious and the Arbitrator ought to have ignored that. Needless to say, the suit property is public land which was meant for construction of houses for public servants employed by KPTC. In the circumstances, directing Telkom to transfer the suit property to Exclusive, which is a private entity, at a very small fraction of the current value of the suit property is without a doubt aimed at unjustly enriching Exclusive.

264. In addition, by ignoring the second part of the consideration which is very clear from Clause 3 of Agreement, the only conclusion that can be drawn is that Exclusive will have the suit property to use for its own purposes which was not contemplated in Agreement A between Telkom and Postel. This was obviously oppressive and an outright injustice to Telkom and to that end, I am in agreement with Telkom's submissions that the Award was so perverse as to constitute an outright misconduct on the part of the Arbitrator.

Bias

265. Both Telkom and Afraco raised various complaints of bias against the Arbitrator. The **Black's Law Dictionary, 10th Edition** defines the word "bias" as follows:

"a mental inclination or tendency, prejudice, predilection"

266. The test for the removal of an Arbitrator on grounds of bias was set out in the case of **Modern Engineering v Miskin [1981] 1 Lloyd's Rep 515** as follows:

"The proper test to apply when considering whether to order removal was to ask whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion....The question is whether the way he conducted himself in the case was such that the parties no longer have confidence in him. It seems to me that if this arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a judge or an arbitrator saying, 'I have not had a fair hearing.'"

267. There is no doubt that the Arbitrator demonstrated bias against Telkom by applying different standards of interpretation of the two agreements. As rightly submitted by the 1st Defendant, at paragraphs 154, 155 and 156 of the Award, she rejected the claim of illegality on the basis that she required strict proof of the allegations made by Telkom and refused to make any assumptions in relation to the said allegations. The introduction of the requirement for strict proof in relation to Telkom as contrasted with her eagerness to make assumptions in favour of Exclusive and Postel amounted to treating the parties before her differently which is an instance of clear mishandling of the arbitration and therefore misconduct on her part.

268. She also expressed bias when she pronounced herself that the interested party had no sufficient interest in the arbitral proceedings. In as much the Interested Party had withdrawn its Claim in the arbitral proceedings, it remained a Defendant. This was demonstrated by the failure to withdraw the Defence and it mattered not that it only filed a one page submissions in the Tribunal. What this implied was that the Interested Party still had a case to defend and thus, it had a stake in the proceedings. Therefore, by pronouncing herself as such, she implied that the Interested Party had no business participating in the proceeding.

269. In the case of **Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited [Supra]**, the Court held that:-

"When considering the issue of bias, "the court looks at the impression which would be given to other people. Even if he (arbitrator) was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand" – see Metropolitan Properties Co. Ltd v Lannon (1968) 3 All ER. 304 at page 310, paragraphs A to B."

270. In the instant case, the Arbitrator lost sight of the fact that Afraco was incorporated into the proceedings by consent of all parties. Being aware that it had a stake in defending the claim, no doubt the Arbitrator expressed impartiality which like-minded minds would not apply in the circumstances of the case. For this reason, I cannot hesitate to conclude that she misconducted herself in the manner in which she ruled in that respect.

271. Under this head, it is important to note that although the 1st Defendant and the Interested Party argued that bias was expressed on account that the Arbitrator failed to consider some issues submitted on, the Award attests different. It is clear from the Award that she was thorough in addressing the matters raised in the submission.

272. It is noteworthy that the 1st Defendant and the Interested Party have also raised other allegations of misconduct on the part of the Arbitrator, *inter alia*, the failure to determine all the issues in dispute, misapplying the law and misconstruing evidence; incompleteness of the Award and making of an incoherent and superficial award. I have perused the entire Award as is required of me and find these allegation to be unfounded and with no basis. Accordingly, all the remaining allegations of misconduct are hereby dismissed.

273. Notwithstanding the foregoing, it suffices to note that the Plaintiff requested for enforcement of the Award. Although at the beginning of the hearing of the applications, the court was of the impression that there existed a formal application in this regard, the record discloses that the request was made to the Registrar of this court by the Arbitrator in a letter dated 1st October, 2019. Although I had addressed this issue before the oral highlighting of the submissions, it is important it goes on record that the converse of a dismissal of the two applications herein is to order the enforcement of the Award, and the vice versa. And therefore, there was nothing amiss with the learned counsel, Mr. Gichuhi in making a submission that the Award should be adopted and enforced upon the dismissal of the applications.

274. Thus, having found against the Plaintiff and the 2nd Defendant, **Order 46 Rule 16 (3)** of the **Civil Procedure Rules** obligates the court to pronounce itself on the final order. The same provides as under:

“Where an award is set aside under this rule the court shall supersede the arbitration and shall proceed with the suit.”

275. Before I conclude, I must commend the advocates for all the parties in this matter for their respective thorough submissions and authorities cited which I have given due consideration. The authorities have indeed made it easier for this court to decide the matter.

276. Accordingly, I give the following orders:

- a) **The 1st Defendant’s (Telkom) Notice of Motion dated 1st November, 2019 and the Interested Party’s (Afraco) Notice of Motion Application dated 31st October, 2019 are hereby allowed in that the Arbitral Award published on 16th September, 2019 by the Arbitrator Ms. Zehrabanu Janmohamed Advocate is hereby set aside.**
- b) **Conversely, the request for enforcement of the Award is dismissed.**
- c) **The Parties are now at liberty to proceed with the suit.**
- d) **Costs of the two applications shall be borne by the Plaintiff.**

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Gichuhi for the Plaintiff.*
2. *Mr. Nyaburi for the 1st Defendant.*
3. *Mr. Dancun for the 2nd Defendant.*
4. *Miss Hanan for the Interested Party*