



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND TAX DIVISION**  
**MISC CIVIL SUIT NO. 350 of 2015**  
**IN THE MATTER OF THE ARBITRATION ACT**  
**AND THE ARBITRATION RULES 1997**  
**AND IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD**

**BETWEEN:**

**KENYA POST OFFICE SAVINGS BANK .....APPLICANT**

**and**

**THE ADVERTISING COMPANY LIMITED .....RESPONDENT**

**AND IN THE MATTER OF AN APPLICATION TO ADOPT AN**  
**ARBITRAL AWARD AS AN ORDER OF THE COURT**

**B E T W E E N**

**THE ADVERTISING COMPANY LIMITED ..... APPLICANT**

**KENYA POST OFFICE SAVINGS BANK .....RESPONDENT**

**R U L I N G**

1. The Court has before it two opposing applications relating to the Arbitral Award of the Hon Arbitrator, Kamau Karori Esq date 28<sup>th</sup> April 2015 and published on 30<sup>th</sup> April 2015 (the Arbitral Award). The underlying dispute between the Parties arises from a contract between an advertising agency, The Advertising Company Limited (hereinafter referred to as “TAC LTD”) and its client, Kenya Post Office Savings Bank (hereinafter referred to as “Postbank”). The first Application is brought by Postbank and seeks to set aside the Arbitral Award. The Second Application filed several months later seeks to have the Award recognised and adopted as an order of the Court.

2. The First Application is dated and was filed on 29<sup>th</sup> July 2015. It is brought “under **Section 35(1), (2) (a)(iv and (2)(b)(i) and (b)(ii)** of the **Arbitration Act, Rule 7 of the Arbitration Rules 1997** and all enabling provisions of the Law). The First Application seeks the following Orders:

“1. THAT the award dated 28<sup>th</sup> April 2015 and published on 30<sup>th</sup> April 2015 in the Arbitral Proceedings between the parties herein; THE ADVERTISING COMPANY LIMITED against KENYA POST OFFICE SAVINGS BANK be set aside in its entirety

2. THAT the costs of this application be provided for.

The Application sets out 12 Grounds on which they it is based. They can be summarised as follows:

(1) The Arbitral Award, the Claimant (TAC Ltd) succeeded in its claim and was awarded the sum of Kshs. 10,336,567.06cts with interest accruing at the rate of 17% per month from 7<sup>th</sup> November 2012 until full payment;

2. The Award consists of Withholding Tax lawfully deducted by Postbank and remitted to the Kenya Revenue Authority (“KRA”) under *the Income Tax Act Cap 470*(the Act) and the *Withholding Tax Rules 2001* (the Rules);

3. Under the Act only the Commissioner of Income Tax has the Authority to decide whether Withholding Tax has been rightfully withheld and remitted onwards to KRA and if not to make a refund. Under the Act only TAC Ltd has the locus standi to claim a refund of tax paid in this way;

4. That the Award seems to excuse the Claimant for liability to pay income tax and therefore to be subject to the withholding of tax from payments

5. Only the Commissioner of Income Tax has the power to make that decision;

6. The Arbitral Award to the extent that it does or purports to absolve the Claimant from a liability to pay tax, is contrary to public policy and unenforceable

7. The issue of tax liability was not capable of being resolved by Arbitration “*and therefore the award is wholly void*”.

8. The Award is contrary to public policy because it is absurd and “amounts to double jeopardy on the part of Post bank.

9. Postbank is a public body and stands to lose the amount equivalent to the award and thereby causing loss of funds to the public.

10. The award of interest is also against public policy and unconscionable

11. That it is in the interests of justice for the orders sought to be granted.

3. The Application is supported by the Affidavit of Mercy N.K. Mbijiwe who is the Company Secretary of Postbank and an Advocate of the High Court of Kenya. She says she is well versed with the subject matter of the dispute, so competent and also she is duly authorised by reason of her position to swear the Supporting Affidavit. The Supporting Affidavit Exhibits a number of documents that are common to and relied upon by both Parties. These are:

**1. MNKM 1 (a) and (b)** comprising copies of the Award and covering Letter

**2. MNKM 2** – a Copy of the Agreement between the Parties dated 29<sup>th</sup> April 2010.

**3. MNKM 3** – an extract from *The Income Tax (Withholding Tax) Rules 2001*

**4. MNKM 4** – a copy of the schedule of invoices summary for the Tax withheld

5. **MNKM 5** – a copy of the Claimants Bundle and Pleadings and Submissions used in the Arbitration together with the Respondents Pleadings and Submissions.

4. The Supporting Affidavit copies out vast tranches of the documents that are exhibited. However, it makes several assertions relating to the Application including that all the payments to be made under the Agreement were subject to Value Added Tax, that the Claimant was liable to pay all taxes due under the law. (Paragraph 6) and that Postbank was responsible for deducting the withholding tax and remitting it to the Kenya Revenue Authority (KRA) (paragraph 9) and Rules 4, 5 and 6 of the **Withholding Tax Rules (WTR)**. The Affidavit also puts forward Postbank's case, namely that the invoices in relation to which the deductions were made and remitted to KRA related to invoices for production, decision and other professional services. The sum of the deductions has been agreed by the Parties as amounting to Kshs. 10,336,567.06. It is also agreed that the same amount was remitted to KRA.

5. At paragraph 12 the deponent states; *“THAT a perusal of the award shows that the Hon Arbitrator arrived at various findings from paragraph 32 to 39 of the award as well as paragraph 45, the effect of which was to conclude the invoices from which the Applicant withheld tax and remitted it to KRA did not amount to invoices for services professional services and therefore, the deduction amounted to a breach of contract and the Applicant was bound to make the payment irregularly deducted and pay the same to the Claimant even though it amounts to a second payment.”*. The Affidavit goes on to say that the Arbitrator as a consequence completely misinterpreted his mandate. It is not clear what is meant by the use of the term “mandate” in that context. TAC Ltd suggests that it means jurisdiction. What is said in paragraph 13 is *“THAT... The Hon Arbitrator in arriving to the aforesaid finding completely misinterpreted his mandate and therefore the award reached exceeded his mandate and let to an award that is ultra vires the contract and the law....”* The Deponent then goes on to repeat the legal advice received, which in effect amounts to legal argument, not fact. At paragraph 18 it is said *“that no prejudice shall be suffered by the Claimant should the orders sought herein be granted noting that it is entitled to seek a refund of the money.”* She does not attribute a source to that statement, so it is unclear whether it is meant to be a fact of the tax liability/status of TAC Ltd, of a statement of law, or a simply conjecture.

6. The Respondent to the First Application (TAC Ltd) filed a Replying Affidavit on 10<sup>th</sup> September 2015. The Deponent of that affidavit is Mr Paul Owora who is a Director and the Chief Executive Officer of TAC Ltd. The correspondence relied upon by the Applicant Postbank was authored by a different officer of the Respondent TAC Ltd (Chief Accounting Officer). The Replying Affidavit asserts that the Application is bad in law. It sees the Application as an attempt to appeal. In the circumstances, it asks the Court not to exceed its mandate. It is argued that the public policy is in favour of enforcing arbitration awards.

7. On 3<sup>rd</sup> December 2015 the First Application was due to be heard. On the day before that, 2<sup>nd</sup> December 2015, TAC Ltd filed the Second Application by way of a Chambers Summons. I will deal with that below. By its Reply the Respondent is challenging the First Application. Paragraph 3 repeats legal advice and therefore presents the legal argument. It is said that the First Application, in the opinion of the deponent and his lawyers the Application should have been brought under **Section 39**. That seems to suggest that the Respondent believes that the Application is, in fact, being brought to resolve a question of law during the currency of the arbitration. That is not the case. The Application is being brought to set aside an arbitral award that has been handed down, thereby denoting that the arbitration has been concluded. The Affidavit deals with very little of the factual background.

8. The legal advice given to the Respondent, as set out in the Replying Affidavit is that the Applicant is seeking to appeal the decision of the Arbitrator. If that was the case, the Applicant would be asking the Court to replace the Arbitrator's decision with its own. That is not what the Application seeks. In addition at paragraph 3(a) of the Replying Affidavit it is said *“The Applicant's instant application invites this Honourable Court to exceed its mandate provided under Section 35 of the Arbitration Act and sit in appeal “(sic) on the Arbitral Tribunal's Award with the sole aim of giving the Applicant a chance to re-litigate the same matters of fact and law which were raised, pleaded heard and fairly and justly addressed in the Arbitral proceedings”*. Paragraph 3(b) then goes on to say that the application invites

this Honourable Court to exceed its mandate under **Section 35** and review either by way of Judicial Review or Review the same matters. Those assertions demonstrate a misunderstanding of the process invoked by **Section 35 of the Arbitration Act** and the First Application. Paragraph 3(e) states “*It is misleading for the Applicant to allege that the Arbitral Tribunal misinterpreted and exceeded its mandate when the Tribunal’s mandate was formulated and agreed upon by the parties in their pleadings, agreed issues and submissions prior to the delivery of the ruling*”. That Replying Affidavit, argues that the Arbitrator had jurisdiction to hear the dispute by reason of Clause L of the Agreement. Paragraph 5(d) makes the valid point that the Applicant did not raise any objection to jurisdiction or excess of mandate at the time and has therefore lost its right to object under **Section 5** of the **Arbitration Act**. To that extent it sets out a well established principle. In its arguments the Replying Affidavit seems to be using the words “jurisdiction” and “mandate” as if they mean the same thing. In relation to dispute resolution they are not and that raises an issue for determination.

9. Paragraph 6 of the Affidavit deals with the question of public policy. It states correctly that the public policy leans in favour of recognition of arbitral awards. It goes on to state that the award neither absolves the Respondent of its obligations to pay tax nor prevents the Applicant from deducting withholding tax where lawfully due. The Respondent relies heavily on paragraphs E and F of the Agreement. It is said that the Applicant did not provide any evidence to prove that any of the invoices related to professional fees, thereby entitling the Applicant to deduct withholding tax. The Affidavit then sets out the arbitral process. That does not fall within the Court’s remit under **Section 35** because the Applicant is not arguing that the arbitral process is flawed. It is said on advice that the Applicant does not satisfy the legal requirements for the grant of the orders sought and the Application should be dismissed.

### The Second Application

10. The Respondent here, TAC Ltd, has filed its own Application (on 2<sup>nd</sup> December 2015). It seeks to enforce the Award. That Application is brought under **Section 36(1) and 3** of the **Arbitration Act**. It may be that is a reference to sub-section(3) not Section 3. In brief TAC Ltd is seeking enforcement of the Award. The Application prays for orders that:

1. That this Honourable Court be pleased to recognise and adopt the Arbitral Award prepared by Kamau Karori, FCIaRB (sic) on 28<sup>th</sup> day of April 2015 as a Judgment of this Honourable Court
2. That the Honourable Court be pleased to grant leave to the Applicant to enforce the said award as a decree of this Honourable Court
3. That the costs of this application be borne by the Respondent.

11. The Application is supported by the Affidavit of Paul Owara who says he is the Chief Executive Officer and as such he is conversant with the facts and duly authorised to file the Affidavit. The timing of the Application was such that suggests certain assumptions on the part of TAC Ltd. However it does give the Court the opportunity to deal with both Applications together for better case management. That gives rise to two main or headline issues, that is; (1) should the Court set aside the Award and (2) Should the Court recognised and adopt the Award thereby allowing for its enforcement. Both Applications require separate consideration analysis and determination. One is not the flip side of the other. The Second Application also asks for leave to enforce the Award. It is not entirely clear why TAC Ltd feels that is necessary. The Supporting Affidavit does not expand upon that. It may be that it considers Postbank to be a public body. The Application is being brought because (a) Postbank has not satisfied the Award (paragraph 9) and has failed to prosecute its own application (Paragraph 11) .

### The Law

12. The Application relates to an arbitration between the Parties resolved under the Arbitration Act (as amended) and the Arbitration Rules. The Arbitral process from which the Award emanates was undertaken pursuant to the Arbitration Act and the Chartered Institute of Arbitrators Rules (not the Rules under the Arbitration Act). The Act, at **Section 35** sets out clearly the grounds on which the Parties can

challenge an award. It states:

35. *Application for setting aside arbitral award*

(1) *Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).*

(2) *An arbitral award may be set aside by the High Court only if—*

(a) *the party making the application furnishes proof—*

(i) *that a party to the arbitration agreement was under some incapacity; or*

(ii) *the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or*

(iii) *the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

(iv) *the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or*

(v) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or*

(vi) *the making of the award was induced or affected by fraud, bribery, undue influence or corruption;*

(b) *the High Court finds that—*

(i) *the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or*

(ii) *the award is in conflict with the public policy of Kenya.*

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

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

From its face, it is clear that **Section 35** is what the First Application relies upon.

13. The Second Application is brought under **Section 36** of the Arbitration Act.

36. **Recognition and enforcement of awards**

(1) *A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.*

(2) *An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.*

(3) *Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—*

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

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

**Section 36** refers to **Section 37** which is very similar to **Section 35** and provides:

### **37. Grounds for refusal of recognition or enforcement**

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

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

(i) *a party to the arbitration agreement was under some incapacity; or*

(ii) *the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;*

(iii) *the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

(iv) *the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or*

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

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

(vii) *the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;*

(b) *if the High Court finds that—*

(i) *the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or*

(ii) *the recognition or enforcement of the arbitral award would be contrary to the public policy*

of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security. Any analysis of the issues in dispute must consider the underlying facts. It is not in dispute that the Parties entered into the Agreement. The Agreement was dated 29<sup>th</sup> April 2010. The Agreement seems to have continued for some time before the dispute arose.

14. The dispute also requires consideration of the **Income Tax Act and Withholding Tax and Rules** but in the interests of brevity they are not set out here.

### Analysis and Decision

15. Although the Replying Affidavits contain argument rather than evidence, what can be garnered from them and the evidence before the Court is that The Agreement contained an Arbitration Clause. The Parties referred their dispute to arbitration. The Arbitration was conducted by a single arbitrator chosen by the procedure provided for using the Offices of the Law Society of Kenya. The Parties both willingly submitted to the jurisdiction of the Arbitrator. That is demonstrated by the fact of their full participation. In the course of that, they agreed through correspondence that the dispute was susceptible to resolution by Arbitration. With that in mind they submitted an agreed list of issues. The Arbitrator provided an award that restricted itself to the Agreed Issues. The starting point of any analysis must be the Agreement and therefore the terms of the contract to which the Parties freely agreed. It is argued, and it is the case that the Parties should be held to their agreement (**Pipelastic v Sankolit CA 1999**).

16. It is a basic principal of construction of contractual clauses is that consideration must be given to the full document and not the selective portions put forward in Affidavits and/or submissions. The Contract was dated 29<sup>th</sup> April 2010 and was between “The Bank and “The Agency”. The Recital provides:

*“Whereas the Bank is desirous of engaging the services of the Agency to provide integrated marketing communication and advertising services encompassing strategic planning, creative development, production, media planning, media buying and other related services and whereas the Agency is willing and committed to offering its services in that regard.”.*

It is abundantly clear therefore that the Parties envisaged the provision of “**advertising services**”. It is also abundantly clear from the above that the provision of those services encompassed “media buying”. Media Buying was not the purpose of the contract, it was a component.

17. Clause B lists the Scope of Work and the Agency’s Obligations. It states;

*“In the Execution of the Bank’s marketing plans, advertising and other services, when appointed by the Bank, the Agency will do the following:*

- 1. Analyse the Banks present and potential markets*
- 2. Create, prepare and submit to you, for approval, advertising ideas and programs.*
- 3. Develop and execute the complete strategy for all mass media viz television, radio and the print media for the Banks products and services.*
- 4. Design concept and produce television commercials (60/45030/10 seconds) or as specified and agreed with the Bank.*

5. *Concept design and production of radio commercials and jingles (60/45/30/10 seconds) as specified and agreed with the Bank.*

6. *Concept design and production of print adverts of various sizes (newspaper full size, ½ page ¼ page strip ads, portrait, landscape, magazine adverts) to be placed in selected newspapers and magazines*

7. *Concept design and production .....*

19. *For all new products and services the Agency will be required to develop and execute the complete strategy ranging from the strategy development, concept design, production, printing, media planning and buying/placements*

20. *To provide public relations and event management services as may be requested by the Bank....”*

18. It is further abundantly clear from what is set out above that the Agency was to provide a full advertising campaign including a portfolio of advertising services. It is also clear and logical that the buying of media air time would come at the end of the process and only after the adverts and/or audio commercials and/or jingles had been produced. Without the former the latter would be pointless. Therefore it is undeniable that the Agency TAC Ltd was engaged to provide “services” and given its expertise those would be “professional services” and well as buying media or airtime. Clause D2 provides that “*The Agency will submit a table format in accordance with schedule 1, the Agency’s commitment as regards the availability of its Senior Management team for discussion and review and the other resources to be allocated to this assignment*”. That level of management suggests something more than obtaining advertising space.

19. The next question that arises is, how was that to be paid for? That brings us to the part of the contract that the Agency TAC Ltd relies upon in particular Clauses E and F. Clause E provides for the payment by the Bank to the Agency the published rate cards less any discounts agreed with the bank. That contains an element of reimbursement of the cost incurred. However, there is also the element of negotiating a discount. How is that to be classified. The Bank is not of itself entitled to the discount. The Card price is what it is expected to pay. Therefore, it is abundantly obvious that a human element of negotiating the discount must be applied. That is a SERVICE provided to the Bank. Clause F provides for the payment of materials and services it provides that materials will be paid for a net cost as will services other than space, television etc. Clause F 2 provides “The Agency shall provide the cost of any material and services to the Bank for authorization before they commence the work. Clause G provides for the payment for the provisions of “**PROFESSIONAL SERVICES RENDERED**”. It is therefore undeniable that the Agreement provided for the provision of a mixture of goods and services. The Agreement had an initial duration of a period of two years from 1<sup>st</sup> January 2010 which was subject to extension. Performance evaluation was to be done on a quarterly basis by the Bank. The evidence before the Court suggests that the Agreement continued for the initial contractual period and the Bank made some payments to the Agency. That suggests that there was satisfactory performance. Given that performance included the provision of goods and services, it is fair to assume that both aspects were satisfactorily performed. Page 25 of the Second Summons exhibits a letter from Postbank dated 29<sup>th</sup> September 2011 stating “that the bank is willing to extend the contract for a further 12 months with effect from January 2012 under the same contractual terms.”

20. In the course of the contractual relationship and in accordance with the terms of the Agreement, the Agency TAC Ltd rendered invoices and they were paid by Postbank. The evidence before the Court relates to the Parties respective arguments here. However, there is voluminous (if not comprehensive) evidence available of the invoices raised and in particular the “Claimant’s List of Documents” relied upon for the Arbitration which appear from page 61 onwards. There is no dispute that the Postbank deducted withholding tax from payments made relating to certain invoices. It is also agreed that such deductions were remitted to the Kenya Revenue Authority to the Credit of the Agency TAC Ltd. At page 71 there is a Letter exhibited dated 23<sup>rd</sup> November 2013 from Postbank to TAC Ltd. The letter refers to

Withholding Tax. It states; *“I refer to the above and our agreement to pay TAC in lieu of WHT recovered. KRA did not provide us with response based on the time line we had set and we have subsequently analysed the WHT recovered in 2010 to 2012 per the attached schedule.”*. It goes on to state that the amounts being claimed by TAC Ltd have already been paid to KRA and therefore the only remedy would be to claw back and WHT obligations and pay “TAC rather than KRA”. Given that the Bank is asserting and relying upon its statutory obligation to pay Withholding tax to KRA. That is a surprising statement. In any event it seems to have given rise to the dispute referred to the Arbitrator and the arguments relating to which Party has the obligation of claiming a refund from KRA. The sums there set out was Kshs10,336,567.06. The Parties agree that is the sum in dispute.

21. Some of the invoices submitted by TAC Ltd for payment are exhibited. They form the basis of the ten million shilling figure and the Schedule attached to the letter. Even a cursory glance at the invoices will demonstrate what is the subject matter to which it relates, (whether goods or services or both) to which each particular invoice relates. Invoice No 9320 (page 83) relates to computer time, graphics typesetting and artwork. It is fair to assume that those items require human input and therefore amount to the provision of services rather than goods. The CD may be “goods” but the information/graphics/recordings loaded upon it can only be the product of services. The same applies to Invoice No 9362 at page 84. The invoice at page 85 provides further assistance. It sets out a cost for computer time/graphics and typesetting and a very useful breakdown of materials used eg CD for loading artworks. It is undeniable that relates to “goods” or reimbursement. It is also clear that the distinction between goods and services was within the contemplation of the Parties because there is a note at the foot of the Invoice which states *“There is no cost for concept/design and copy since we are using existing design and copy”*. It could therefore be conceivable that the invoice dated 28<sup>th</sup> May 2010 relates only to goods and not a mixture of goods and services. From the Submissions exhibited it seems that neither Party brought that distinction to the attention of the Arbitrator. Further, the Arbitrator did not address the issue himself. He simply assumed that each and every invoice attached to the schedule related to goods. The Claimant in the Arbitration argued that the invoices related purely to the provision of “goods” and the Respondent in the Arbitration argued that it was purely services therefore giving rise to the obligation to retain withholding tax. There is no part of the Award which demonstrates that the Arbitrator actually addressed his mind to that distinction, both as a matter of fact, and/or as a matter of law.

22. The Claimant in the Arbitration, went on to argue that Postbank is not the Commissioner of Domestic Taxes, which is a statutory office created under the ***Kenya Revenue Authority Act (Cap 470)***. Postbank in response pointed to the statutory provisions that place the obligation on the payer of services to withhold tax and remit it to the KRA. In those circumstances and in accordance with those provisions Postbank. However, it is deemed to be a Commissioner in the sense of a collector of taxes under the ***Withholding Tax Rules***.

23. Prior to the preparation of that Schedule the parties had exchanged correspondence. On 23<sup>rd</sup> July 2012, the Claimant TAC Ltd wrote to Postbank about the issue. The Letter said, *“we wrote to KRA in regard to the matter of withholding tax from our suppliers invoices. **They responded by proposing that an audit be carried out to confirm how we invoice you for our services. The audit is yet to commence and we are not sure when it will be done**”* (emphasis added). That Letter and that Statement, therefore demonstrates and records that the distinction between the provision of goods and the provision of services was a matter that was within the contemplation of the Parties. The Claimant then resiled from that position in the Arbitration and argued that (a) the entirety of the invoices related to the provision of goods/airtime/advertising space and (b) they were therefore payable in full, on demand. The inconsistency is clear. Who can or should claim repayment is a red herring. The Respondent TAC Ltd relied on the Witness Statement of Paul Owora at paragraph 8 which states *“Effectively, there was no professional fee payable by the Respondent to the Claimant and both parties understood this arrangement from the beginning and hence the requirement in the Agreement requiring the Claimant to obtain a Media Schedule from Media Houses for approval by the Respondent and subsequent issuance of the Local Purchase Order based on the Media Schedule”*. He notably makes no reference to the parts of the Agreement that refer to services. Similarly, the Arbitrator has not demonstrated he took into account those parts in coming to his decision.

24. The Letter goes on to ask for payments to offset debts, in other words to improve the cash flow situation of the Agency. The Chief Accountant said “WE undertake to refund any discrepancy or the whole amount should KRA state otherwise but we are confident of our position as we have had a similar issue in the past.”. The Letter also gives an indication of the real concern. It says. “*We however feel this might take longer than expected and we are under intense pressure from our suppliers to settle overdue accounts, but unable to do so due to cash flow constraints.. As things stand it would be extremely difficult for us to provide Postbank with credit facilities and that would impact on our service delivery.*”. The Arbitrator did not take into account the loss of cash flow in the finding and/or assessment of damage, but he did take it into account in respect to the rate and term of interest payable. At the very least that approach is inconsistent. The Arbitrator did not take into account the fact that TAC Ltd warranted that it was financially viable to take on the contract.

25. The evidence therefore demonstrates that the question of the retention of withholding tax had arisen in the past and had been resolved in favour of TAC Ltd . In this case TAC Ltd although stating itself to be confident of the same outcome, said it could not wait due to cash flow constraints. However, each case must turn on its own facts. The Arbitrator does not appear to have addressed his mind at all to the inconsistency of that position with the warranty of liquidity that TAC Ltd gave in the Agreement at paragraph .... The Bank responded to the Letter of 27<sup>th</sup> September 2012. In it the author said “*Agency fees are subject to withholding income tax at a rate of 5%. The nature of the service provided by your company TAC to Postabank is that of an Agent hence payment to TAC attracts withholding income tax... As a government tax agent we are obliged under the law to withhold income tax for any professional service offered to us and forward the same to KRA as done to all professional service providers.*”. This issue also raises a clear conflict between the Law in the form of the Income Tax Act and Withholding Tax Rules and that part of the Agreement which provides that the Claimant/TAC Ltd would be responsible for paying its own taxes and duties etc. TAC Ltd ’s correspondence shows they were aware of the issue previously however, allowed that Clause to be incorporated into the agreement.

26. However, the Agreement also contains a **Clause U** which provides that the Laws of Kenya shall govern the Agreement. Clause U2 provides that in the event “*That any term, condition or provision contained within this Agreement shall be determined to be invalid, unlawful or unenforceable to any extent, the same shall be severed from the body of the Agreement and the remainder shall continue to be valid and enforceable.* From the Award it is clear the Arbitrator did not address his mind to the issue of whether or not, if Postbank’s argument on the question of withholding income tax turned out to be correct, how those two requirements could be reconciled. He decided in favour of the option and an interpretation that leans in favour of breach of the WHT Rules notwithstanding that the Agreement provides a resolution in Clause U. Also terms of payment are set out in Clause I.

27. In addition, the Claimant’s Bundle contains (from page 220 onwards) copies of Receipts from the Kenya Revenue Authority. It shows that payments were made on behalf of and to the credit of the Agency TAC Ltd. As demonstrated by the Schedule the sum of those receipts amounts to Kshs,10,336,367.06 as claimed by the Respondent. The Arbitration Award and its reasons address the issue of loss. However, it does not consider at all the tax credits that the Claimant has benefited from as a consequence of those payments being made. If the Claimant is entitled to keep those credits and also to receive further payments awarded that amounts to a duplication of payments. The correct analysis of that is not, as argued by Postbank double jeopardy (which is criminal terminology) but “double recovery”. Again there seems to have been no consideration of that in the Award.

28. In addition, notwithstanding the recommendation from KRA for an audit of what was properly due, the Claimant relied upon and the Arbitrator accepted the professional opinion of an Accountant/Auditor. That Accountant is employed by the Claimant. Therefore cannot be said to be an independent professional opinion. The Arbitrator gave no reason for preferring one approach over the other.

29. The Parties filed Written Submissions for both Applications together. They are reflective of the Affidavits filed. The Court has taken them into account. The Parties also highlighted their Arguments at length and the Court found them very helpful and is grateful for the hard work undertaken by Counsel for both Parties.

30. However, as argued by TAC Ltd , It is a well accepted proposition that, “An arbitral award is final and binding on the parties; the intervention of the Court as regards an award delivered by an arbitral tribunals is limited strictly to the grounds set out in **Section 35** of the Arbitration Act and no more; the authority of the court dealing with an application under **Section 35** does not confer upon it an appellate jurisdiction meaning that the court is not entitled to review the decision of the arbitrators for the purposes of substituting its own view or conclusions with that of the arbitral tribunal.”

In **Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others, Civil Application No. 327 of 2009**, where the Court stated thus:-

**18. “...I fully endorse the principles as outlined in the CHANNEL CASE (supra) because they are in line with the arbitral tribunal’s jurisdiction as set out in section 17 of the Arbitration Act of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of section 17 and in particular violated the principle known as “Competence/Competence” which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is “Competence to decide upon its competence” and as expressed elsewhere in this ruling in German it is “Kompetenz/Kompetenz” and in French it is “Competence de la Competence”. To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as “acting wrongly but within jurisdiction.”**

Apart from the fact that the English Act that corresponds to the Arbitration Act 1995, is the Arbitration Act 1975 and not the Arbitration Act 1996, the proposition holds.

31. Therefore dealing with the issues raised by the Parties for setting aside the Award. The Application was filed within 3 months. The Application is brought under **Section 35** and falls squarely within that procedure. The Applicant argues that the Arbitrator exceeded “his mandate”. In so far as the expression “his mandate” is meant to mean jurisdiction, that argument has no basis. Both the Agreement and the Law gives the Arbitrator the power and authority to decide the parameters of his Jurisdiction. However, the Agreement provides for the Application of Kenyan Law. Kenyan Law includes the Evidence Act as well as the Constitution and tax legislation. In the circumstances, in so far as the Arbitrator has failed to apply the principles to ensure a fair trial by applying the appropriate rules of evidence, both in terms of admissibility, the Arbitrator has gone beyond the Agreement by failing to apply the Law of Kenya and to that extent the Application is justified.

32. In relation to the Ground of Public Policy considerations the Arbitrator had various choices to make. The first was the choice between the Income Tax Act and its Rules and the Agreement. The Act provided for income tax to be withheld in certain circumstances. The Agreement provided for the opposite. The Arbitrator adopted the approach that meant tax was not withheld nor remitted. Potentially that provides an interpretation that is at odds with the Payers responsibilities and duties under the tax legislation. It could also be argued that it facilitates tax avoidance, in exactly the way forbidden by the Withholding Tax Rules 2001. In the circumstances, such an interpretation is contrary the Act and therefore contrary to Public Policy in particular that part of the public policy that requires efficient assessment and collection of taxes in the public good.

33. Further, it is clear from the above analysis that the Arbitrator was selective in the evidence on which he based his decision. He gave no reasons for discounting or dismissing the evidence incorporated in the Agreement itself and also the correspondence. In the circumstances, the Applicant Postbank has not had a fair trial. That is contrary to public policy. In addition, the Constitution gives the High Court supervisory jurisdiction including to ensure a fair trial where a person or body exercises a judicial or quasi judicial function (**Article 159(3) CoK**).

34. The Arbitrator has not explained why a tax credit is treated purely as a loss and not a benefit as well. Further, the Arbitrator has, in the assessment of damages, applied the standard for claims of tort (to return

the party where it would have been but for the injury) and not the assessment of damages for contractual claims, that is putting the party where it would be had the contract been properly and fully performed, which is the correct measure (*MacGreagor on Damages*).

35. For the Reasons set out above, the Application by Postbank is allowed. The Application for setting aside is allowed.

36. Moving onto the Second Application. Although it is brought under **Section 36**, the Court is required to apply the criteria set out in BI which is almost identical to **Section 35**. Therefore the findings relating to the First Application apply mutadis mutandis to the Second Application. For the shortcomings identified. Although through filing a certified copy of the Agreement and the Award, the Application complies with **Section 36**, the Application for recognition of the Award is dismissed for the reasons set out above.

37. As can be seen from the analysis the issue is very straightforward. It was raised by the KRA. The Parties are to define which invoices/demands relate to the provision of goods and which relate to the provision of services. The broadbrush approach used by the Arbitrator was facilitated by the Parties failure to carry out that analysis or audit. In the circumstances, each Party is ordered to pay its own costs.

38. In relation to the costs of the Arbitration, the Court file contains a Letter showing that the Parties have consented to the Applicant Postbank paying the Respondent Agency's costs of the Arbitration. This Court will not interfere with that Order of Consent.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**DELIVERED, DATED and SIGNED this 29<sup>th</sup> day of June 2017**

**In the Presence of**

Court Assistant: James

Applicant Bank: No Appearance

Respondent Agency : Advocates' Clerk