REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 129 OF 2014

IN THE MATTER OF THE ARBITRATION ACT 4 OF 1995

AND

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE AN ARBITRATION AWARD

BETWEEN

KENYA TEA DEVELOPMENT AGENCY LTD........................1ST APPLICANT

KAPKOROS TEA FACTORY LIMITED.................................2ND APPLICANT

NYANKOBA TEA FACTORY LIMITED.................................3RD APPLICANT

RUKURIRI TEA FACTORY LIMITED....................................4TH APPLICANT

GIANCHORE TEA FACTORY LIMITED................................5TH APPLICANT

MOGOGOSIEK TEA FACTORY LIMITED.............................6TH APPLICANT

WERU TEA FACTORY LIMITED..7TH APPLICANT

KAPSET TEA FACTORY LIMTED..8TH APPLICANT

Versus

SAVINGS TEA BROKERS LIMITED..RESPONDENT

<u>RULING</u>

Two applications: setting aside and recognition of award

[1] I have two applications before me. The first in time is the Chamber Summons dated 17th March,

2014; it is asking the Court to set aside the final arbitral award made by the arbitrator herein, or in the alternative, the portion of the final award to the extent that it awards the goodwill sum of Kshs. 106,912,822/= and/or loss of profit for private sale to be set aside. The second one is the Chamber Summons dated 29th April, 2014; it is seeking for the enforcement of the award as a decree of the Court. My view is that when applications under section 35 and 37 of the Arbitration Act are presented together, the Court should determine the one for setting aside the award first, and then determine the one for recognition and enforcement of award. The said order and sequence makes sense; first, it is a coherent way of doing things; and second, the decision in the application under section 35 will determine the course of the application for recognition and enforcement of award. Inversion of this pecking order may produce unnecessary embarrassment or lead to duplication of efforts. I have always said that when the two applications are made at the same time, they should be heard back to back and determined forthwith. I will so proceed. Accordingly, I propose to deal with the Chamber Summons dated 17th March, 2014 first.

APPLICATION TO SET ASIDE AWARD

Introduction

[2] The Applicants and the Respondent had a business relationship; the Respondent brokered for sale of tea produce belonging to the Applicants on a commission basis. A dispute arose between the parties, whereby the Applicants stopped supplying tea to the Respondent for auction. The Respondent claimed that there was breach of contract of various agreements entered into by the Parties. The Respondent, filed a suit against the said applicants in ***High Court Civil Suit No. 522 of 2010 Savings Tea Brokers Ltd –vs- K.T.D.A & 7 Others*** seeking injunctive relief against the Applicants together with damages and a declaration that a dispute had arisen between the parties warranting arbitration in terms of respective contracts between the parties. In a ruling delivered on 10th May, 2012, **Mutava J** found and ordered that indeed a dispute had arisen between the parties and in terms of the respective brokerage agreements, the same should be referred to arbitration. By a joint letter dated 9th November, 2012, the parties Advocates agreed to appoint Justice (Rtd) Aaron Ringera as the sole arbitrator over the dispute. The final award was published on 20th February, 2014 where the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Applicants were jointly and severally to pay Kshs. 151, 278,991/= to the Respondent within 15 days of either party taking up the award. The said applicants were also to pay costs of the arbitration, including the tribunal fees and expenses.

[3] Dissatisfied with the award, the Applicants filed a Chamber Summons dated 17th March, 2014 asking the Court to set aside the arbitral award made by the arbitrator or that in the alternative, the portion of the final award to the extent that it awards the goodwill in the sum of Kshs. 106,912,822/= and/or loss of profit for private sale be set aside. The application is expressed to be brought under Section 35(2) (a) (iv) & (b) (ii) of Arbitration Act, 1995, Article 159(2) (d) (e) of the Constitution of Kenya and all other enabling provisions of the law.

[4] The application is supported by the Affidavit sworn by the Applicants' Group Secretary, John Kennedy Omanga. The affidavit sets out the principal grounds for the application. These grounds are:

a) That the award contains decisions and matters beyond the scope of reference to the arbitration. The major arguments are; first, that the Arbitrator exceeded the scope of the agreements when he awarded the Respondent a goodwill sum of Kshs. 106,912,822/=. And second, the Arbitrator erred by making an award based solely on computation of commission on private sale based on sales carried out by the applicants, when the dispute herein concerned compensation of private sales by the Respondent.

b) That the tribunal did not decide the reference in accordance with the terms of contract between the parties and contemplated matters not provided for by contract.

c) That the Tribunal did not take into account the usages of trade applicable to the transaction

between the parties.

d) That the tribunal did not apply relevant substantive law on the interpretation of written contracts.

e) That the Arbitrator determined and conferred jurisdiction with respect to the 4th, 6th, 7th and 8th Applicants without any written agreement for Arbitration and contrary to the provisions of section 4 of the Arbitration Act which provides that an arbitration award has to be in writing and the same cannot be implied by estoppel.

f) That the final award was flawed as it was not open for the Arbitrator to make a joint and several award in a dispute predicated upon separate agreements by the 2nd to the 8th Applicants in which the 1st Applicant was acting solely as an agent.

g) That the final award was in contravention of the Arbitration Act to the extent that it was ordered for the payment under the award to be made within 15 days.

[5] These grounds were amplified in the written as well as oral submissions filed and made by Counsel for the Applicant. The submissions are quite elaborate and are part of record. On 23rd January, 2015, Mr. Oraro, learned Counsel for the Applicant made oral submissions in court and emphasized several areas of the grounds in support of the application. He insisted that the court should ask itself whether there is an arbitration agreement between the 3rd, 4th, 5th, 6th and 7th Respondents. He submitted that the agreements with the 4th, 6th and 7th Respondents did not have a commencement date and were not executed by the 1st Applicant or sealed with the seal of the company. He urged that section 17(8) of the Arbitration Act is clear on the Scope of the Arbitrator's authority and jurisdiction. It is not correct for the Respondent to state that pleas that the arbitral tribunal is exceeding the scope of its authority are to be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The Applicant posits that the challenge herein is predicated on an excess of jurisdiction. They cited **Mustill and Boyd** in their book, ***"Commercial Arbitration, 2nd Edition*** that;

> ***"<u>An award will be entirely void if the parties never made a binding arbitration agreement; if the matters in dispute fell outside the scope of the agreement</u>; if the arbitrator was not validly appointed, or lacked the necessary qualifications; or if the whole of the relief granted lay outside the powers of the arbitrator. <u>The award will be partially void if the relief granted</u> related to a matter which was not referred <u>or if for some other reason it was outside the jurisdiction of the arbitrator</u>. In all these situations, the primary active remedy is for the Court to declare that the award is void, in whole or in part."*** **At page 554.**

[6] According to the Applicants, they have demonstrated at paragraph 6 of Supporting Affidavit the Agreements relating to the 4th, 6th and 7th Applicants were not in conformity with section 4 of the Arbitration Act, and therefore void. Section 4 of the Act provides that an arbitration agreement is only valid if it is contained in a document signed by all parties or where the existence of an agreement is alleged in the statement of claim and not denied by the other party. In respect to the latter, it is beyond peradventure that the existence of valid contracts with respect to the 4th, 6th and 7th Applicants was denied. In any event, the proceeding before the High Court in Milimani HCC No. 522 of 2010 was for an order to refer a dispute to Arbitration. The decision on jurisdiction was made for the first time by the Arbitrator in the Award and could not therefore be the subject matter of an appeal to the High Court before the instant application to set aside was made. Section 17 of the Arbitration Act allows the raising of the issue arising out of the final award. That is the position here following the arbitrator's finding ono Issue No. 1 that was framed as follows;

> ***"Whether or not there were valid and enforceable brokerage agreements between the Claimant and any or all the Respondents."***

The finding on this issue went to the jurisdiction of the Arbitrator which can only be challenged by way

of the instant application. The Applicant is of the view that according to the quotation from ***Mustill and Boyd*** (supra), where there is no valid agreement, then the Award is for setting aside.

[7] Mr Oraro also emphasized the point that the award was contrary to the law and, therefore, against public policy of Kenya. He cited the work of Ringera J (as he then was) in the case of ***Christ for All Nations v Apollo Insurance Co Ltd, Nairobi HCCC No. 477 of 1999 (Unreported),*** on the parameters of public policy in the following terms;

> ***"… I take the view that although public policy is a most broad concept incapable of precise definition, … an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough. …"*** [Emphasis added]

He gave two major reasons to support this ground. The first one is that, the award was made jointly and severally whereas the contracts were distinct and separate. He stressed that only KTDA was common in all the agreements, and therefore, the award should have been against KTDA alone. It was not possible to have a joint award when there was no contract where all the parties were directly the parties. And so, the argument by the Respondent that the 1st Applicant herein contracted both as principal and as agent cannot raise an agreement between all the parties. Similarly, the argument by the Respondents (Applicants herein) acted in concert as they were represented by or acted on the advice of the 1st Applicant does not bind the parties in a single contract. Mr. Oraro argued that each of the 2nd to 8th Applicants entered into distinct tripartite contracts with the Respondent and the 1st Applicant. And as a matter of fact the Respondent's claim was based on the existence of eight agreements between itself, the 1st Applicant and each of the 2nd to 8th Applicants. He cited the case of **Agricultural Finance Corporation v Lengetia Limited [KLR] 765**, where the Court of Appeal upheld the following statement in ***Halsbury's Laws of England***, *3rd Edition*, *Volume 8* at paragraph 110:

> ***"As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."***

In view of the above decision, the Applicants' contended that, despite the relationship between the 2nd - 8th Applicants and the 1st Applicant, there existed no direct contract between the Respondent and the Applicants herein under which they could be held jointly and severally liable. They relied on Order 1 Rule 3 of the Civil Procedure Rules and a passage in ***Halsburys Laws of England 4th Ed. Vol. 9 para 621*** that***;***

> ***"Where two or more persons make joint and several promises to one another, each of the promisors may be sued, at the option of the promisee in respect of a joint and several liability and separate action may be brought against each ."***

In the event any finding on liability for breach of contract has to be calculated on the basis of the separate agreements, then, liability will borne only by the parties who are privy thereto. Accordingly the Award was contrary to the general principles of contract law to the extent that it was joint and several.

[8] The other reason why the Applicants assert that the award was contrary to the law is that, the arbitrator having found that the agreements in respect to the 4th, 6th and 7th Applicants were not executed by all parties then the said agreements did not conform to the requirements set out under section 4 of the Arbitration Act. Section 4 of the Arbitration Act provides that an arbitration agreement shall be in writing

if it is contained in a document signed by the parties. Therefore, from case law cited, a finding made in an Award which contradicts an express provision of statute is contrary to public policy. Accordingly, the arbitration agreements were not valid. And the arbitrator erred when he went ahead to hold at paragraphs 49, 50 and 51 that the said agreements gave rise to contractual rights by performance and that the Applicants herein were estopped from denying the existence and validity of the Agreements. It was the Applicants' humble submission that the finding that an Arbitration Agreement could be by way of performance and estoppel was inconsistent with the written law hence contrary to public policy. This is a ground set out under section 35 of the Arbitration Act and the limitation prescribed under section 17 of the Act does not apply.

[9] According to the Applicants, the award on Goodwill for loss of reputation was beyond the scope of the arbitration. The allegations that the Respondent lost its standing in the East Africa Trade Association hence the claim for goodwill is not contemplated by the arbitration agreement. The definition of goodwill was aptly captured by Lord Macnaghten in the case of **Commissioner of Inland Revenue v Muller & Co. Margarine Ltd,** and was adopted by this Court in **Patificio Lucio Garafolo SPA case** as follows:

> ***"It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates."***

Therefore goodwill herein was predicated on losses and/or damages suffered as a consequence of loss of reputation which is a tortious claim. The Arbitration clause related to any dispute between the parties as to the construction of the respective agreements or the rights and obligations of the parties as more particularized therein. On the use of the word "disputes", ***Mustill and Boyd*** state in their book, **"Commercial Arbitration"** as follows;

> ***"General words such as these confer the widest possible jurisdiction. They must, however, be construed by reference to the subject matter of the contract in which they are included. Thus, the inclusion in a mercantile contract of an arbitration clause in general terms would not endow the arbitrator with jurisdiction over disputes between parties concerning, say, personal injuries caused by one to the other, or over allegations of libel."*****(See pages 118-119)**

In view of the above, it cannot be gainsaid that the arbitral tribunal herein did not have the jurisdiction to award goodwill arising out of loss of reputation. Accordingly that part of final award that granted goodwill in the sum of Kshs. 106,912,822 is for setting aside as it went beyond the scope of the agreement between the parties. The Learned Arbitrator at paragraphs 98-99 of the Award made the following finding;

> ***"As regards the claim for loss of goodwill, the Claimant's case is that by reason of the Respondents actions its business and goodwill was destroyed. It claims loss of goodwill on the basis of lost net profit for five (5) years. As I understood the Respondents, they did not dispute the legitimacy of the claim for loss of goodwill. What they contested was the figures computed by the Claimant.***
>
> ***Having consider the evidence on record and the submissions I accept the Claimant's case that its business was destroyed by the Respondents' actions and that, accordingly, the claim for loss of goodwill is well founded, I also accept that the same should be calculated on the basis of the aggregate of the average of the last (5) trading years profits (understood to be commission income less operational costs)."***

The claim for goodwill was never predicated on any pleading. There was no evidence that was presented before the arbitral tribunal on goodwill. Likewise, the computation of goodwill was not based on credible formula or proved strictly the way special damage ought to be proved. The arbitrator also found for the

claimant to be entitled to goodwill on the basis that both parties conceded to the goodwill as legitimate claim. Yet, at page 209 of the record, it is clear that the Applicants rejected the claim of goodwill. The arbitral tribunal framed this issue by itself instead of the parties. As such, their case is more of an appeal than an application to set aside the award.

[10] The Applicants submitted that goodwill was thus predicated on the tortious claim of the loss of reputation which was beyond the agreement. In this case, the claim for goodwill is not predicated on breach of contract but for loss of reputation. Lord Diplock in the case of **Reckitt & Coleman Products VS Borden Inc. & Others (1990) AllER 873** laid down the test for an award for damages for goodwill on the following basis:

> ***"There should be a misrepresentation made by a trader in the course of trade to prospective customers of his or his ultimate consumers of goods or services supplied to him which is calculated to injure the business or goodwill of another trader (in the sense that this is reasonably foreseeable consequence and which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia time action) will probably do."***

This was confirmed by this Honourable Court in **Biersdorf Ag .V. Emirchiem Products Limited [2002] 1 KLR 876** where it was held that the award for goodwill as damages for breach of contract can only be on exceptional basis, and is well recognized by law. Further, in the case of ***Addis v. Gramophone Co. (1908-1910) AllER 1*** Lord Atkinson stated as follows;

> ***"In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress he may, no doubt, recover exemplary damages, or what are sometimes styled "vindictive" damages; but if he chooses to seek redress in the form of an action for breach of contract, he lets in all consequences of that form of action. "***

The Applicants humbly submitted that the aforesaid decisions aptly capture the general principles applicable. In this case, however, the parties did not contemplate goodwill. And so, the award should be set aside for making an award not contemplated by the agreement of the parties, hence, going beyond the scope of the reference. In the famous Indian case of **Associated Engineering Co vs. Govt. of Andhra Pradesh and ANR (1992) AIR 232**, the Supreme Court of India asserted the supremacy of an arbitration agreement as follows:

> ***"The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract, if he has travelled outside the bounds of the contract, he has acted without jurisdiction"***

See what Kimondo J said about assessment of quantum of general damages for a tortious act in the case of **Airtel Networks Kenya Limited. vs Nyutu Agrovet Limited [2011]eKLR**:

> ***"In my considered opinion once the arbitrator embarked on assessment of general damages for the tort of negligence and set up a contract period to run to the year 2013 and to employ the arithmetic and multipliers above, he expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the margins of contract into the world of tort and damages for negligence. ...... The Arbitration clause in the distributorship agreement had limited the dispute to those arising out of or relating to this agreement and breach thereof.....while it is true that in the course of breach of contract a tort may arise, I am prepared to hold that in this case it may well have been completely outside the contemplation of the parties. Having then meandered outside his boundaries, it is then safe to say that the Arbitrator exceeded his jurisdiction ...."***

In view of the above authorities, it is the Applicants' humble submission was that the claim for goodwill

was not feasible within the Agreement between the parties and to the extent that such goodwill was awarded, it was beyond the jurisdiction granted under the arbitral agreement and ought to be set aside.

The Respondent opposed the application

[11] The application was hotly contested by the Respondent. They filed grounds of opposition dated 29th April, 2014. The Respondent made a claim; that the Applicants herein seek to introduce new evidence through its affidavit in support of the application. And any evidence that was not presented to the Arbitrator during the arbitration process should not be considered by this court. But Mr Onyancha made specific submissions on res judicata, that is, the matter of existence of arbitral agreements, including the impugned agreements, was decided upon conclusively by Mutava J when he made the referral order in **Milimani H.C.C.C. No.522 of 2010**. The issue is, therefore, res judicata and it cannot be revisited at this stage. Litigation must come to an end. He stated that Respondent contended that the arbitration agreements and the whole process of arbitration in this matter were not contrary to public policy as asserted by the Applicants. The Respondent also refuted the Applicants' claim that the Arbitrator went beyond his scope of reference, as the award dealt with all the issues submitted and agreed by the parties. The Respondent stated that the Managing Agents (KTDA) of the tea factories drew all the contract documents. They issued notices of alleged breach of the impugned agreements. The Managing Agents gave the claimant (pursuant to the impugned agreements) one (1) month notice (30 days) to 'rectify' or 'cure' the purported breach. Before expiry of the notice, the Claimant cured the breach. The Managing Agents confirmed in writing that there had been 'cure', but the Claimant was not reinstated. In the face of these findings of fact (pursuant to Section 20(3) – Arbitration Act – the Arbitrator had authority to decide on admissibility, relevance, materiality and weight of any evidence before him, and the Arbitrator was satisfied that the Applicants having issued notice to the Claimant under the impugned agreements and also confirmed 'cure' of the purported breach, they were **ESTOPPED** from challenging the existence of the contracts. In our humble submission, this finding conforms to **Section 120, Evidence Act, Cap 80.** Further, in English common law of contract (applied to Kenya vide **the Law of Contract Act, 1961, Cap. 23)** the principle of estoppel is well established. In the case of Central London Property Trust Ltd., v High Trees Ltd., (1947) K.B.130, Denning J (as he then was) applied this principle of estoppel thus:

> ***'Where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his work and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to such qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word'***

The principle was applied in **Century Automobiles Ltd. V Hutchings Biemer Ltd.,** (1965) E. A. 304. There4fore, the Applicants' contention that the Arbitrator's application of **estoppel is contrary to public policy** or that **it offends S4 of the Arbitration Act** is totally misplaced. Under CL.9 (d) of the contracts (the Arbitration Clause), the Arbitrator was to decide ALL CONTENTIOUS ISSUES. The dispute of the existence of the agreements was such an issue. The law does not allow a party to make contradictory assertions of existence of a fact. The applicants never appealed H.C.C.C. No. 522 of 2010. The arbitrator has conducted and concluded the arbitration as ordered in that suit. By their conduct, the Applicants cannot be heard to say that they had not agreed to be bound by the orders of the court in H.C.C.C. No. 522 of 2010, or that res judicata does not apply. See **Pan African Builders & Contractors Ltd. V. N.S.S.F. Board of Trustees (**2006) eKLR. Clearly, the court cannot now be asked to investigate the same issue: **estoppel** applies. It is in the public interest that there should be finality in litigation**.** *Re judicata* is a rule of law provided for under Section 7 of the Civil Procedure Act. By applying res judicata the Arbitrator complied with the law of Kenya. He never offended any public policy.

[12] The Respondent was of the view that, on the issue of the existence and validity of the contracts between the Respondent and the 1,2, 3 and 5th Applicant , the Arbitrator found that by the conduct of the aforesaid applicants, the applicants were estopped from approbating and reprobating on the issue of the said contracts. The applicants had failed to demonstrate that there was any irregularity affecting the

Tribunal's jurisdiction. It was therefore the conclusion of the Respondent that the Arbitrator's findings as to fact and law on the matters presented before him were proper and should be upheld by the court.

[13] Mr Onyancha pointed out also that the Applicants had contested the jurisdiction of the Arbitrator, and the arbitrator through his ruling on 15th May, 2013, made a finding that he had the jurisdiction to entertain the Claimant's claim. There was no appeal that was preferred against this ruling within the prescribed timeline and the Applicants cannot therefore raise the issue of jurisdiction through the back door. It was also pointed out that the applicants' participation in the arbitral proceedings without appealing the issue of jurisdiction amounted to the parties submitting to the arbitrator's jurisdiction. The Respondent also asserted that the contention that the Arbitrator acted in excess of his authority cannot be raised now. It ought to have been raised as soon as it was alleged during the arbitral proceedings in accordance with **Section 17(3) Arbitration Act** which provides that:

> ***"A plea that the tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings".***

Failure to do so is a smack on a substantive mandatory provision of the law.

[14] Additionally, the Respondent contended that goodwill arises from damage to reputation and it has been defined in case law. arising from the Applicants are estopped from contesting the Claimant's claim for damages for loss of goodwill and commissions as pleaded given that the Arbitrator proceeded to hear the arbitral proceedings on the basis of the pleadings provided by the both the Claimant and the Respondents. The parties were given ample opportunity to submit on the claim of goodwill. And they cannot now raise the issue as they are deemed to have waived their right to challenge the claim of goodwill on the basis that it is a tortious act. See **section 5 Arbitration Act:-**

> ***"A party who knows by any provision of this Act from which the parties my derogate or any requirements under the Arbitration agreement has not been complied with yet proceeds with the Arbitration without stating his objection to such non-compliance without delay or, if a time limit is prescribed, within such period of time, <u>Shall be deemed to have waived the right to object</u>" (Emphasis Added).***

Goodwill cannot be said to be outside the agreements herein as KTDA and the Respondent were members of EATTA and were bound by the rules of the game. They knew that for a broker to remain as a member of EATTA it must sell not less than 15,000,000 Kgs of made tea per year. The action by the Applicant affected the Respondent's threshold set by EATTA. At the time the Respondent was expelled from EATTA, the MD for KTDA was the chairman of EATTA and it is pretentious for them to say they never anticipated the consequences of their actions. The agreement covers goodwill and such claim on tort is not excluded under section 3 of the Arbitration Act. See the case of **Kenya Shell Ltd v. Kobil Petroleum Ltd. (2006) eKLR, Civil Appeal No.57 of 2006**. The test on both contract and tort on damages is that of reasonable foreseeability. Similarly, the measure of damages in tort and contract is the same and the claimant can choose the best claim it wants to make.

According to Mr. Onyancha, this application to set aside is neither an appeal nor in the nature of judicial review. He also urged that the application is premised on the belief that the court has an inherent jurisdiction to supervise arbitrators on alleged 'manifest disregard' of the law. There is no such power as was held in **Bremer Vulcan vs. South India Shipping Corporation** (1981) A.C. 909. Also see **Mustill & Boyd, Commercial Arbitration 2nd edition.** The court cannot exercise a jurisdiction not donated to it by the Arbitration Act. Accordingly, they argued that the Indian case of **Associated Engineering Co. v. Government of Andra Pradesh** 1992 AIR 232, 1991 SCR (2) 924, is distinguishable from the matter before court. The regime of judicial review does not apply to the decisions of arbitrators. This is because; (1). Arbitration is consensual; (2) besides, arbitration is a mode of procedure which is **sui generis.** Therefore, according to the Respondent Rtd. Judge A. G. Ring'era never travelled outside the express terms of the contracts. He remained wholly within the confines of the contracts and the agreements. On the reasons stated above, the Respondent urged the Court to dismiss the application and upheld the award.

THE DETERMINATION

Elegant submissions

[15] This application was elegantly canvassed by counsels who made very powerful submissions in support of their avowed respective stand points. Mr. Oraro appeared for the Applicants, and Mr. Onyancha for the Respondent. The jurisdiction of the Court under section 35 of the Arbitration Act in setting aside an arbitral award is a strict one. A party invoking that jurisdiction must bring himself under that specific jurisdiction, and should not set out to invoke the inherent jurisdiction of the Court in the hope that the court will hold an award to be contrary to the law on a wild ground of alleged 'manifest disregard' of the law. I too say that, there is no such power as was held in **Bremer Vulcan vs. South India Shipping Corporation** (1981) A.C. 909. Also see **Mustill & Boyd, Commercial Arbitration 2nd edition.** But the application has set out clear grounds of objection to the award and on which they believe it should be set aside. These grounds are:-

a) The award is contrary to the policy of Kenya;

b) The Arbitrator lacked jurisdiction' and

b) 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

These are perfect grounds to set aside an award under section 35 of the Arbitration Act. The question is, have they been proven? I will examine all the arguments by the Applicants to see whether they fit or prove the grounds proffered. The Applicants bear the onus of proof.

AWARD CONTRARY TO PUBLIC POLICY

Public policy

[16] I need not re-invent the wheel. About ''Contrary to Public Policy'' as a ground to set aside an arbitral ward, Ringera J (as he then was) correctly stated in the case of **Christ for All Nations v Apollo Insurance Co Ltd, Nairobi HCCC No. 477 of 1999** that;

> ***"… I take the view that although public policy is a most broad concept incapable of precise definition, … an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough. …"***

Existence and Validity of Agreement

Without doubt, an award which is inconsistent with the Constitution or the law, written or unwritten, is said to be against public policy and it will be set aside under section 35 of the Arbitration Act. I understood Mr. Oraro to argue that the arbitrator found and held that agreements among the 4th, 6th and 7th Applicants and the Respondents were neither executed by the 1st Applicant nor sealed with the company seal. Yet he went ahead to declare that the unexecuted contracts gave rise to contractual relationship, rights and obligations by performance and estoppel. Estoppel arose from the conduct of the Applicants in the giving of notice for breach and requiring cure thereof in accordance with the said agreements. To him, these agreements violated section 4 of the Arbitration Act and they were invalid. Likewise the arbitration agreements were invalid for they were not contained in contracts signed by parties. The Applicants read this inconsistence with the law to have made the award to be contrary to the

public policy of Kenya. The other alleged instance in which the award violated the law was the fact that the agreements herein were distinct and separate and, therefore, it was impossible to hold the Applicants jointly and severally liable on that kind of contracts. Liability was on each individual contract and was borne by the parties to the particular contract. In so far as the arbitrator held the Applicants to be jointly and severally liable on all the contracts was contrary to the law, hence, the award was contrary to the policy of Kenya. I will examine both the above arguments.

Existence and validity of agreement

[17] Under section 17 of the Arbitration Act, the arbitrator is empowered to decide on the existence and validity of an arbitration agreement. This court will not have the power to decide on the validity of an arbitration agreement in an application under section 35 of the Arbitration Act. Section 17 of the Arbitration Act provides follows:-

> ***"The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose;***
>
> ***a) An arbitration clause which forms part of a contract shall be treated as an independent agreement of the other terms of the contract; and***
>
> ***b) A decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause."***

Invalidity of the contract will also not invalidate the arbitration clause. I find a lot of persuasion by the decision of Kimaru J in the case of **Kenya Airports Parking services Ltd & Another v Municipal Council of Mombasa Civil case 434 of 2009** on the application of the principle of seperability of an arbitration clause when he stated that:-

> ***"...it is this court's view that where there exist an agreement with an arbitration clause, under the principle of seperability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement."***

The learned judge quoted with approval the observations made by the supreme Court of United States of America in the case of **Buckeye Check Cashing Inc. v Cardegena et all 546 U.S 440 (2006)** and went on to hold as follows:

> ***"...the principle of seperability of an arbitration clause in an agreement has thus been given judicial stamp of approval and is applicable even where one of the parties is challenging the validity or illegality of the agreement itself. As stated in the above U.S case, the issue as to the validity of the agreement is an issue that the arbitrator has jurisdiction to deal with."***

In light of the law, I find it difficult to accede to the interpretation given by the Applicants on the effect of section 4 of the Arbitration Act on the arbitration clause 9 in the contracts herein especially in light of the findings by the arbitrator which was on the evidence before him. Therefore, the Arbitral Tribunal had jurisdiction to try a dispute referred to arbitration on the construction of the agreement or the rights and obligations of the parties under clause 9 of the contracts. Equally, the Arbitral Tribunal also had the power to rule on its jurisdiction and also to determine the validity or otherwise of the Agreements in question.

[18] I have read the Award by the sole arbitrator. At page 12 thereof, it is clear that the first issue for determination was whether or not there were valid and enforceable brokerage agreements between the Claimant and any or all of the Respondents. The tribunal found that there were enforceable agreements between the 1st to 7th Applicants and the Respondent. Specifically at paragraph 56 of the said Award, the Arbitrator rendered himself thus;-

"56. I take the view that KTDA having delivered the Teas from Rukuririri, Mogogosiek and Weru Tea Factories and the Claimant having sold them at the Mombasa auction since 2008 as per the imperfect agreements and KTDA having invoked specific clauses in those agreements to terminate them, the Respondents are estopped from denying the existence and validity of the tea brokerage contracts between them and the Claimant. In the premises, I find that by dint of the doctrine of estoppel, there exists formal and valid agreements between the Claimant and the 4th, 6th, and 7th Respondents. I further find that the Respondents thesis of a sale by sake contract was an afterthought which was not even pleaded"

As I have already stated, the Arbitrator was perfectly in order to render himself the way he did on the existence and validity of arbitration agreement between the parties. He found that there were indeed agreements between the 1to 7th Applicants and the Respondent. See the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others CA 327 of 2009**, where the Court of Appeal upheld the doctrine of *Kompetez* where the tribunal can rule on both the validity of the arbitral clause and the underlying contract.

[19] As such, the court should resist the temptation by the Applicants to draw the court into the arena of determining on the validity of arbitration clause lest the court should be usurping the jurisdiction of the arbitrator in total contravention of Section 10 of the Arbitration Act. The principle of non-intervention by court where parties have agreed to resolve any dispute between them by arbitration should be respected. The argument by the Respondent that Mutava J determined the issue of existence of a valid agreement does not also hold sway. But most importantly, I find no merit in the Applicants assertions that the Arbitrator lacked jurisdiction by reason that the agreements between the Respondent and the 4th to 7th Respondents were invalid and so there was no valid arbitration agreement. I should state also that matters of conduct of parties are entangled in factual analysis which only the arbitrator can disentangled, for he is the master of facts. He is obliged to receive evidence, weight its relevance and weight, and admissibility thereof, and then makes a finding upon the evidence as by law provided or agreed between the parties. The arbitrator applied the law on estoppel upon the facts of the case before him on conduct of parties, which is invariable component of his work as arbitrator. On this I agree with the Respondent that the law on estoppel was available to the arbitrator to apply to the facts of the case before him. One other thing; the way I understand the law, even if there was a mistake of facts or law in the appreciation or explication of fact or the law respectively by the arbitrator, such will not found a ground to set aside an award or be corrected in an application under section 35 of the Arbitration Act. The law and the plethora of case law I am aware of say that is within the purview of appellate jurisdiction of the Court where facts and law will be evaluated. See the literary work by At pages 558-9 **Mustil & Boyd, Commercial Arbitration, 2nd Edition, a**t page 558-9 that**:-**

"Mistakes by the arbitrator in the conclusions of law or fact implicit or explicit in a final award or in an interlocutory ruling do not (generally) form a ground for remission or setting aside.

A mistake of law, or inconsistency of reasons, may in certain circumstances be the subject of an appeal".

And at page 560, **Mustill & Boyd – Commercial Arbitration, supra,** observes that:

"It sometimes happens that a party asserts, not only that the arbitrator's decision of the facts is wrong, but that it could not possibly be right, since there is no evidence to support it; or that the arbitrator has exercised a discretion in a way which is wholly wrong in principle. Such an attack fails, for the same reasons as other challenges to the arbitrator's decision. To arrive at a wrong conclusion of fact or to exercise a discretion on a wrong principle is at most an error of law, and does not find an application for relief except by those mechanisms which are available for appeals on questions of law"

Even though Mr. Oraro stated that their application is in the nature of an appeal, I do not think that was a serious commitment on the law as this is an application to set aside an arbitral award under section 35 of

the Arbitration Act. This is not an appeal pursuant to Section 39 of the Arbitration Act. On that basis, the argument fails. I reject it.

Challenge to jurisdiction

[20] I move on to the other argument on jurisdiction and when it should be raised. I agree with the Respondent that once the challenge on jurisdiction had been raised as a preliminary issue, and the arbitrator ruled on it as such, the issue can only be revisited by the High Court on an application made in that behalf and within the time prescribed under section 17(6) of the Arbitration Act. The arbitrator ruled on the challenge to his jurisdiction on 15th May 2013. No application was lodged under section 17(6) of the Arbitration Act, and within the time prescribed in law. It will be contrary to law to convert this application under section 35 of the Arbitration Act into such appeal. The argument by Mr. Oraro that the arbitrator made a determination on jurisdiction in the final award when he made a finding on issue 1 on the validity and enforceability of the brokerage agreements, can only profit an appeal rather than an application under section 35 of the arbitration Act. I stated and held that the arbitrator was perfectly in order when he exercised jurisdiction in determining the existence of the underlying contract as well as the validity of the arbitration agreement. The argument by the Applicant on that front again fails and is hereby rejected. Before I close on this point, I wish to state that an application under section 17(6) of the Arbitration Act is restricted to such matters and challenge as was presented before and was decided by the arbitrator. Some applications I have seen being filed is so expanded as to include new issues which were never before the arbitrator to the extent that the challenge is completely distorted from the initial challenge before the arbitrator. That practice should be avoided at all costs.

''Jointly and Severally'' Liability

[21] What about the argument on whether it was possible for the award to find the Applicants were jointly and severally liable on contracts which were separate and distinct? As a general rule, where contracts are completely distinct and separate from each other, it may be impossible to enter liability ''jointly and severally''. But it all depends on the relationship between the parties and the nature of the agreement. Where a nexus is established that promises were made by a party or a party acted in concert with another in a manner which draws a nexus among the various agreement, then liability on the basis of ''jointly and severally'' will be legally permissible. The arbitrator weighed the evidence which was before him some of which was the conduct of KTDA, and receipt of banker's guarantee by KTDA in respect of all the contracts. For instance, see what the arbitrator found at paragraph 90 that:

> ***"I am persuaded by the evidence of EZEKIEL MACHOGU (CWI) and the Claimant's submissions that the termination of the claimant's business relationship with the Respondents in consequence of the intimation by KTDA of the existence of the so-called "governance issues" in the claimant company was orchestrated by Senior KTDA officers to aid Emily Nyagarama in her boardroom fight with other directors of the claimant company. I did not believe Mr. Omanga's evidence that KTDA's notification of the factories of the "governance issues" was an exercise in vigilance and diligence ……… I accept the claimant's submission that the alleged governance issues were seized upon by KTDA and used as a device to stimulate termination of the contracts between the claimant and the factories in aid of Emily Nyagarama in her fight with other directors." See page 101 of the Record.***

[22] On intense analysis of the law and the arguments before me, the arbitrator is the master of facts and based on his appreciation of the facts and the applicable law, he found judgment against the Applicants jointly and severally. This finding is not absurd or impossible in law. It is permissible in law as I have stated above. Whether he was right or wrong is not for this court to delve into especially in an application to set aside an arbitral award under section 35 of the Arbitration Act. Likewise, the argument by the Applicants that the arbitrator committed an error which renders the award inconsistent with the law, fails.

[23] The upshot on the ground that the award was inconsistent with the Arbitration Act and the law, and therefore, contrary to public policy of Kenya, is that it does not meet the legal threshold. It fails and is rejected.

MATTERS NOT CONTEMPLATED BY AGREEMENT: GOODWILL

[24] The award of goodwill in the sum of Kshs. 106,912,822 was hotly contested by Mr. Oraro S.C. It seems the Applicant has paid special attention to this relief because they made an alternative request that the court should set aside the specific part which awarded goodwill. I understood Mr. Oraro S.C. to argue that the claim for goodwill based on alleged injury on the Respondent's reputation was a tortious relief. He insisted that, such injury and goodwill was not contemplated by the arbitral agreement which was purely on construction of the contracts in question. The Applicants' position is that the arbitral tribunal did not have the jurisdiction to award goodwill arising out of loss of reputation. They stated that cancellation of the Respondent's license or expulsion from membership by a society cannot be a basis for an award of goodwill. In other words, it cannot be argued that the Applicant could not terminate or cancel the agreements between the Applicants and the Respondent because that would affect the membership of the Respondent in EATTA. To the Applicants, the part of the final award that granted goodwill in the sum of Kshs. 106,912,822 went beyond the scope of the agreement between the parties and should, therefore, be set aside.

[25] On the issue of goodwill, Mr. Onyancha submitted that the arbitrator was correct in awarding the amount of Kshs. 106,912,822, since the Respondent had lost its standing in the East Africa Trade Association (EATTA) hence its claim. He asserted that, according to the award, the Tribunal found that there was breach of contract causing loss of goodwill and profits. Mr. Onyancha argued that the Arbitrator then went ahead and awarded damages on the same for breach of contract in a restitutionary nature. He relied on the case of **Wroth v Tyler (1974) Ch. 30** in support of his contentions. It was also Mr. Onyancha's argument that a claim for tort was not excluded in the arbitration process by virtue of section 3 of the Arbitration Act.

[26] Did the Arbitrator exceed his scope of authority when he awarded Kshs. 106, 912,822/= as goodwill? Was the award thereof contrary to the terms of the agreement between the parties? It was the contention of the Applicants that the remedy of goodwill for loss of reputation was outside the jurisdiction of the arbitrator as it was not contemplated in the Contract by the parties. They argued that, in any event, loss of reputation is a tortious claim which cannot be remedied under breach of contract. As I understand this objection, it is the Applicant's contention that the arbitrator went beyond the dispute contemplated by the parties as the sum awarded was based on loss of goodwill which is a tortious act whereas the claim before the arbitrator was founded on breach of contract. To determine whether the arbitrator went beyond his boundaries and outside the agreement of the parties, a good starting point is section 29 (5) of the Act which provides that;

> ***"in all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction"***

Each of the Agreements contained an arbitration clause in the following terms;

> "***Any dispute between the parties as to the construction of this Agreement or the rights and obligations of the parties hereunder including the question whether any breach or non-observance by any of the parties of any of the terms of this Agreement is such as would justify arbitration proceedings for rescission by the other party shall be submitted to arbitration. Such Arbitration shall be conducted in accordance with the Arbitration (Act No. 4 of 1995) of the Laws of Kenya." (emphasis added)***

And the contentious award of goodwill was made by the arbitrator at paragraph, 98 and 99 of the Final Award in the following terms, that:-

> ***"98. As regards the claim for loss of goodwill, the Claimant's case is that by reason of the Respondents actions its business and goodwill was destroyed. It claims loss of goodwill on the basis of lost net profit for five (5) years. As I understood the Respondents, they did not dispute the legitimacy of the claim for loss of goodwill. What they contested was the figures computed by***

the Claimant.

99. Having considered the evidence on record and the submissions I accept the Claimant's case that its business was destroyed by the Respondents' actions and that, accordingly, the claim for loss of goodwill is well founded, I also accept that the same should be calculated on the basis of the aggregate of the average of the last (5) trading years profits (understood to be commission income less operational costs).”

The arbitrator went on further to state in paragraph 115 that:-

115 In paragraph 99, I found that the claim for loss of goodwill is well founded and that in computing the claim, a multiplier of five (5) years and a multiplicand of the aggregate of the average profit for the period is reasonable……

Thereafter, in paragraphs 116- 119, the arbitrator went into the rigors of assessing the amounts due to the claimant on loss of goodwill.

[27] It is not disputed that loss of reputation is a tortious relief. Lord Macnaghten defined goodwill in the case of **Commissioner of Inland Revenue v. Muller & Co. Margarine Ltd. [1900-1903] All ER 413** as follows:

“It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.”

The above definition has been adopted by courts in Kenya, and I will also adopt it here.

[28] Ordinarily, damages for loss of goodwill are normally awarded in an action for defamation or passing off. But, it also true that in the course of a breach of contract, a tort may arise and damages for the tortious act could be claimed and awarded, except, however, it has been acknowledged in law that such possibility is maintainable in very exceptional circumstances. See the decision by Kimondo J in the case of **Airtel Networks Kenya Limited. vs Nyutu Agrovet Limited [2011]eKLR** on this. See also the case of **Biersdorf Ag vs. Emirchiem Products Limited [2002] 1 KLR 876** where it was recognized that the award for goodwill as damages in a breach of contract can only be on exceptional basis. I should also add for completeness of the law, that, and both parties correctly submitted, where a party has more than one relief; a claim for a tort committed in the course of breach of contract and for breach of contract, he must choose which relief to apply for. Therefore, my understanding of this limb of the law, in a contract, damages for a tort arising in the course of the breach of contract can only be in the alternative as opposed to ‘’in addition to’’ a claim for breach of contract. I find support in the opinion by Lord Atkinson in the case of **Addis v. Gramophone Co. (1908-1910) AllER 1** that:-

"In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress he may, no doubt, recover exemplary damages, or what are sometimes styled "vindictive" damages; but if he chooses to seek redress in the form of an action for breach of contract, he lets in all consequences of that form of action. "

Further, even where a claim for goodwill is made in the alternative, the test applicable is one of ‘’***reasonably foreseeable consequence’’.*** See Lord Diplock in the case of ***Reckitt & Coleman Products VS Borden Inc. & Others (1990) AllER 873*** where he laid down the test on granting an award for damages for goodwill as follows:

"There should be a misrepresentation made by a trader in the course of trade to prospective customers of his or his ultimate consumers of goods or services supplied to him which is calculated to injure the business or goodwill of another trader (in the sense that this is reasonably foreseeable consequence and which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia time action) will probably do."

[29] In arbitration, the availability of a claim for goodwill or any other tortious act is seen only within the contractual framework of the parties. Therefore, an award for damages for tortious acts such as injury to business reputation and goodwill is hemmed by the arbitration clause itself and the terms of the reference. That is why section 35(2) (a) (iv) of the Arbitration Act uses deliberate and carefully chosen words underlined below;

"An arbitral award may be set aside by the High Court only if 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,…

Accordingly, the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law. The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether a claim based on tort was contemplated by the agreement or falls within the terms or scope of the reference to arbitration. Even where general, broad, generous and elastic words are used in arbitration agreement or reference to arbitration, courts will still interpret them by reference to the subject matter of the contract. See the literary work of **Mustill and Boyd**, ***Commercial Arbitration*** on the word ''disputes''**;**

"General words such as these confer the widest possible jurisdiction. They must, however, be construed by reference to the subject matter of the contract in which they are included. Thus, the inclusion in a mercantile contract of an arbitration clause in general terms would not endow the arbitrator with jurisdiction over disputes between parties concerning, say, personal injuries caused by one to the other, or over allegations of libel."**(See pages 118-119)**

[30] I have set out the arbitration clause herein. I have also set out the relevant part of the award granting damages on goodwill. I have carefully analyzed the two and applying the test of reasonably foreseeable consequences in the case of **Reckitt & Coleman Products VS Borden Inc. & Others (1990) All ER 873**, I come to the conclusion that goodwill was never contemplated by clause 9 of the contracts as one of the disputes which were to be referred to arbitration. The arbitral agreement used restricted terms and permitted reference to arbitration of *any dispute between the parties as to the construction of this Agreement or the rights and obligations of the parties hereunder including the question whether any breach or non-observance by any of the parties of any of the terms of this Agreement is such as would justify arbitration proceedings for rescission by the other party.* I must state that mere pleading for goodwill or the fact that parties submitted on the claim for goodwill does not confer jurisdiction on the arbitrator to award goodwill unless with the unequivocal consent of the parties or authority by the arbitration agreement itself. On this see the case of **Food Corporation of India Vs Surendra & Mahendra Transport Company [2003] RD S.C. 54 (India 5 February 2003)**, that:-

"…in order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen in whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction"

With tremendous respect to the learned arbitrator, he granted the award for loss of goodwill completely outside the scope of the reference to arbitration and the arbitration agreement, and thereby, exceeded his scope of authority. Looking at the kind of submission the parties made, it became an issue also on whether a person with jurisdiction could be said to exceed his authority. It is Mr. Onyancha who posed the question. Mr. Oraro S.C. replied that the excess of authority was only in respect of the goodwill for it

was never contemplated by the arbitration agreement. I agree with Mr. Oraro S.C. The arbitrator had jurisdiction and authority over the reference; that is, all matters within the scope or falling within the reference and the arbitration agreement. But, he had no jurisdiction or authority over matters not falling within the scope of the reference and arbitration clause. As soon as the arbitrator steps outside the margins set by the arbitration clause, he had gone out of the boundaries of his realm, and he is said in law to have acted without jurisdiction on the matters falling outside the scope of the reference. Any award on the particular matters complained of, in so far as it is severable from the other items, is to be set aside. See the famous Indian case of **Associated Engineering Co. vs. Govt. of Andhra Pradesh and ANR (1992) AIR 232**, where the Supreme Court of India asserted the supremacy of an arbitration agreement as follows:

"The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract, if he has travelled outside the bounds of the contract, he has acted without jurisdiction"

And the words of Kimondo J in the case of **Airtel Networks Kenya Limited vs Nyutu Agrovet Limited [2011]eKLR** that:

> *"**In my considered opinion once the arbitrator embarked on assessment of general damages for the tort of negligence and set up a contract period to run to the year 2013 and to employ the arithmetic and multipliers above , he expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the margins of contract into the world of tort and damages for negligence. ...... The Arbitration clause in the distributorship agreement had limited the dispute to those arising out of or relating to this agreement and breach thereof .....while it is true that in the course of breach of contract a tort may arise, I am prepared to hold that in this case it may well have been completely outside the contemplation of the parties. Having then meandered outside his boundaries, it is then safe to say that the Arbitrator exceeded his jurisdiction ....”***

Accordingly, the part of the award that relate to goodwill in the sum of Kshs. 106, 912,822/=can be separated from the other relief granted. And as the said award of goodwill in the sum of Kshs. 106, 912,822/= is the only part of the arbitral ward which contains decisions on matters not referred to arbitration or not contemplated by the arbitral agreement, it is hereby set aside. The other items granted by the arbitrator are upheld as is. The final award herein is accordingly as ordered. It is so ordered. Each party shall bear own costs of the application in view of the decision of the court.

APPLICATION FOR RECOGNITION AND ENFORCEMENT OF AWARD

[31] I promised in the first part of this ruling that I will consider the Chamber Summons dated 29th April, 2014 for recognition and enforcement of the award herein as a decree of the Court. I have determined the Chamber Summons dated 17th March, 2014 which was for setting aside the final award herein. Therefore, as there is no pending application under section 35 of the Arbitration Act, the award which should be recognized by and enforced as a decree of this court is as determined in that application. Accordingly, the said award as determined in the Chamber Summons dated 17th March, 2014 is hereby recognized by this court and shall be enforced as the order of this court. It is so ordered. Each party shall bear own costs given the decision in the application for setting aside the award. It is so ordered.

Dated, signed and delivered in court at Nairobi this 16th day of March 2015

F. GIKONYO

JUDGE