REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO.504 OF 2013

IN THE MATTER OF THE ARBITRATION ACT, NO. 4 OF 1995

AND

IN THE MATTER OF ARBITRATION

BETWEEN

JUSTUS NYANG'AYA.....CLAIMANT

Versus

IVORY CONSULT LIMITED.....RESPONDENT

RULING

Enforcement of arbitral award

[1] I have before me application by way Chamber Summons Application dated 14th February, 2014 is made by Justus Nyang'aya, (the Applicant) in a representative capacity as the duly constituted attorney of William John Patterson. The Applicant has applied for enforcement of the Final Award made on 30th September, 2013 by the arbitrator, George GitongaMurugara, as a Decree of this Honourable Court. The other prayers in the application relate to cost of this Application and expenses which will be incidental to the enforcement and execution of the Final Award herein.

[2] The application is supported by the Supporting Affidavit and Supplementary Affidavit sworn by the Applicant on 5th February, 2014 and 21st May, 2014 respectively.

Background information

[3] The subject of arbitration was, upon the application by the Respondent, referred to arbitrationby Havelock J. on 9th November, 2012 in case **HCCC No. 579 of 2011; Justus Nyang'aya vs. Ivory Consult Limited;** a suit thathad been instituted by the Applicant on 22nd December, 2011. On 16th January, 2013 the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) duly appointed Mr. George Murugara as the Arbitrator pursuant to the said order of Hon. Havelock J.The said Arbitrator subsequently convened and duly conducted the arbitration proceedings between the

Claimant and the Respondent and on 30th September, 2013 he delivered the Final Award (the Award).The Claimant duly filed a certified copy of the Award in the High Court pursuant to Rule 4 of the Arbitration Rules, 1997 and served the notice thereof on the Respondent. The Respondent has not filed an application for setting aside the Award within 3 months from the date of receipt of the Award. The 3 months expired on 30th December, 2013. Consequently, the Claimant filed the present Application seeking to enforce the Award as a Decree of this Honourable Court.

[4] The Applicant emphasizes on the timelines provided in Section 35(3) of the ArbitrationAct and invited the court to consider the decision by J.M. Ngugi J. in the case of **Nancy Nyamira& Another vs. Archer Dramond Morgan Ltd (2012) eKLR**on the object of the said provision. The application si made pursuant to Section 36 of the Arbitration Act, No. 4 of 1995 on these grounds:

a. The Final Award sought to be enforced as a Decree of this Honourable Court is a domestic arbitral award and as such it ought to be recognized as binding.

b. . The Claimant has duly furnished a duly certified copy of the arbitral award duly filed herein on 27th November, 2013 together with a duly certified copy of the arbitration agreement

Locus standi

[5] Contrary to the Respondent's assertions, the Applicant urged that, none of the grounds for refusal of recognition or enforcement of the Award as a Decree of this Honourable Court listed under Section 37 of the Arbitration Act apply to the Application the subject of these submissions. The Applicant has locus standi to apply within the authority donated in the Power of Attorney, and the issue was well addressed by the Arbitrator in the award. See page 18 of the Award where the Arbitrator determined the question on whether the Claimant (Applicant) held a valid Power of Attorney donated by William Patterson, the Principal. In *inter alia* the Arbitrator held as follows:

I. ***Under clause 3 of the Power of Attorney, the Applicant had powers to represent the Principal's interests in regard to the loan agreements entered into between the Principal and the Respondent.***

II. ***Clause 1 of the Power of Attorney also authorizes the Claimant to do any act that the Principal can do by an attorney though limited by the conditions of the Power of Attorney itself***

III. ***By instituting these proceedings, the Applicant was furthering the Principal's interest according to the powers granted to him by the Power of Attorney.***

IV. ***The act of instituting proceedings against the Respondent is therefore within the mandate conferred on the Applicant by the Power of Attorney.***

Application of Civil Procedure Rules

[6] They reiterated that, as rightly noted by the Arbitrator, Order 9 Rule 2 (a) of the Civil Procedure Rules cited by the Respondent does not apply to the arbitral proceedings since under Section 1(2) of the Civil Procedure Act, the Civil Procedure Rules only apply to proceedings before the High Court and subordinate courts. The Arbitration Act and the Arbitration Rules thereof are a separate code altogether. It is treated as a self-contained code. See what J.M. Ngugi J. in the **Nancy Nyamira case** (supra) said applying the binding decision of the Court of Appeal in **Anne Mumbi Hinga vs. Victoria NjokiGathara; Civil Appeal No. 8 of 2009** that the Arbitration Act is a complete code. The Court of Appeal further held as follows:

'-No application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration.'

Application of Canadian Law

[7] The Applicant stated that the Respondent is attempting to mislead this Honourable Court by submitting that the Arbitrator failed to apply Canadian law without showing to what extent the Arbitrator failed to apply Canadian Law or which Canadian Law was violated or misapplied. The Arbitrator himself confirms that Canadian Law was applied in the arbitral proceedings.See **D. Manji Construction Limited vs. C & R Holdings Limited (2014) eKLR**on the effect of statements such as the one of the application of Canadian Law which have been made at a very high level of generalization without concrete proof how the award failed to take into account Canadian Law; only creates false impression that the Respondent's right to fair hearing has been violated. The arbitrator applied Canadian law and dealt only with matters not beyond the terms of reference to Arbitration as alleged.

Jurisdiction

[8] The Arbitrator also gave the question of jurisdiction foremost attention on commencement of the arbitration proceedings. At page 3 of the arbitral award, the Arbitrator states that he convened the first preliminary meeting on 8th February, 2013 in which he invited both parties herein to confirm that they had no objection to the Arbitrator's appointment and also to confirm that the issues in dispute were actually within the Arbitrator's jurisdiction. He stated the following:

> ***'All the parties present at that meeting confirmed that they had no objection to my appointment as the Sole Arbitrator and also that the issues in dispute were actually within my jurisdiction.'***

[8] The arbitrator also formally determined the issue of jurisdiction; *whether the tribunal had jurisdiction to entertain the claim for Canadian Dollars 115,000.00.* See page 10 of the award. See also the paragraph 6 of the Respondent's Supporting Affidavit sworn on 8th February, 2012 by the Respondent's Director, Clive Wafukho, and filed in **HCCC No. 579 of 2011; Justus Nyang'aya (duly constituted attorney of William John Patterson) vs. Ivory Consult Limited** in support of the Respondent's Application for referral of the dispute to arbitration which was to the effect noted by the arbitrator as follows:

> ***'THAT all advances including ones in which no such written agreement was made, there was a prior understanding between the parties that any dispute will be resolved through arbitration in the first instance.'***

The Respondent cannot now turn around and make a contrary pleading. Equity, justice, fairness and basic good faith will stop them from disowning the oral agreement which the sought to be referred to arbitration. The deposition was made under oath. There was no appeal on jurisdiction as required by Section 17(6) of the Arbitration Act and as such the Respondent is now precluded from raising the same issue at this stage. On this see, the decision in the case of **D. Manji Construction Limited**wherethe court stated that:

> ***'Therefore, unless it is shown that the arbitrator veered off the course cut out for him by the law as his jurisdiction; courts of law should hesitate to interfere with the award. The issue of jurisdiction should be raised at earliest time possible before the arbitral tribunal and should be followed through by an appeal under Section 17(6) of the Arbitration Act if a party feels so strongly about it. In all other cases, the national court should develop great deprecation against claims of lack of jurisdiction of the arbitrator-'***

They also relied on the case of **National Oil Corporation Limited vs. Prissco Limited (2014) eKLR**where it was held as follows:

> ***The statutory act of reserving the authority to determine objections to the Arbitral tribunal, aims at paying due deference to and serving as a mark of recognition of arbitration as a recognized mechanism for Alternative Dispute Resolution (ADR); by preventing the Court from usurping the jurisdiction of the Arbitral tribunal and allowing the arbitral tribunal to exercise its jurisdiction without court interference. The basis of that approach draws from the doctrine of***

KompetenzKompentez which is replicated in most jurisdictions which have adopted the UNICITRAL Model Law on Arbitration. The Kenyan Arbitration Act follows after the UNICITRALModel Law on Arbitration. See a work of. Nyamu JA, (as he then was) sitting in the Court ofappeal in the case of <u>SAFARICOM LIMITED V. OCEAN VIEW BEACH HOTEL LIMITE& 2 OTHERS(2010) eKLR</u> where he held:-

"Although the English Arbitration Act 1996 is not exactly modeled on the Model law unlike our Act, 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 an 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 provision 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 "compliance to decide upon its competence" and as expressed elsewhere this ruling in German it is "Kompetenze** *(sic)/Kompetenz and in France 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 wrong but with jurisdiction".***

[10] The Applicant is convinced the Arbitrator determined the dispute within the confines of both the written and oral agreements. The Arbitrator did not decide matters outside his jurisdiction. He did not wander far outside the designated area. He did not digress far away from the allotted task. He did not ask himself the wrong question; neither did he disregard the agreements and award in excess of his authority. The Arbitrator acted reasonably, rationally and *capriciously*-[I do not seem to understand the use of this word within the category provided] - taking cognizance of the limits of the agreements. Despite the Respondent's deposition under oath admitting that the parties to the oral agreement had agreed to refer all disputes arising therefrom to arbitration, the Arbitrator still sought confirmation from the parties as to the jurisdiction of the tribunal to determine the dispute arising out of the said oral agreement. The Respondent acquiesced by giving its confirmation. See the case of **Equity Bank Limited vs. Adopt A Light Limited (2014) eKLR** the Court stated inter alia that it would accept a genuine attempt by a Tribunal to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties. The Court re-affirmed the holding in the case of **Mahican Investments Limited – Vs – Giovani Gaid& 80 others**, where Justice P.J. Ransley stated the following position:

"In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the Applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute."

Public Policy argument

[11] The Applicant submitted on what public policy entails for purposes of the Arbitration Act and cited the decision by Ringera J. (as he then was)**Christ for All Nations – Vs – Apollo Insurance Co. Ltd. [2002] EA 366**where he stated that:-

"An Award could be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten: or (b) inimical to the national interest of Kenya: or (c) contrary to justice or morality."

According to the Applicant, the Respondent has attempted, albeit unsuccessfully, to create a relationship between the broad concept of public policy and the myriad sensational arguments put forth thus far including the application of Canadian Law, the Applicant's scope of authority/ locus standi under the Power of Attorney and the jurisdiction of the Arbitrator to determine the dispute over the Canadian Dollars 115,000.00 agreement.these issues have been addressed in the foregoing submissions.

[12] The Respondent cannot challenge the determination of facts by the Arbitrator as it has done. See **D. Manji Construction Limited case** andalso**Mahican Investments Limited – Vs – Giovanni Gaidi& 80 Others** the court held that;-

> ***"A court will not interfere with the decision of arbitration even if it is apparently a misinterpretation of contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."***

[13] In light of the above, the Applicant submitted that the Respondent's contention that the award offends public policy is utterly misplaced. The Respondent has no valid objection to the arbitral award but is merely seeking to delay conclusion of this matter by transforming arbitration into another formof litigation. The arbitral award represents the Arbitrator's honest attempt to determine the rights of the parties in accordance with the Arbitrator's interpretation of the terms of the agreements the subject of the arbitration proceedings. Hon. P.J. Ransley J. (as he then was) in the case of **MahicanInvestments Limited & 3 Others vs. Giovanni Gaida& 80 Others (2005) eKLR** stated that**;**

> ***'A court will not interfere with the decision of an Arbitration****(sic)* ***even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties.'***

Accordingly, the Applicant urged the court to recognize the award and order its enforcement as the decree of the court.

The Respondent resisted recognition and enforcement of award

[14] The Respondent stated that the award sought to be recognized and enforced requires the Respondent to pay to the Claimant sums of USD 200,000 with interest at the rate of 9% p.a. from 20th August 2008 and a further amount of Canadian Dollars 115,000 with interest at the rate of 12% p.a. from 22nd December 2011 as well as the Respondent to bear the party and party costs of the Arbitration. The basis of the Award was that the Respondent and the Claimant had entered into two separate loan agreements in respect of two debts being USD 200,000 and CAD 115,000, the former amount being subject to a written loan agreement and the latter being the subject of an oral agreement; both were allegedly breached by the Respondent.

[15] The Respondent urged the court to refuse to recognize and enforce the Arbitral Award under Section 37 of the Arbitration Act 1995 and specifically on the following grounds:

(a) 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 (section 37 (1) (a) (ii))

b. 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. (section 37 (1) (a) (iv)

c. The recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya. (Section 37 (1) (b) (ii)

[16] The Respondent queried the locus standi of the Applicant to apply to enforce award and on that basis, the Application is incompetent and bad in law. The Applicant filed Civil case No. 579 of 2011; participated in the Arbitration Proceedings and filed these proceedings purportedly under a Power of Attorney number IP/A55441/1donated by WILLIAM JOHN PATTERSON. But the Power of Attorney:

a) Paragraph 1- appoints and authorizes the Applicant to do any acts on behalf of the Donor

subject to the conditions and restrictions contained in the power of attorney. It was not a general power of attorney

b) Paragraph 3- titled "CONDITIONS AND RESTRICTIONS" provides as follows:***"This authorization is restricted to representing me and my interests to Ivory Consult ltd. A Nairobi, Kenya Consulting Firm, and to the satisfactory conclusion of existing contracts and understandings with the said firm."***

c) The Power of Attorney is explicitly given to represent the Donor's interest in the Respondent in so far as concluding the existing contracts and understandings between the Donor and the Respondent is concerned. No room to infer any other powers like instituting legal actions or making representations in legal proceedings.

On this, see the decision in **Montgomerie v UK Mutual Steamships Association [1891] 1 QB 370 at 317** as quoted in **Mayfair Holdings Ltd v Ahmed [1990] KLR 667** that generally an agent is ordinarily neither entitled to sue nor liable to be sued on a contract made by him in representative capacity.Additionally the case of**Succession Cause 31 Of 2006 In The Matter Of: The Estate Of Nicole Polcino (Deceased) quoted the following Canadian and English cases on construction of powers of attorneys:**

The Privy Council in Bryant, Powis and Bryant Ltd –vs- La Banque Due Peuple. Bryant Powis and Bryant Ltd –vs- Quebec Bank [1893] A.C. 170 (1891 – 4) ALL E.R. 1253 stated as follows:

"Powers of attorney must be construed strictly, and, if a question is raised as to the authority conferred by the power, it must be shown that, on a fair construction of the whole instrument, the authority in question is conferred in express terms or by necessary implication."

In Stagg -vs- Elliot [1862] 6 L.T. 433 it was held as follows:-

"….that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair instrument the uthority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."

[17] According to the Respondent, oral and written agreements between the Donor and the Respondent were being negotiated and the power of attorney should be seen within that context. It does not include authority to institute legal proceedings on behalf of the Donor and swear affidavits. The Applicant lacks locus standi on the basis of Order 9 Rule 2(a) of the Civil procedure Rules, 2010 for lack of a power of attorney specifically and explicitly authorizing him to make such appearances and do such acts on behalf of the party; and the approval of the Court. The two requirements are conjunctive and indispensable. See the case of**Maritim v Elizabeth N Njaaga [2013] eKLR**on necessity of approval of the court before making any appearance or application by making an application by way of notice of motion as a way of allowing the opposing party to challenge the validity of the authority. See also **CarolyneMpenzweChipande v WanjeKazunguBaya [2014] eKLR**, where the Court stated thus:

"This provision is not a technical requirement of procedure as suggested by the appellants but one that goes to the root of the capacity of the recognized agent to bring the suit or to act on behalf of the real party."

See also **Theuri v. Republic [1990] KLR**that:

"in the simple case where a power of attorney is given to someone to bring or defend an action in the name and on behalf of the Donor, the proceedings should be in the name of the principal and the title of the proceedings will not indicate that another person has been empowered to act on his behalf; the action proceeds as if the principal had not delegated to an attorney the taking or defending of the proceedings."

Accordingly this Court should dismiss this application suit for the Defendant's lack of locus standi. Even the primary referral suit was without authority and so invariably, the arbitration process and arbitral award must also be deemed void.

Arbitration agreement invalid in relation to the oral Loan Agreement

[19] The Arbitral award in so far as it deals with the oral agreement for the loan for Canadian Dollars 115,000,cannot be the basis for a referral to arbitration or grant an arbitrator jurisdiction. The Arbitrator found at page 10 of his ruling that he had jurisdiction to entertain the claim for the loan for Canadian Dollars 115,000 on the basis of the fact that the Respondent through Mr. Clive Wafukho had sworn an affidavit in support of the Respondents Application to have the entire dispute referred to arbitration, wherein Mr. Wafukho stated that there was a prior understanding that any dispute including those arising from understanding between the parties made without an agreement would be resolved through arbitration. That is to say the Arbitrator held that an oral agreement to refer a matter to arbitration was valid and conferred the Arbitrator with jurisdiction.

[20] The Respondent submitted that the Arbitrator failed to identify the law under which the Oral Agreement for Arbitration would be valid. There was no evidence led as to the governing law of the oral contract. Accordingly it was incumbent on the arbitrator to apply the law of Kenya to determine the validity of the oral Agreement and under Kenyan law an arbitration agreement must be in writing as is clearly spelled out in Section 4 of the Kenyan Arbitration Act 1995. See **Naizons (K) Limited v China Road and bridge Corporation (Kenya) civil appeal number 187 0f 1999**where the Court held that Jurisdiction cannot be conferred by estoppel, consent acquiescence or default. Absent agreement in writing there is no valid arbitration agreement in writing and not jurisdiction is conferred. The Respondent could not be estopped from challenging the Jurisdiction of the tribunal in such situation. And without jurisdiction there was no basis for the continuation of the proceedings on the oral agreement. Thus, the Arbitral award to the extent that it deals with the oral agreement is a nullity and this Honourable Court should not enforce the Arbitral Award to that extent.

Section 37 (1) (a) (iv) of the Arbitration Act)

[21] The Respondent argued that the Arbitral award dealt 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. Specifically, the Award primarily deals with two issues,

> a. A loan of USD 200,000 advanced to the Respondent by Mr. William John Patterson subject to an "Undated Agreement" (Applicant's Annexure JN2).
>
> b. A loan of CAD 115,000 advanced to the Respondent by Mr. William John Patterson on the basis of an oral agreement ("the Oral Agreement").
>
> With regards to the USD 200,000 loan the Undated Agreement between the parties required as follows:
>
> > At Clause 12 – Governing Law: This agreement shall be governed and construed according to the laws of Canada
> >
> > At Clause 13 – Arbitration: The parties by entering into this agreement submit to adjudication of any dispute and / or claims between them. The forum of arbitration shall be Nairobi Kenya. The arbitral proceedings shall be governed by the Laws of Canada.

[22] The governing law s Canadian law. Indeed even giving consideration to the Order of the High Court in Civil Suit No 579 of 2011, the Learned Judge noted the reservation as to Canadian Law when referring the matter to Arbitration and ordering the appointment of the Arbitrator. However, despite this explicit reference to Canadian law, the Arbitrator completely neglected to apply such law to either the procedural aspect or substance of the Arbitration. There wasn't a single attempt to construe any issue in

contention under Canadian law, and more specifically the Powers of Attorney, which itself was a Canadian document but which was subjected to an English / Kenyan law interpretation. This was a misconduct of the arbitration which warrants the refusal to enforce the award. This is evident from the face of the ruling, to wit:

> a. with respect to the Power of attorney the Arbitrator while expressly acknowledging that it is a Canadian Document proceeded to interpret its scope albeit erroneously, in accordance with English law and arguable as the basis of Kenyan Common law. The reliance on English law / Kenyan law fell beyond the scope of the Arbitration reference.
>
> b. With respect to the disputed loan of USD 200,000 the arbitrator did not apply Canadian law in interpreting the Contract and indeed it is not clear at all what law was applied in the resolution of the dispute. The only deduction that can be made is from paragraph 19 (c) of the Award where there is reference made to Chitty on contracts, 29th Edition Volume 1, which infers once again the use of English law in resolution of the dispute. This once again fell foul of the terms of reference of the Arbitration.

See the case of**JosphatMurageMiano and Another v. Samuel Mwangi Miano Civil Appeal NO. 26 of 1996**where the court held as follows:

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

[23] Grounds for setting aside of an arbitral award are the same as those for the refusal to enforce an award. The Respondent's request that the award be set aside for misconduct is in order.

Recognition or enforcement of the award contrary to the public policy of Kenya (Section 37 (1) (b) (ii) of the Arbitration Act)

[23] The Respondent humbly submitted that the Arbitral award should be set aside as its recognition or enforcement would be contrary to public policy in Kenya. He cited the case of **Christ For All nations v Apollo Insurance Co. Ltd (2002) 2 EA 366.** The Respondent submitted that the Arbitral award offends the Constitution and laws of Kenyan, and goes against justice and morality as it is patently illegal. By failing to apply the governing Canadian Law to the Arbitration proceedings and substance (with respect to the USD 200,000 loan), the Arbitrator violated the right to a fair hearing as encapsulated in Article 50 of the Constitution of Kenya, which provides:

> ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent tribunal or body."***

Additionally, the Respondent submitted that the Right to fair hearing is absolute and non-derogable in accordance with Article 25 (2) of the Constitution of Kenya 2010.

[24] The award was inimical to justice and morality, for patent illegality. See **DB Shapriya and Company Ltd v Bish International BV (2) 2003 2 EA 404** (HCT) where the court held thus:

> ***"it is only when an erroneous proposition of the law is stated in the award and which is the basis of the award that the court can set aside or remit it for reconsideration on the ground of error on the face of the record."***

And also**Naizons (K) Limited v China Road and bridge Corporation (Kenya) civil appeal number 157 of 2000; (2001) 2 EA 502**, the court stated that:

"if parties should seek, by agreement to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void."

Accordingly, an error of law is deemed to be contrary to public policy as it clearly constitutes an injustice.

[25] The Respondent humbly submitted that whereas the purpose of arbitration is to resolve matters speedily and with finality, it cannot be to compromise the administration of justice. Arbitration must abide by the concepts of justice and the rule of law. The court cannot ignore an apparent error of law as such would perpetuate grave injustice which offends to the very core of public policy. See **Oil &Natural Gas Corporation Ltd vs Saw Pipes Ltd. the Supreme Courtof India** ("Saw Pipe Case") on public policy and violation of statutory provisions-a matter of public interest. This indeed resonates with local decisions such as **Narenda Kumar Jasbhai Patel V. Bank of Baroda Civil Appeal No. 80 0f 2000; (2001 (1) EA 189**.In view of the foregoing, the Respondent submitted that, the Arbitral award is against the terms of the Undated Agreement and the Oral Agreement and replete with erroneous propositions of the law on the face of the award. Section 29 (1) of the Arbitration Act provides that the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. On the face of the Record it is apparent that the Arbitrator made no attempt to apply Canadian law to the dispute. The arbitrator was re-writing the contract between the parties. In so doing the Arbitrator went against the Provisions of Section 29 (5) of the Arbitration Act, 1995 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. His finding were based on opinions which is not supported by evidence are wrong and amount to misconduct justifying setting aside of the award – as was decided in **Francis MainaMathii v Peter NguruBedan civil Appeal No. 292 0f 1996.** A proper construction of the Contract in Canadian Law as well as even Kenyan Law, would have revealed that Clauses 4 and 6 of the contract provided for instances of default and process of acceleration which were a prerequisite to the loan being payable on demand. Accordingly in the absence of a default notice with a stipulated period for cure of default, the loan agreement could not be accelerated and therefore could not be payable on demand. Once again the Arbitral tribunal failed to render a decision in accordance with the terms of the particular contract as required by Section 29(5) of the Arbitration Act. The Respondent urged the court to refuse to recognize and enforce the Arbitral Award and instead set it aside. And accordingly, this Honourable Court should dismiss the Applicant's Chamber Summons dated 14th February 2014 with costs.

DETERMINATION

Issues

[26] When an application under section 37 of the Arbitration Act is opposed, the issues ordinarily mirror the grounds set out in the section for refusal of recognition of the award. And ultimately, the court determines whether it should refuse or grant recognition and enforcement of the award as sought in the application. This case is not any different. The following questions constitute the issues for determination:-

a) Did the Award deal with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or contain decisions on matters beyond the scope of the reference to arbitration? See Section 37 (1) (a) (iv) of the Arbitration Act.

b) Is the award contrary to the public policy of Kenya? See Section 37 (1) (b) (ii) of the Arbitration Act: And

c) Was there misconduct on the part of the Arbitrator?

PRELIMINARY ISSUES

(i) Locus standi

[27] Two matters of great preliminary significance have emerged and need to be determined from the outset. The matter of *locus standi* of the Applicant and the overall competence of the referral suit, the arbitral proceedings and this applicationoccupied a central position in the arguments by the Respondent. And therein lay the hotly argued objection on the validity and scope of the Power of Attorney IP/A55441/1 granted to the Applicant by the principal donated by WILLIAM JOHN PATTERSON. The Respondent argued that the Power of Attorney was no a general one but a special one limited to only concluding negotiations of the oral and written agreements between the principal and the Respondent. They said it did not include filing of suit or commencing arbitration proceedings or enforcing the award. This is their interpretation of Paragraph 3- titled "CONDITIONS AND RESTRICTIONS" which provides as follows:

> ***"This authorization is restricted to representing me and my interests to Ivory Consult ltd. A Nairobi, Kenya Consulting Firm, and to the satisfactory conclusion of existing contracts and understandings with the said firm."***

[28] The Applicant on the other hand argued that it had a general power of attorney which authorized him to file suit as well as conclude arbitral proceedings and enforce the award therefrom. I find to be erroneous, the argument by the Respondent that it was misconduct for the Arbitrator to have subjected the Power of Attorney *''which itself was a Canadian document but which was subjected to an English / Kenyan law interpretation''*. The Respondent seems to confuse the power of attorney with the arbitration agreement. The true position is that, construction of the Power of Attorney was not part of the arbitration clause. It was merely to confer authority upon the doneeto do certain acts in Kenya on behalf of the donor in respect of the subject of the agreements in question. I do not think, therefore, such connexion that is being drawn by the Respondent between the power of attorney and the arbitration agreement is correct or a basis to found misconduct on the part of the Arbitrator. Construction of the Power of Attorney was proper as long as it was in accordance with the terms and conditions in the power of attorney itself. Looking at the overall tenor of the power of attorney, the Applicant had authority to file suit in respect of the subject matters of the oral and the written agreements between the donor and the Respondent in Nairobi. This is a necessary implication arising from the nature of the agreements and the fact that quasi-judicial proceedings in the form of arbitration were envisaged. I dismiss the contrary argument. Therefore, the applicant has locus standi to filethis suit as well the arbitral proceedings; thus, the arbitral proceedings, this suitwere and the application before me are competent.

Absence of section 35 application

[29] The other preliminary issue is the argument by the Applicant to the effect that there is no application to set aside award under section 35 of the Arbitration Act. I understood the Applicant to insinuate that the objections by the Respondent should not be entertained because he has not file an application under section 35 of the Arbitration Act and tile therein has expired. I have had several occasions to render myself on this question and I am content to cite the case of **National Oil Corporation of Kenya Limited vs. Prisko Petroleum Network Limited [2014] eKLR**as below**:-**

Legal basis of objections

[20] The Applicant challenged the legal basis for the objections by the Respondent which I find to be an issue of preliminary significance. I propose to deal with it as such. The Applicant has argued that the Respondent is precluded from raising objections to the award at this stage especially because it did not file an application to set aside the award within ninety days as provided for under section 35 of the Arbitration Act. According to them the right to apply or raise objections to the award was lost and cannot be exercised at the stage of enforcement. The Respondent on the other hand argued that section 37 provides them with an opportunity to raise objections to the award on grounds of lack of jurisdiction or acting on invalid contract and arbitration agreement. I wish to be clear and understood about section 35 and 37 of the Arbitration Act on the setting aside, suspension, refusing recognition or enforcement of the award. In light of the above arguments by counsels, I see great need to compare the jurisdiction of the court in the two sections at this preliminary stage. If I understood the Applicant's argument well, it seems to me to be suggesting that once the time prescribed under section 35 of the

Act for applying to set aside the arbitral award has lapsed, the party against whom the award is made cannot apply for the setting aside of the award at the stage of recognition or enforcement of the award. That is a huge jurisprudential point around foreclosure of the right to access to justice and to be heard. The court had occasion to deal with the two sections and I am content to adopt a work of this Court in the case of SAMURA ENGINEERING LIMITED v DON-WOOD CO LTD [2014] eKLR that:

[8] There is no doubt that the application for enforcement of the award dated 22nd March, 2012 was made ex parte through a Chamber Summons dated 26th November, 2012. It was never served on the Applicant, and it proceeded ex parte. It was also granted as such by Mabeya J on 5th February, 2013. Section 36(1) of the Act allows a party to file an application for recognition and enforcement of the award. Rule 9 provides for the procedure of applying as follows:

An application under section 36 of the Act shall be made by summons in chambers.

Another further but important detail: Rule 6 provides for an ex parte application in the following manner:

If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply ex parte by summons for leave to enforce the award as a decree.

A cursory and shallow reading of rule 6 above may found a justification of sort that the application envisaged under section 36(1) of the Arbitration Act and rule 9 of the Arbitration Rules is to be made Ex parte especially where the person against whom the recognition and enforcement of the award is being invoked, has not filed an application to set aside the award under section 35 of the Arbitration Act. But, that kind of approach or interpretation will certainly excite serious constitutional objections on the front of the right to be heard. At least in this case, the objection has already been raised in that behalf; and it being a major constitutional matter, gives the court occasion to settle it in a more resounding manner.

[9] Let me go back to section 36(1) and (3) of the Act which provides as follows:

36(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

36(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish.

a. ***The duly authenticated original award or a duly certified copy of it; and***

b. ***The original arbitration agreement or certified copy of it."***

Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the Constitution. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed. Accordingly, by that requirement, I think, a notice will invariably be required and the provisions of rules rule 4 and 5 of the Arbitration Rules on filing of the award will abide, which provide that

> ***The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.***

[10] The proposition I have made, finds support in the provisions of section 37 of the

Arbitration Act and which an application under section 36(1) of the Arbitration Act must comply with. Section 37 gives the party against whom the recognition and enforcement of the award is being invoked, an opportunity to file an application in court for the setting aside or suspension of an arbitral award on the grounds set out in subsection (1)(a)(vi); and 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. There are striking similarities on the grounds of setting aside the award under section 35 and 37 of the Arbitration Act. It is also clear that both sections give the party against whom an award has been made opportunities at different stages of the proceedings. But despite that clear position, I have heard many practitioners posit that there is a conflict between section 35 and 37 of the Arbitration Act, and that argument has bred two schools of thought on the matter. The proponents of one school of thought favour strict application of section 35 of the Arbitration Act and seem to assign legitimacy to an ex parte application being made under section 36(1) of the Arbitration Act without reference to the other party; while there are others who ascribe to the constitutional desire and principle of fair trial and right to be heard. The latter advert themselves to the argument that the right to a fair trial which includes the right to be heard in all substantive processes in a judicial proceedings is a constitutional right which cannot be circumvented, and in arbitration the right extends to the process of recognition, adoption and enforcement of the award as the order of the court. The process in section 36 and 37 of the Arbitration Act leads to the adoption of the award by the court, thus, the court super-adds its authority into and embodies the award as the order of the court; from that time, the person in whose favour the award is made can enforce the award, and the person against who the award is made runs the risk of suffering execution. On that basis, I agree that there is justification and merit in the argument that an application for recognition and enforcement of the award under section 36(1) of the Arbitration Act and Rule 9 of the Arbitration Rules should be served on the other party. Again, I do not think there is any conflict between section 35 and 37 of the Arbitration Act. Equally, I do not think section 35 of the Arbitration Act is a claw-back on the opportunity to be heard granted under section 37 of the Arbitration Act. In any event, the Arbitration Act as an existing law as at the effective date of the Constitution of Kenya, is the exemplar and classic promoter of the principles of justice enshrined in the Constitution. The opportunity to be heard in section 37 of the Arbitration Act is not, therefore, rendered otiose just because the person against whom execution of the award is sought has not filed an application under section 35 of the Arbitration Act. Accordingly, by making specific reference in section 36(1) of the Arbitration Act that, recognition and enforcement of the award will be subject to section 36 itself and section 37, Parliament was not under any delusion, and the opportunity to be heard in section 37 of the Arbitration Act is not an unnecessary or superfluous addition or appendage; it is a substantive provision of the law aimed at providing substantive justice to all the parties in the arbitral proceedings. The process provided for in the Arbitration Act should also be seen within the nature of arbitration as a consensual and voluntary process. There is absolutely no prejudice that the party applying will suffer in adhering to the law and serving all processes on the other party. The practice of adhering to procedure in the Arbitration Act will only reinforce the probity of and sanctify the courts willingness to issue adoption orders, and undoubtedly, execution will be freed from unnecessary applications by unscrupulous parties who do not wish the arbitral process to end. I hope parties will so comply with the law and obviate a situation where the court will waste the precious judicial time on a convoluted matter such as this. I also would wish to see a recast of the Arbitration Rules in order to reconcile them with the requirements of the Act and the Constitution which encourages Alternative Disputes Resolution.

[30] With that rendition, I find that the request by the Respondent within the scheme on section 37 of the Arbitration Act that the award be set aside is properly before the court and I will determine it on merit.

Jurisdiction

[31] I have said this before and I will repeat it here, that, unless it is shown that the arbitrator veered off the path cut out for him by the law as his jurisdiction; courts of law should hesitate to interfere with the award on ground of jurisdiction which is raised for the first time before the National Court. The issue of

jurisdiction should be raised at earliest time possible before the arbitral tribunal and should be followed through by an appeal under Section 17(6) of the Arbitration Act, if a party feels so strongly about it. In all other cases, the national court should develop great deprecation against claims of lack of jurisdiction of the arbitrator being raised before them except in accordance with Section 17(6) of the Arbitration Act. Section 17(6) states as follows:

> ***'Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.'***

[32] The question of jurisdiction on the oral agreement as well as the written agreement herein was dealt with as a preliminary issue. It was reinforced by the parties including the Respondent. If there was to be any objection, the correct channel to follow through on it would be the one provided in Section 17(6) of the Arbitration Act. It will be inappropriate for this court to revisit the issue. Even if I revisit it, my view is that parties are allowed to present to the arbitrator by consent such matters they have agreed to form part of their dispute as was done in this case. Therefore, the Respondent would still be precluded from going back on the issue. I will, however, determine the other grounds which have a bearing on the authority of the arbitratortoascertainwhether the arbitrator veered off the path cut out for him by the law, the contract and the reference.

Claim that Award dealt with matters not contemplated by reference

[33] Under Section 37 (1) (a) (iv) of the Arbitration Act, the Respondent is entitled to ask: Did the Award deal with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or contain decisions on matters beyond the scope of the reference to arbitration?The Respondent argued that the arbitrator assumed jurisdiction on an oral agreement which was not subject of the arbitration agreement. And by considering and making an award on those matters of the oral agreement, the Award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or contained decisions on matters beyond the scope of the reference to arbitration. The reference was made by the court in High Court in Civil Suit No 579 of 2011. The Respondent indeed asked the court to refer the entire dispute including the oral agreement to arbitration. The referral to arbitration was at the instance of the Respondent and despite the reservations by Havelock J on the Canadian law; the Respondent did not raise an objection in the suit to the referral. The Respondent's conduct was again tinctured when the question on jurisdiction on the oral agreement was raised before the arbitrator; it precludes him from denying the oral agreement was to be subject of arbitration. Arbitration is a consensual process to which parties submit voluntarily and as such the law will never allow a dishonest party to take another through the rigours of the arbitration process by making representations conferring jurisdiction on the arbitral tribunal only to come later and attempt to deny them. That is force, stealth fraud and dishonest conduct which the court must always suppress the moment it manifests itself before the court. I agree with the Applicant on that front. The oral agreement was within the purview of the reference.I note that the Respondent has submitted that evidence to support the oral agreement was not adduced. I should state here that, findings of facts and evaluation or sufficiency of evidence is a preserve of the arbitrator and this court will not interfere with an award on the allegations of insufficient evidence. For the court to claim proper intervention with an award, it has to look at the record which should in plain eye-sight and patently reveal that the decision was not based or supported by any evidence at all; or in simple terms, the decision was made out of the blues. This is not the case here as the arbitrator evaluated the evidence before him and applied the law in making the award. See **D. Manji Construction Limited case,** where the court stated as follows:

> ***'The applicant has cited some alleged erroneous decisions by the arbitrator on matters to do with completion date, double gauge windows, rate of interest awarded, final accounts, disregard of evidence, extension of time, only to mention but a few. As it will be borne out later, those arguments did not really show that the law was violated as they are matters which fall within the fallibility of every person who is exercising judicial or quasi-judicial authority. They also relate to the merits and factual appreciation of the case by the arbitrator; which again falls squarely on the competence of the arbitrator as the master of facts. See the case of KENYA OIL COMPANY***

LIMITED & ANOTHER v KENYA PIPELINE COMPANY[2014] eKLR, MORAN v LLOYDS (1983) 2 ALL ER 200 and DB SHAPRIYA& CO. v BISHINT (2003) 3 EA 404,where there is judicial consensus that;

"All questions of fact are and always have been within the sole domain of the Arbitrator……..the general rule deductible from these decisions is that the court cannot interfere with the findings of facts by the Arbitrator."- ' *(Emphasis mine.)*

[34] Was Canadian law applied? The arbitrator expressly stated he applied Canadian Law. The Respondent states none of the Canadian law was applied. The question is this: What Canadian Law did the Respondent cite or which was to be applied but the arbitrator did not? None was cited before the arbitrator and none has been cited before this court. Nonetheless, the Respondent still wanted the court to found misconduct on this point. Even in this application, the Respondent has not pointed out the Canadian laws which were applicable but were not applied. The court is not told that the principles applied by the arbitrator were contrary to Canadian law; and I suppose that would have been achieved by citing the substantive laws and principles thereto. This was not done before the arbitrator and has not been done before this court. We can only speculate what the Respondent means by saying that the arbitrator did not apply Canadian Law. The arbitrator stated in the award that he applied Canadian Law. The Court is not here to question the ability of the arbitrator to appreciate Canadian Law. I can only say that the argument is attractive and appears to be very powerful and formidable ground-which I believe was the Respondent's intention- yet, on close examination, it is hollow and feeble in substance. The argument on application of Canadian Law cannot support the setting aside of the award herein.

Claim that the Award was Contrary to Public Policy

[35] The Respondent has combined all the foregoing arguments to support the ground that the award is, therefore, contrary to public policy of Kenya.Ringera J. (as he then was) **Christ for All Nations vs. Apollo Insurance Co. Ltd. [2002] EA 366**postulated what contrary to public policy entails as follows:-

"An Award could be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten: or (b) inimical to the national interest of Kenya: or (c) contrary to justice or morality."

The learned Judge went on to hold that;-

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

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

I should state that, I have made a finding on the arguments on the application of Canadian Law and the oral agreement. In light thereof, there is no deprivation of constitutional right to fair trial or a violation of statute law as claimed. The award is not, therefore, contrary to public policy of Kenya. I also find that, there is not any misconduct by the arbitrator, personal or otherwise,for which the award should be set aside. Accordingly, I am not satisfied the Award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or contained decisions on matters beyond the scope of the reference to arbitration. The award herein was in accordance with the law and the reference; it is final and

binding. I hereby issue an order of recognition of the award as the decree of this court and shall be enforced as such decree in accordance with the provisions of the Arbitration Act and other applicable laws on execution. Costs of the application go to the Applicant.

Dated and signed at Nairobi this 15th day of May 2015.

F. GIKONYO

JUDGE

Delivered, dated and signed in court at Nairobi this 21st day of May 2015.

E. OGOLA

JUDGE