REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION No. 17 of 2013

IN THE MATTER OF THE ARBITRATION ACT, 1995

IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD

BETWEEN

TOTAL KENYA LIMITED.....APPLICANT

Versus

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

RULING

Setting aside arbitral award

[1] The Applicant herein TOTAL KENYA LIMITED was dissatisfied with the Award made and published on 4th August, 2012 by Mr. Richard Mwongo (hereinafter referred to as "the Arbitrator"). It applied through the Application dated 21st January, 2013 expressed to be brought under Section 35 of the Arbitration Act, 1995 for the following Orders that;-

a) The Arbitral Award made and published by Mr. Richard Mwongo on 4th August, 2012 to be set aside.

b) The dispute between Total Kenya Limited and Kenya Pipeline Company limited which was subject matter of the Arbitral Award made and published by Mr. Richard Mwongo be heard and determined *de novo* before an Arbitrator to be appointed by the Parties in accordance with the Transportation and Storage Agreement dated 17th August, 2007 between them.

c) Costs of the Application to be provided for.

[2] The Application is supported by two affidavits sworn on 21stJanuary, 2013 and 8th April, 2014 by Boniface Abala. The Applicant canvassed the following three significant grounds as the basis for setting aside the Arbitral Award, that;-

a) The Arbitrator's findings in the Arbitral Award, were ostensibly premised on matters in respect of which the Applicant was incapable of testifying on or presenting evidence about,

thereby rendering the Applicant under substantial incapacity to its prejudice and detriment.

b) The Arbitrator paid undue regard to matters not contemplated in or falling within the terms of the reference to Arbitration.

c) The Arbitral Award is in conflict with public policy of Kenya.

[3] The Applicant submitted that, by the letter dated 8th December, 2009, it set out the dispute between the parties as follows;-

> ***"Pursuant to a Transportation and Storage Agreement dated 17th August, 2007, the Respondent was under duty to confirm to the Claimant that 5,000 metric tons of diesel (5,000MT AGO) had been safely received at Kipevu Oil Storage Facility (KOSF) and credited to the Claimant's stock to enable it deal with the same. The Claimant started trading on the said stock as it awaited credit of another 3,000 MT AGO. In breach of the Agreement, the Respondent instead altered the Claimant's stocks to 3,000MT AGO. Accordingly, instead of the Respondent crediting the Claimant with a total of 8,000 MT AGO it credited the Claimant with 3,000 MT AGO occasioning a loss of 5,000 MT AGO valued at 5, 025,271.20. The Claimant had paid the sum of Shs. Shs. 116,495,500/- in taxes to the tax authorities."***

[4] The Respondent on its part, agreed that the Claimant's counsels letter dated 8th December, 2009 captures the dispute but its position was that at the time the Claimant alleges that the property had passed, Triton had already issued instructions to transfer the product to third parties and the product was not available to be given to the Claimant.

[5] The Dispute, therefore, and the Applicant's case was as set out in the Amended Statement of Claim is as follows;-

> 1) The claim by the Applicant is for 5000 Metric Tonnes of Diesel (5000 MT AGO) purchased from Triton Petroleum Company Limited (Triton) and valued at USD 3,140,794.50 and in respect of which the Applicant paid the sum of Kshs. 116,495,500/= in taxes to the Kenya Revenue Authority("KRA").
>
> 2) The said 5000MT AGO was part of a larger consignment of 8000 MT AGO purchased from Triton, and was stored at the Kipevu Oil Storage Facility (KOSF) owned and operated by the Respondent.
>
> 3) It is the duty of the Respondent, pursuant to a Transportation and Storage Agreement entered on 17th August, 2007 (hereinafter "the TSA") between the Applicant and the Respondent, to ascertain and confirm to the Applicant the product in question had been received at KOSF and credited to the Applicant's stocks, to enable the Applicant deal with the same.
>
> 4) On 28th November, 2009, following compliance with a well laid down procedure, which included the issuance of confirmations as to the availability of the product at KOSF, and the payment of applicable duties, the Respondent confirmed that it had received and credited to the Applicant stocks 5000 MT AGO purchased from Triton.
>
> 5) Relying on the Respondent's representations, the Applicant commenced trading in its stocks, as it awaited confirmation on the delivery of a further 3000 MT AGO.
>
> 6) On 2nd December, the Applicant received a confirmation of credit of 3000MT AGO but as an alteration of the earlier credit of 5000MT AGO to 3000 MT AGO. The essence of the confirmation of stocks contained in the email of 2nd December, 2008 was that out of the

8000 MT AGO purchased, the Applicant had only received 3000MT AGO and that the Applicant had lost 5000MT AGO or its value and Kshs. 116,495,500/- in taxes paid.

7) The Respondent on its part alleges that it gave the confirmations and made the alteration because upon reviewing its records, it realized that Triton did not hold sufficient stocks at KOSF to enable it make good its sale to the Applicant.

[6] The Applicant argued that, whereas arbitration is a consensual process and leads to a final award, Courts play supervisory role in order to safeguard the basic elements of fairness and impartiality. The court in exceptional circumstances will set aside the award. The Applicant urged that the Arbitrator's determination was to have been on issues which were contemplated by the agreement or the parties in the Transportation and Storage Agreement between the Applicant and the Respondent dated 17th August, 2007, clause 22 at page 38 of the Application dated 21st January, 2013. This is the position reiterated in the Applicant's Advocates letter dated 15th April, 2010 attached to the Respondent's Further Affidavit filed on 24th January, 2014. But the determination was contrary to public policy.

Arguments on Public Policy

[7] The Applicant stated that Arbitration Act, 1995 has adopted the Model Law on International Commercial Arbitrations- the United Nations Commission on International Trade Law (UNCITRAL). It has adopted public policy as a ground for setting aside an award and as a part of the law thereof, an award which in contrary to the basic principles of morality and justice will be set aside as a matter of public policy. The Applicant argues the award was contrary to morality and justice. It submitted that in international Arbitration, it is not the abstract rule of law applied by the Arbitrators which is measured against the requirements of international public policy, but the actual result reached by the Arbitrators. **-See the New York Law Journal on the Extent of Court's Review of Public Policy.** The Applicant cited the case of **Rwama Farmers Co-operative Society Limited vs. Thika Cofee Mills Limited [2012] eKLR**, where Mabaya J relying on Renusagar Power Company Ltd vs. General Electricity Company (1994) AIR 860, National Oil Company (1987) 2 All ER 769 and Glencore Grain Ltd vs. TSS Grain Millers Ltd [2002] 1 KLR 606 concluded that :-

"Conflict with public policy used in Section 35(2) of the Arbitration Act, is akin to contrary to public policy 'against public policy', ' opposed to public policy'. These terms do not have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."

[9] Therefore, in the perspective of the Applicant, an award will be set aside on the basis of public policy where there is something ***''…that is injurious to the public, offensive, with an element of illegality, that is unacceptable to the Kenya society with Award."*** They also cited that case of **Mahican Investments Limited & 3 others vs. Giovani Gaida & others 80 others [2005] eKLR**, where the Court upon considering the decision of Justice Ringera in **Christ for**

All Nations vs. Apollo Insurance Co. Ltd on public policy concluded that;-

"There is not all embracing definition which exhaustively defines what public policy includes. Suffice to say that what is contrary to public policy will be a matter to be determined by a judge in any case where it is alleged to have been infringed."

[10] And relying on paragraph 16 of the Supporting Affidavit of Boniface Abala the Applicant is convinced that enough grounds have been adduced for the award to be set aside for being contrary to the public policy of Kenya. These include;-

a) Disregard of the customs and trade usages in petroleum industry even when the Award is allegedly stated to be premised on the said customs and trade usages. Thus, may lead to uncertainty

of the trade usage. One of the trade usage which the Arbitrator dismissed was that the Applicant like any other Oil Marketing Companies (OMCs) which had not participated in the Open Tender System could purchase oil product from a party that had participated. Throughout the Arbitral Award, the Arbitrator has unnecessarily demonstrated that the failure by the Applicant to participate in the Open Tender System removed the Applicant from those OMC which could claim entitled to the product imported by Triton for the industry under the Tender awarded yet the Applicant had not claimed entitled to the same. At the hearing, it was not disputed that the OMC which successfully bids to import for the industry's requirement could import + or – 5% of the market requirement. It was confirmed that Triton actually discharged product in excess of what had been tendered for the use and/or distribution in the market. **See Clause/paragraph 36 of the Award which is at pages 1261 to 1312 of the Application (Volume 3)**

b) The Arbitrator exonerated the Respondent from any liability/ responsibility in the alleged correction of error even after finding that the said correction of error had not been done according the known practice in the industry, in addition to the losses incurred by the Applicant.

c) The Award justifies the Respondent capricious alteration of the Oil Marketing Companies (OMC's) stock positions without any regard to the interest acquired by the OMCs using the internal controls and processes. The said alteration is made in spite of the representations made to the OMCs and acted upon by the OMCs notwithstanding that the unilateral reversals or alterations or corrections affects stocks which may have been traded in by the OMCs rendering the petroleum trade uncertain and unpredictable.

d) The Arbitral Award unjustifiably diminishes the role of the Respondent in payment of taxes in the petroleum industry by absolving the Respondent from the responsibility of confirming the value and/or quantity of the product within the bonded warehouse for the purpose of ascertaining the taxes payable by a party to KRA. This role can only be performed by the Respondent and no other party.

e) Despite finding that the Applicant had paid Kshs. 116,495, 500/- to KRA in taxes for the product traded in tank, the Arbitral Award removes the Respondent's participation in ascertaining whether tax could be paid or not. Yet, the said taxes cannot be paid without the Respondent's confirmation as to the availability of the product.

[11] For those reasons, the Applicant believes the Award is in conflict with the public policy of Kenya and should be set aside on account of its actual effect in the oil/ petroleum industry.

Claim that award is outside the terms of reference

[12] Under this head, the Applicant argued that the decision whether the decision of the Arbitrator went outside the terms of reference depends on the issues the parties have raised in their pleadings. The issues for determination are set out from pages 1302 of the Application (volume 3). The Applicant has at paragraph 15 of Affidavit of Boniface Abala sworn on 21st January, 2013 set out matters which the Arbitrator paid undue regard to. The said matters were not contemplated by the parties and as a result, the Arbitrator failed to determine the actual dispute between the parties. Section 35(2) (a) (iv) of the Arbitration Act provides that;-

"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 reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only the part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside."

They found support in the case of **Josphat Miano & Another vs. Samuel Miano & Another [1997] eKLR**, where the Court of Appeal in allowing an Application to set aside an Arbitral Award held that;-

"***The basis of this award is unexplained and it is apparent on the face of it that the real issue in controversy between the respondents and the appellants was not adjudicated upon by the arbitrators. As cited with approval the observation of Lush, J. William v. Wallis and Cox, [1914] 2 K. B. 478 by this Court in Bagwasi Nyang'au v Omosa Nyakwara, (1982-88) 1 KAR 805at page 807:***

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

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

[13] They concluded that this kind of misconduct is present here and makes the award to be in conflict with the public policy and cannot stand. In addition to reference to the Joint Participation Agreement dated 1st February, 2008 between the Applicant and Triton, the contents of the Transport and Storage Agreement between the Respondent and Triton and the dismissive reference to the dates on which taxes were paid, the Arbitrator at **Clauses 38 and 39 of the Award** considered matters that had not been referred to the Tribunal. The basis of the claim by the Applicant was the Agreement to purchase stock which was in-tank and in the custody of the Respondent.

The ground of incapacity

[14] Instances of the Applicant's incapacity are set out at paragraphs 8, 9, 10 and 11 of the Affidavit of Boniface Abala sworn on 21st January, 2013. They stated that unlike the case of **APA Insurance Co. Ltd vs. Chrysanthus Barnabas Okemo [2005] eKLR,** where the Court declined to set aside an Arbitral Award because the evidence before the Arbitrator had not been challenged at the Arbitral Tribunal and the Applicant had attempted to challenge the said evidence at the High Court, the Arbitrator in these proceedings found on the basis of uncontroverted evidence before him that;-

a) The Applicant has expended US D 5,052, 271.20 being the full contractual consideration on stock purchased "**in-tank**" from Triton and taxes amounting to Kshs. 116, 495,500.00 paid to government. ***See item 91 of the Arbitral Award at page 1306 of Volume 3 of the Application.***

b) The role of the Respondent upon receiving Stock Transfer Advice (ASE) from the selling and the purchasing party is to reduce stock from the selling party and transfer or allocate it to the buying party.

c) Import Declaration Fee is paid for the product discharged and received at KOSF, the bonded warehouse. The Respondent is together with KRA officers located inside the KOSF warehouse as it is custom bonded, responsible for ensuring accuracy of product quantity and quality at the point of importation.

d) The Applicant did not import but had entered into an agreement to purchase imported stocks held at KOSF from Triton.

e) Requests to Transfer Ownership (C21)-A request to the KRA at a specified location, in the case of the product in issue, at KOSF, seeking authority to transfer ownership of the warehoused product from the owner (transferor) to the transferee. No transfer can take place without the approval of this form by the KRA stamping the same. In practice, the KRA officer requests KOSF, by a hand written note at the back of the form to "*confirm if product is available*". If it is available, the KOSF Officer/ Depot Manager will write underneath the querry: "*Product is available*" or "*product is not available*", and return the form to the KRA officer. **If the product is available, the**

KRA officer stamps and signs the form. If it is stated to be not available the process ends there, and no allocation and transfer of product can be made.

The Arbitrator then went on to hold that:-

In the present case neither the KRA officer nor the Respondent's officer who dealt with the C21 at page 69 of DOC C5 was called, nor was the rear side of the form exhibited to disclose the participation of the Respondent in the action of confirming or not confirming availability of the product" See Clause 86 of the Award at page 1305

f) The Arbitrator was convinced that taxes are paid at any time before the product is moved out of the bonded warehouse and the said taxes are paid by the person claiming ownership of petroleum product. **See Clause 85 of the Award at page 1303.**

g) In answering the issue as to role of KRA in the transactions between OMC's and the Respondent , the Arbitrator found that KRA's role is to ensure that the right amount of revenue is collected from the declared owner of the product that is for use in the market.

h) Further, KRA and the Respondent co-ordinate and correlate information upon a proposed stock transfer (Via ASE and C21).

[15] Despite the forgoing, the Arbitrator erroneously dismissed the Applicant's claim on the basis of matters which the Applicant did not prove its case against the Respondent and held that:-

a) No evidence was adduced to show that KRA usually advises the Respondent when to credit an OMC. This is a matter within the knowledge of KRA and the Respondent only – See Clause 88 of the Award at page 1305;

b) Neither the KRA officer nor the Respondent's officer who dealt with the C21 at page 69 of DOC C5 was called, nor was the rear side of the form exhibited to disclose the participation of the Respondent in the action of confirming or not confirming availability of the product – Clause 86 of the Award at page 1305; and

[16] In faulting the Applicant for not availing the reverse side of Form C21 to confirm participation of the Respondent in confirming the availability or non- availability of the product even after it was confirmed by all the witnesses that the said Form is usually in the custody of KRA, unduly placed relevance on said evidence which the Applicant was incapable of adducing. The need to call a witness from KRA became unnecessary as there was a confirmation that the Respondent had indeed confirmed availability though in error (allegedly) of the product, the basis on which the KRA stamped the Tax declaration Forms and the Applicant paid the requisite taxes. In addition, the Arbitrator, at Clause 94 confirmed that the Respondent credited the Applicant's stocks on 13th November, 2008 as per the summary of November, 2008 ASEs sent to the OMC's on 28th November, 2008. The crediting of the stocks granted the Applicant ownership and alleged correction of the alleged ought to have been made procedurally as indicated at Clause 96 of the Award.

[17] To demonstrate further incapacity of the Applicant, the Arbitrator in answering issue number 18 as to whether the Applicant has suffered any loss, passes the blame of the Respondent's error to the Applicant. The Applicant had no way or means of finding out or discovering the outstanding ASE's to be serviced by Triton and could not testify on the same without the input of the Respondent. It is therefore not true that the Respondent plays no role in confirmation of availability of product for the parties trading on the product which is held at KOSF. The Contract between the Applicant and Triton entered on 11th November, 2008, required payment on 11th November, 2008 at 11am. Triton and the Applicant ASE's were issued on **13th November, 2008** and taxes were paid on **14th November, 2008**, long after the expiry date of the offer. It cannot be true that the Applicant did not exercise due diligence in making payments before the availability of the product could be confirmed. The Arbitrator placed undue regard to the date

of the contract and the deadline for performance.

[18] At Clauses 23-24 of the Award, the Arbitrator clearly brought out the inconsistencies of Applicant's stocks as appearing on the statements/summaries availed by the Respondent. It is clear from the evidence that by the email of **28th November, 2008**, the Respondent confirmed that the Applicant had an increase of 5000 MT AGO of its stocks on **13th November, 2008**. On 18th November, 2008, the increase of the Applicant's stocks was by 3000MT. However, the subsequent email dated **2nd December,2008**, the Respondent issued a varied summary of November ASE's showing that the Applicant's stocks had been credited (increased) 3540m and Triton debited on **13th November,2008**. This is the same date for the earlier credit of 5000MT. The later ASE to credit the Applicant with 3000 MT had been raised on **18th November, 2008**. It follows that the credit of 5000MT AGO shown in the email of 28th November, 2008 cannot be the same as the credit of 3000MT AGO shown in the subsequent email. From the Arbitrators analysis of the evidence, it is clear that the Respondent had participated in confirming availability of stocks as at **13th November, 2008** when the ASE for 5000 MT AGO was raised and for which taxes were paid on **14th November, 2008.** It is only the Respondent was had/has capacity to testify as to date when the alleged insufficiency of stocks to support the ASE of **13th November, 2008** crediting the Applicant's stocks with 5000MT AGO was discovered and/or how the said error was occasioned. The Applicant had received the assurance of availability of the stocks on **13th November, 2008**, paid the requisite taxes on 14th November, 2008 and by the email of **28th November, 2008**, the Respondent re-affirmed the passing of the title. The Applicant became alarmed when the email **of 2nd December, 2008** indicated a position contrary to what had been communicated on 28th November, 2008.

[19] The dates of each action and/or payment had consequences and cannot be disregarded or dismissed when it comes to payment of taxes while placing so much relevance on the date of the contract and payment of the purchase price. It is clear from the foregoing that the Award and dismissal of the Applicant's claim is premised on evidence which the Applicant was incapable of adducing. Therefore, the Applicant submitted that it has demonstrated and proved a case of incapacity, undue regard to matters outside the terms of reference and that the Award cannot stand as it is against the public policy of Kenya. The Courts should allow the Application dated 21st January, 2013.

The Respondent opposed application

[20] The Respondent opposed the application and filed a Replying Affidavit sworn on 8th May, 2013 and a further Affidavit sworn on 23rd January, 2014 by the Respondent's Senior Legal Officer, Gloria Khafafa. By the said Affidavits, the Respondent avers that the Applicant was capable of testifying on all matters before the Arbitrator and that the Award published is well within the terms of reference and that the Award is not in conflict with the Public Policy.

[21] They submitted that the principle of finality in litigation is crucial and more so in arbitration. The Court of Appeal in the case of **Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR** held as follows on the finality of arbitral awards:

> ***"We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy."***

[22] According to the Respondent, the dispute herein arose from the Transport and Storage Agreement between the parties dated 17th August 2007 ("the TSA"). The award by Richard Mwongo, Esq. They say that the Arbitrator did not pay undue regard to matters not contemplated or falling within the terms of reference. This ground appears only in the Application and in the Written Submissions. The affidavit by Boniface Abala does not identify or disclose the decision of the arbitrator that falls outside the terms of reference. On this ground alone, the application should fail. Nonetheless, section 29(5) of the *Arbitration Act*, 1995 provides as follows:

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.

[23] To support their position, the Respondent cited the decision in **Kenya Sugar Research Foundation v Kenchuan Architects Ltd [2013] eKLR** on the determination of the terms of reference:

The Tribunal was appointed jointly by the parties. The issues for determination as detailed in the Statement of Claim and the Response thereto, together with the List of Agreed Issues, set out the parameters and scope within which the Tribunal was to act.

Also, in **Rwama Farmers Co-Operative Society Limited v Thika Coffee Mills Limited [2012] eKLR** the learned judge stated as follows:

It is clear from the foregoing that the parties themselves under Issue No. 13 of the statement of issues had asked the Arbitrator to determine whether there were any monies owed by the Defendant to the Plaintiff for the period of pre- 1999. That issue read:-

"13. Whether Thika Coffee Mills is indebted to Rwama Farmers Cooperative Society Limited for coffee deliveries made before period year 1999/2000 and 2000/2001?"

Can it therefore be said that by inquiring into the coffee deliveries in the period pre-1999 and ordering any refunds of the amounts found to have been wrongly deducted the arbitral tribunal went outside the terms of reference? I think not. Once the parties submitted that issue for determination and had called evidence and tested each other's evidence through cross examination, my view is that, that was an issue within the contemplation of the parties and within the terms of reference.

[24] From the authorities above, the Respondent urged that, in determining the scope of reference, a court should consider the following:

a. The arbitration agreement;

b. The letter referring the matter to arbitration;

c. The Statement of Claim and Response; and

d. Lists of Issues.

The relevant part of the arbitration clause in the TSA provided as follows:

[If] at any time any dispute or difference arises as to the meaning of this Agreement or anything herein contained, the implementation of the terms hereof, the rights and duties of the parties hereto or either of them or otherwise in connection with or arising out of this Agreement...

[25] The Respondent stated that TSA clearly contemplated that it would be within the scope of the arbitration to determine any right or duty that was in connection with Agreement. In the award, the learned arbitrator introduced the Joint Participation Agreement dated 1st February 2008 ("the JPA") and the Term Contract dated 8th May 2008 as the ***'Background to Contract Inception'*** and demonstrated how they were connected to, or otherwise arising out of the TSA (*see pg 8 of the Arbitral Award, pg. 1269 of the Applicant's Bundle, Vol. 3*). The JPA and the Term contract had been produced as evidence in the proceedings by the Respondent in their list of documents following their disclosure by the Applicant. There was no objection by the Applicant/Claimant to the use of these agreements in evidence. Parties framed their respective Issues through which the Arbitrator was invited to conduct a historical expedition into the relationships of the parties and the various documents that had brought about those relationships. This was noted by the arbitrator who requested the parties to streamline their list of agreed issues but

since they were unable to agree on how the issues would be reframed, the Arbitrator proceeded with the issues as framed. The arbitrator pointed this out at least twice in his award; at paragraphs 11 and 81 of the award (*see pgs 1268 and 1302 of the Applicant's Bundle, Vol. 3***).** As example, the first and second issues required the arbitrator to analyse every clause in the TSA and interpret it in the context and landscape of the petroleum industry as well as consider the relationship between Triton and the Applicant, which was the genesis of the dispute (*see pg 1301 – 1303, Applicant's Bundle, Vol. 3*). Furthermore he noted in paragraph 19 of the award that the JPA and the Term Contract: '*give an important perspective to and furnish an overview on the subsequent dispute between the parties'* (*pg 1302 of the Applicant's Bundle, Vol. 3).*

[26] The issue discussed by the arbitrator in paragraph 38 and 39 of the arbitral award concerning the Applicant not being a participating OMC had been raised by the Respondent in Paragraph 6 of their Amended Response to the Amended Statement of Claim amended on 23rd June 2011. Therefore as per the reasoning in **Kenya Sugar Research Foundation v Kenchuan Architects Ltd** (supra), these matters fell squarely within the scope of reference of the arbitration (*see pg. 162 of the Applicant's Bundle, Vol.1*). In addition, they humbly submitted that it is highly contradictory for the Applicant to submit that the arbitrator went outside his terms of reference by applying the customs and trade usage of the petroleum industry in paragraph 38 and 39 of the arbitral award (*see pg 7 of the Applicant's Written Submissions*) and at the same time state that the arbitrator disregarded the customs and trades of the petroleum industry. The Applicant cannot approbate and reprobate. Importantly, they argued, whereas the Arbitrator considered the other Agreements to provide context to the relationship between the parties before him, he did not make any decisions on those other Agreements. The dispute he determined was solely that which arose from the TSA between the Applicant and the Respondent.

[27[The Respondent made more arguments. It was convinced that the Applicant did not suffer any incapacity in the course of proceedings before the Arbitrator. The allegation of incapacity is an afterthought. The Applicant simply neglected to provide evidence in support of its case and now is attempting to pass the buck to the Arbitrator. Section 26(c) of the *Arbitration Act,* 1995 provides as follows:

> ***A party which fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it;***

And they quoted the case of **National Oil Corporation of Kenya Limited vs. Prisko Petroleum Network Limited [2014] eKLR,** in which the applicant made a similar allegation, and the learned judge found that:

> ***''The issue that the Respondent was denied the opportunity to be heard cannot arise since section 26 (c) of the Act is explicit that when a party to an arbitration fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. To encourage such ill-advised conduct to thrive amongst parties to a proceeding will defeat the purpose of adjudication of cases and the duty to comply with court summons or process''***.

[28] Therefore, the Respondent argued, the Applicant failed to present a witness from the Kenya Revenue Authority (KRA) to testify on the circumstances leading to the payment of taxes by them or produce the requisite documentary evidence. When asked by the Arbitrator himself whether the Applicant intended to call a witness from KRA – Applicant's counsel responded that "*after consultation and consideration at this point we do not think it will serve any useful purpose" (see the Record of Proceedings, pg 929, Applicant's Bundle, Vol. 3).* Clearly, there was no question of incapacity.

[29] About Form C21; the Applicant's own witness, Edward Kitavi, stated that a request could be made for the document: "*That document is solely for Kenya Revenue Authority...if you have it, it is by mistake unless you have requested for it" (see pg. 974 of the Applicant's Bundle, Vol. 3).* The Applicant has not explained why they did not make request to KRA for the document even though their own witness was clear that it could be requested and produced before the Arbitral tribunal. The Applicant's own failures

led the arbitrator to decide the matter before him solely on the evidence that had been adduced by the parties in accordance with section 26 (c) of the Arbitration *Act.*

C. Is the Award in conflict with Public Policy?

[30] Under this head, the Respondent posits that the Applicant has not identified which public policy the Award conflicts with and how this conflict arises. Onyancha J., in the case of **Glencore Grain Ltd v TSS Grain Millers Ltd (2002) I KLR 606** gave the following definition of public policy in relation to the setting aside of arbitral awards:

> ***"A contract or arbitral award will be against the Public Policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society."***

There is nothing illegal or immoral about the Award. Neither does it, in any unacceptable manner violate basic legal and/or moral principles or values in the Kenyan society. Contrary to the averments of the Applicant, the arbitral award did not disregard the customs and trade of the petroleum sector. The learned arbitrator could only have determined the customs and trade usages of that particular industry through the evidence presented to him by the parties. A large portion of the Award is dedicated to discussing and defining the trade customs and usage for the petroleum industry (*see pg 1276 to 1287 of the Applicant's Bundle, Vol. 3).* Even if there are errors in the Arbitrator's summation of trade custom and usage (which is denied), such errors cannot be the subject of an application to set-aside an award under section 35 of the Arbitration Act. We say this because it is trite law that an arbitrator is the master of the facts. The court cannot interfere with findings of fact made by an arbitrator (see the case of **Moran v Lloyds [1983] 2 ALL ER 200.** The court's intervention on appeal pursuant to section 39 of the Arbitration Act - is limited to errors of law. The correctness of this submission is buttressed by Ringera J, as he was then, in his decision in **Christ for all Nations Vs Apollo Insurance Co Ltd [2002] 2 EA 366** where he held:

> ***''in my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act.***

An error whether of fact or law cannot be said to be inconsistent with the public policy of Kenya. An error would be for appeal. Despite invitation to do so by the Respondent, the Applicant explicitly refused to reserve an appeal on a question of law (*see pg 39, Gloria Khafafa's Further Affidavit*). The Respondent calls this application ''backdoor attempt to "appeal" the Award, which should be rejected by this Honourable Court. Public policy of Kenya leans toward the finality of arbitral awards which is reflected in clause 22 of the TSA:

> ***The determination of the arbitrator on the issues in dispute so far as the law permits shall be final and binding upon the parties."*** [Emphasis added] *(see pg 25 of the TSA at page 58 of the Applicant's Bundle, Vol. 1***).**

The threshold set by the *Christ for All Nations* and *Glencore Grain Ltd* cases supra for setting aside an arbitral award on the ground of public policy have not been met in this Application. Rather the Applicants have merely listed their reservations (or what Ringera J would term 'warts') on the findings of facts made by the Arbitrator without demonstrating how these are immoral, illegal or in violation of a basic legal or moral principle in the Kenya society. There are no legitimate grounds on which the Award may be set aside under section 35 of the *Arbitration Act*. The Application should be dismissed with costs to the Respondent.

DETERMINATION

> [31] The Applicant stated, and correctly so, that Arbitration Act, 1995 has adopted the Model Law on International Commercial Arbitrations- the United Nations Commission on International Trade Law (UNCITRAL). It has adopted public policy as a ground for setting aside an award and as a part of the law thereof, an award which in contrary to the basic principles of morality and justice will be set aside as a matter of public policy. In line with what **Ringera J** (as he then was) in **Christ for All Nations vs. Apollo Insurance Company Limited (2002) 2 EA. 366,** observed:
>
> **"… An award could be set aside under section 35(2) (b) of the Arbitration Act as being inconsistent with the Public of Kenya if it is shown that it was either a) inconsistent with the Constitution or other laws of Kenya written or unwritten, or b) inimical to the national interest of Kenya, or c) contrary to justice or morality".**

[32] I also admit, just as Ringera J proclaimed, public policy is most broad concept incapable of precise definition. But that does not mean it is an impossible ground; it has been unpacked and the circumstances of each case should enable the Court to decide whether the award was contrary to justice or morality. An illegal award is definitely inconsistent with the Constitution or other laws of Kenya, including principles of common law, doctrines of equity, international law and other principles of general application which are part of the laws of Kenya by dint of the Constitution and other reception statutes. The Applicant submitted that in international Arbitration, it is not the abstract rule of law applied by the Arbitrators which is measured against the requirements of international public policy, but *the actual result reached by the Arbitrators*. To buttress the argument that the award is contrary to public policy, the Applicant urged three major issues under this head. The first; that the arbitrator disregarded the customs and trade usages in petroleum industry even though the Award is allegedly stated to be premised on the said customs and trade usages. The award will lead to uncertainty of the trade usage. One of the trade usages which the Arbitrator dismissed was that the Applicant like any other Oil Marketing Companies (OMCs) which had not participated in the Open Tender System could purchase oil product from a party that had participated. But I find it strange for the Applicant to argue that, on the one hand; that *''throughout the Arbitral Award, the Arbitrator has unnecessarily demonstrated that the failure by the Applicant to participate in the Open Tender System removed the Applicant from those OMC which could claim entitled to the product imported by Triton for the industry under the Tender awarded''*; and on the other hand; that *''yet the Applicant had not claimed entitled to the same''***.** There is a problem there because those submissions may suggest or mistaken to suggest that there was no issue that really arose on OMC or OTS or that was settled by the rendition of the arbitrator on those matters. See also what the Applicant that, *''at the hearing, it was not disputed that the OMC which successfully bids to import for the industry's requirement could import + or – 5% of the market requirement. It was confirmed that Triton actually discharged product in excess of what had been tendered for the use and/or distribution in the market''*.

[33] Apart from these submissions, the elaborate discussion on the Open Tender System (OTS) and the Oil Marketing Companies (OMC) by the arbitrator was under the title *''OIL INDUSTRY OVERVIEW''*. He also referred to the Petroleum Act and specifically the Petroleum (Amendment No 2) Rules, 2003 on OTS and OMC. Within his understanding of these systems and terms as with the oil industry, the arbitrator categorically stated that *''An OMC that participated may resell or trade in its portion of allotted product, all under the OTS Conditions''*. The conclusion thereof is contrary to the submission by the Applicant that the arbitrator dismissed trade usage that the Applicant like any other Oil Marketing Companies (OMC) which had not participated in the Open Tender System could purchase oil product from a party that had participated. The Applicant has placed a lot of emphasis on the discourse on OMC and OTS but from the record of the arbitral tribunal, it was only used to answer the issues which had been formulated by the parties. Those issues related to the Applicant, Triton and the Respondent. For instance, issue No 2 at paragraph 82 of the Award sought the arbitrator to determine the obligations of the Respondent under its respective TSAs with the Applicant and Triton. The TSA in question was between the Applicant and the Respondent but this issue as well as issue No 3, and 4 introduced a type of tripartite situation and such background information on the matters in the issues would be necessary. In particular, see issues No 3, 4 and 6 which clearly needed a determination on OMC's and OTS'S. When looked at

that context, the path followed by the arbitrator cannot be faulted. Otherwise how else will issue No 2, 3, 4 and 6 be answered? And following the thread of thinking by the arbitrator, he utilized his understanding on MOC and OTS to determine those issues as framed. See the arbitrator's answer to issue No 2 in paragraph 82 that;

> ***''It is sufficient to answer the issue by stating that the Respondent's obligations to Triton were more pointed, more readily ascertainable and actionable as a participant than those to the Claimant, who was not''.***

He was simply of the view that the obligations of the Respondent were more pointed and elsewhere he stated that a case against Triton on the facts disclosed before him would have been most apt. It must be noted that Triton was not a party in the arbitral proceedings and strictly speaking the entire circumlocutions on KRA, the Applicant and Triton were merely to answer issues as framed. Even if the arbitrator may have erred on the question of OMC and OTS that will not be a ground on which the award may be set aside. The arbitrator did not determine anything which distorted the trade usage in the petroleum industry. That argument fails.

[34] I am now ready to tackle the other strand of argument by the Applicant that the Arbitrator exonerated the Respondent from any liability and or responsibility in the alleged correction of error even after finding that the said correction of error had not been done according the known practice in the industry, in addition to the losses incurred by the Applicant. This is an attack on the tenor of the decision by the arbitral tribunal. From the arguments put forth by the Applicant, I understand them to be saying that the decision was contrary to law and not supported by evidence after he found that the correction of the error was un-procedural. This is a mixed issue of law and fact. There is no appeal which was reserved herein which would enable this court to intervene. And also, by the guidance in section 10 of the Arbitration Act, and that the arbitral tribunal is the master of facts, this court as well will not be in apposition to intervene and set aside the arbitral award on the stated ground. Even if the court were to consider the issue, I would still decline to set aside the award on that account for the following reasons. Although in the Amended Statement of Claim at paragraph 4c the Applicant founded its claim on Clause 20 of the TSA, further reading of the Amended Statement of Claim at paragraphs 25 and 26 thereof as well as the evidence tendered before the tribunal, this is a case of illegality, fraud, malice and misrepresentation by the Respondent in unilaterally altering stock of some 5900m thereby decreasing the Applicant's stock to that extent. It was never, therefore, a matter of *loss of the Applicant's Petroleum Products while in the Respondent's custody'* envisaged in Clause 20 of the TSA. And, whereas the arbitrator found that the stock of 5900 cubic meter was allocated to the Applicant in error, and the correction thereof was done un-procedurally, he also made three important findings; 1) that there was nothing illegal with the alteration; 2) although fraud was pleaded, the issue was neither seriously pursed nor any evidence adduced which had probative value to prove fraud; and 3) the Respondent's action in correcting the error was not shown to have been malicious. The arbitrator dismissed the claim on that basis. These findings only the arbitral tribunal can make after hearing the evidence. But I will at a later stage determine the question of taxes paid when I will be determining the issue of incapacity to produce evidence.

[35] I do not agree with the Applicant that the Award justifies the Respondent's capricious alteration of the Oil Marketing Companies (OMC's) stock positions without any regard to the interest acquired by the OMCs using the internal controls and processes. The arbitral tribunal decided the case on its merits and made a decision on the facts that the alteration of stock was not illegal or fraudulent or malicious. The decision only binds the parties in the suit in so far as the subject matter of the suit is concerned. It will not have the kind of precedent effects effect or be a basis for trade practice by the Respondent to carry out unilateral reversals or alterations or corrections which affect stocks being traded by the OMCs as to render the petroleum trade uncertain and unpredictable. The erroneous crediting and alteration thereafter of the stocks in question does not in any way constitute illegality or contrary to morality in the practice and usages in the oil industry as pleaded by the Applicant. Therefore, the entire ground that the award herein is in conflict with public policy of Kenya, fails. Except, I must state that, the Respondent being the integral player in the oil industry which is so important in the economy of the country and the persons trading in the industry, should always adhere to laid down procedures in making such alterations or

corrections on allotted petroleum products lest it should open itself to liability of huge dimensions.

Incapacity to adduce evidence and tax issue

[36] Instances of the Applicant's incapacity to produce evidence were set out at paragraphs 8, 9, 10 and 11 of the Affidavit of Boniface Abala sworn on 21st January, 2013. The Applicant submitted that there was uncontroverted evidence before the arbitral tribunal that;- a) the Applicant had expended US D 5,052, 271.20 being the full contractual consideration on stock purchased "**in-tank**" from Triton and taxes amounting to Kshs. 116, 495,500.00 paid to government; b) the role of the Respondent upon receiving Stock Transfer Advice (ASE) from the selling and the purchasing party is to reduce stock from the selling party and transfer or allocate it to the buying party; c) Import Declaration Fee is paid for the product discharged and received at KOSF, the bonded warehouse. The Respondent and the KRA officers are located inside the KOSF warehouse as it is custom bonded, responsible for ensuring accuracy of product quantity and quality at the point of importation; d) Requests to Transfer Ownership (C21) was made out to KRA at a specified location of the product in issue, at KOSF and no transfer can take place without the approval of this form by the KRA stamping the same. In practice, the KRA officer requests KOSF, by a hand written note at the back of the form to "*confirm if product is available*". If it is available, the KOSF Officer/ Depot Manager will write underneath the querry: "*Product is available*" or "*product is not available*", and return the form to the KRA officer. According to the Applicant all the above were done and the arbitrator captured the process well when he stated that:

> ***If the product is available, the KRA officer stamps and signs the form. If it is stated to be not available the process ends there, and no allocation and transfer of product can be made.***

The only and biggest legal quarrel the Applicant has is where the Arbitrator eventually held in the following terms, that:-

> ***In the present case neither the KRA officer nor the Respondent's officer who dealt with the C21 at page 69 of DOC C5 was called, nor was the rear side of the form exhibited to disclose the participation of the Respondent in the action of confirming or not confirming availability of the produc***t" See Clause 86 of the Award at page 1305

[37] The Arbitrator was convinced after hearing the evidence of parties on the matter and indeed it is the practice within the oil industry that taxes are paid at any time before the product is moved out of the bonded warehouse and the said taxes are paid by the person claiming ownership of petroleum product. He captured that in paragraph 85 of the Award. The arbitrator, in answering Issue No 7 on the role of KRA in the transactions between OMC's and the Respondent, found that KRA's role is to ensure that the right amount of revenue is collected from the declared owner of the product that is for use in the market. He also found that although KRA officers are physically present and verifies the correct amount of tax payable on the declared amount of product, there was no evidence to show that they advise the Respondent when to credit OMC.

[38] Despite the forgoing, the Applicant averred that the Arbitrator erroneously dismissed the Applicant's claim on the basis of matters which the Applicant did not prove its case against the Respondent. They argued that, the fact whether KRA usually advises the Respondent when to credit an OMC is a matter within the knowledge of KRA and the Respondent only. My view here is that, the arbitrator is the master of facts and correctly held that there was no evidence that KRA advice the Respondent to credit an OMC on receipt and verification of ASE and C21 for taxes purposes. But I will deal with the dismissal of the claim for reimbursement of taxes in the sum of Kshs. 116,495,500 by the Applicant as prayed for in the Amended Statement of Claim in paragraph d (iii).

[39] There is one thing I agree with the Applicant; that, the arbitrator erroneously dismissed the Applicants claim on taxes it paid on the 5000 MT AGO when he based his decision on the evidence that the Applicant did not adduce. The allegation of incapacity is not an afterthought as claimed by the Respondent because the Applicant was clear that it was not necessary to call an officer of KRA on the taxes paid on the impugned ''petroleum product'' as there was enough evidence and admission that the

taxes were paid. It will be the wrong question to ask whether or not the Applicant should have called a witness or obtain C21 from KRA. The correct question to ask is whether the evidence tendered supports the claim that taxes were paid and so amenable to be refunded under the TSA by the Respondent. And, it is grave judicial error for the arbitrator to have based his decision on evidence which ought to have been adduced. The correct judicial path is to base the decision of the arbitral tribunal on the evidence tendered. Section 26(c) of the Arbitration Act, 1995 is the guide here. It provides as follows:

> ***A party which fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it;***

The court had occasion to tackle the import of section 26 of the Arbitration Act in the case of **National Oil Corporation of Kenya Limited vs. Prisko Petroleum Network Limited [2014] eKLR,** and the relevant part of its rendition thereto is that:

> ***''The issue that the Respondent was denied the opportunity to be heard cannot arise since section 26 (c) of the Act is explicit that when a party to an arbitration fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.***

[40] The evidence before the arbitral tribunal on this issue was that it was not in dispute that the Applicant paid to KRA taxes and levies amounting to Kshs. 116,495,271.20 on the impugned petroleum product; the said amount was receipted and the Respondent did not dispute that fact. Indeed at paragraph 91 of the Award in answer to issues No 11 and 12 the arbitrator stated:

> ***''The Claimant paid government taxes in the amount of Shs. 116,495,500.00 including levies. The amount was also duly paid and receipted''.***
>
> It was also undisputed and ample evidence was before the arbitrator that under Clause 4.12.3 of the TSA that the Respondent would reimburse the Applicant of such duties and taxes. Those taxes had been paid on the supposedly petroleum product which the arbitrator found had been credited in error to the account of the Applicant. In other words, and the Respondent admitted this, there was no petroleum product to credit in the fast place and on that basis the arbitrator held and declared the transaction was simply an error which was bound to be corrected. See the award in that respect. Therefore, the decision of the arbitrator in so far as the claim on taxes paid is concerned was not based on the evidence before the arbitrator as well as on the specific findings which the arbitrator made on the payment of taxes in paragraph 91 of the award. In law the decision to dismiss the claim on taxes was not supported by the evidence available; indeed on the face of the record, it was at complete variance or contradiction with the evidence and findings of the arbitrator on the matter. The decision thereto was based on erroneous considerations of some evidence which was supposedly not adduced but which the arbitrator considered relevant. Laying absolute emphasis on the evidence which was not adduced in making the decision on a substantive claim on taxes was a grave error of law and principle on which the award will be set aside and since the award on the claim on reimbursement of taxes paid is capable of being severed from the rest of the award, I hereby set aside the part of the award in respect of the claim on taxes and refer the severed part thereof back to the arbitrator or such other arbitrator as the parties will agree for consideration. The court is aware the arbitrator is now honourable judge of the High Court and current Principal Judge of the High Court and may not be available as an arbitrator under the legal instruments on appointment of arbitrators in Kenya. The court took similar route in the case of **Re Midco Holdings Limited & Summit Textiles (E.A.) Limited [2014] eKLR** and held that:-
>
> ***The arbitrator only committed an error on application of discount of 25% which resulted into deprivation of Applicants' property in contravention of Article 40 of the Constitution. That is a perfect ground to set aside an award, except, the aspect of discount is capable of separation from the other issues which were properly determined. I therefore, refer the award to the arbitrator for re-consideration of the award in accordance with this ruling. Parties shall agree when the reconsideration of the award should be done by the arbitrator.***

[41] The other decisions in the arbitral award herein are upheld and are not set aside. It is ordered accordingly. I will not make any order for costs as the application dated 21st January, 2013 succeeds to the extent of this ruling.

Dated, signed and delivered in court at Nairobi this 21st day of November 2014

F. GIKONYO

JUDGE