REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 658 OF 2012

INTOIL LIMITED ……………………..……………………. APPLICANT

VERSUS

TOTAL KENYA LIMITED ………………….…………..…… DEFENDANT

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO ENFORCE THE ARBITRAL AWARD ISSUED BY THE HONOURABLE JUSTICE MWONGO, CHARTERED ARBITRATOR ON 10TH AUGUST, 2012

BETWEEN

TOTAL KENYA LIMITED ………………….. CLAIMANT/APPLICANT

VERSUS

KOBIL PETROLEUM LIMITED ……..……..……… 1ST RESPONDENT

HASS PETROLEUM (K) LTD. ……………………..…… 2ND RESPONDENT

INTOIL LIMITED ……………………...…………… 3RD RESPONDENT

R U L I N G

1. In the instant matter are two applications for determination. The 1st application is by Intoil Ltd dated 30th October, 2012. The application is brought under the aegis of **Order 21 Rule 2** of the *Civil Procedure Rules*, **Rule 7** of the *Arbitration Rules (1997)* and **Section 35** of the *Arbitration Act, 1995*. The applicant seeks the following Orders:

   "1) That this Honourable Court be pleased to set aside the Arbitral Award herein dated 10th August, 2012;

2. **That there be a stay of execution of the arbitral award and the consequential orders of this Honourable Court pending the hearing and determination of this application;**

3. **That in any event, the costs hereof be awarded to the Applicant".**

2. The application is predicated upon the grounds that the Honourable Judge, Justice Richard Mwongo, having been duly appointed as a High Court Judge on 30th August, 2011, should have recused himself from the proceedings of the arbitration after his appointment to the Bench. It is further adduced that the Honourable Judge in conducting, hearing and determining the arbitration and issuing an arbitral Award on 10th August, 2012, was in breach of the Judicial Service Code of Conduct and Ethics (hereinafter referred to as the "Judicial Code of Conduct")and rules of natural justice.
3. The application is supported by the Affidavit of Peter Murigi Njirwa sworn on 30th October, 2012. It is deponed therein that the Honourable Judge was appointed to the Bench on 30th August, 2011 before the determination of the arbitration proceedings as the sole arbitrator. The deponent avers that the actions by the Honourable Judge may be construed as an affront to the Judicial Code of Conduct and natural justice. Further, it is attested that the proceedings were rushed and the Applicant denied an opportunity to properly ventilate its issues, which were the subject matter of the arbitration, which in itself, is tantamount to misconduct and in disregard of the principles of natural justice.
4. The application is opposed. In the Replying Affidavit of **Boniface Abala** sworn on 14th November, 2012, it is deponed that the Applicant, during the arbitration proceedings, had been given ample opportunity to take part and participate in the proceedings. It is deponed that Kihara, J ordered in his Ruling delivered on 7th December, 2012 in **H.C.C.C No. 211 of 2008 (OS),** for the parties to settle their protracted dispute through arbitration, appointing as Sole Arbitrator the Hon. Justice Richard Mwongo. It is also contended that the Judicial Code of Conduct as postulated by the Applicant was incorrect, and its strict interpretation does not bar the determination of arbitral proceedings by a Judicial Officer. It had not been shown just how the actions of the learned Judge were in breach of the said Code of Conduct. The deponent averred that the instant application is an afterthought, amounts to approbating and reprobating by the Applicant and should therefore be dismissed.
5. Having considered the instant application and the affidavits therein, both in support and in response thereto, the Court notes that vide its application dated 30th October, 2012, the applicant seeks for the setting aside and/or stay of execution of the arbitral award. Recourse to the High Court, such as the application herein, is pursuant to **Section 35** of the *Arbitration Act, 1995*. **Section 35 (2) (a)** and **(b)** of the Act read:

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

a. **the party making the application furnishes proof-**

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

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

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

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

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

accordance with this Act; or

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

b. **the High Court finds that –**

i. **the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**
ii. **the award is conflict with the public policy of Kenya:**

6. The Applicant's contention is that the Judge, having been appointed as such during the tenure of his arbitral role, should have recused himself from such role. On reading of the aforementioned provisions of the law, and in particular **Section 35 (2)**, it is provided that an application for stay to the High Court may be made, on the premise that the pre-requisites as mentioned are able to be proven by the Applicant. However, **Section 35 (2)** provides for the disgruntled applicant to have recourse if it is found that a matter of public policy is in issue, and as such, the arbitral award has to be set aside. In the instant application, and in the written submissions by the Applicant, it attests that issues of public policy arose from the arbitral award, given that the same was awarded by a sitting Judge of the High Court of Kenya. In buttressing its arguments, the Applicant relied on the provisions of **Rules 9 and 10** of the *Judicial Code of Conduct*. **Rule 10** of the *Judicial Code of Conduct* reads;

> **"Every Judicial officer and any other officer of the judicial service is required to observe the following general principles in relation to his private interests-**

a. **to ensure that he does not subordinate his judicial or administrative duties to his private interests or put himself in a position where there is conflict between his official duties and his private interests;**

b. **to undertake not to associate outside duties with any financial or other activities in circumstances where there would be suspicion that his official position or official information available to him was being turned to his private gain or that of his associates;**

c. **to undertake not to engage in any occupation or business which might prejudice his status as a member of the Judicial Service or bring the Judicial Service into disrepute; and**

d. **to maintain at all times the professional and ethical standards which the public expects of him in transacting official business with efficiency, integrity and impartiality".**

7. It is the Applicant's contention, that the arbitral award of 10th August, 2012, delivered a year after the Honourable Judge was appointed to the bench, was tantamount to giving an "opinion" by a judicial officer in a private matter and, thus contrary to **Rules 9 and 10** of the *Judicial Code of Conduct*. It also contended that the Judge was estopped from conducting the arbitration once his appointment to the Bench was revealed to the parties, and from which, in any event, he should have recused himself from the matter. It is contended that, regardless of the parties continuing with the arbitration without raising the issue of his appointment, the Judge was barred by statute from proceeding with the matter. To this end the Applicant relied on **<u>Income Tax Commissioner v A.K</u> (1964) E.A 648** and **<u>J.K Chatrath & Another v Shah Cedar Mart</u> (1967) E.A 93.** Further, it was contended that the arbitral award was made, contrary to public policy and in contravention to **Section 35 (2)** of the *Arbitration Act*. The Applicant relied on the Ringera, J Ruling in **<u>Christ for All Nations v Apollo Insurance Co. Ltd</u> [2002] 2 E.A 366**, in which it was held *inter alia:*

> **"Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the**

public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

8. It can be deduced, therefore, based on the arguments put forward by the Applicant in its application and submissions thereto, that it maintained that the arbitral award by the Honourable Judge was solely against public policy, and not against any of the other provisions of the law as provided under **Section 35 (2) (a) (i)-(iv)** or **35 (2) (b) (i)** of the *Arbitration Act*. The Applicant relies entirely on **Section 35 (2) (b) (ii)** of the Act to push its case for the setting aside of the arbitral award. In the Ruling by Ringera, J in **Christ for All Churches v Apollo Insurance Co. Ltd** (supra), the learned Judge highlighted three main grounds which an application for setting aside an arbitral award should be predicated upon as regards it being contrary to public policy:

"(i) Inconsistency with the Constitution or any other laws of Kenya, whether written or unwritten;

ii. **Inimical to the national interests of Kenya; and**
iii. **Contrary to justice and morality".**

9. In view of the Applicant's application, and a reading of Ringera, J's Ruling in **Christ for All Nations v Apollo Insurance CO. Ltd** (supra), there are in my view, no inconsistencies or contradiction to justice and morality. The learned judge, as far as I can see from the Affidavit evidence before me, conducted himself in the most courteous and esteemed manner in informing all the parties concerned of his appointment to the Bench. The Applicant did not raised any objection to the statement adduced by the Respondent in its Replying Affidavit with regard to the Chief Justice allowing time to the Judge to complete any pending private matters before taking up his appointment in the Bench. Indeed, as this grace period was permitted, it cannot then be deemed that the actions by the Judge were contrary to the provisions of **Rules 9** and **10** of the *Judicial Code of Conduct*, **Section 12 (1)** of the *Public Officers Ethics Act, (Act No. 4 of 2003)* or that there was any contravention of **Section 35 (2) (b) (ii)** of the *Arbitration Act* to warrant the setting aside of the Award. This was not, as adduced by the Applicant, to be an *"opinion"* given by a Judicial officer in a private matter. The Honourable Judge did accord all the parties an opportunity to raise any issues with regard to his appointment, by informing them of such appointment in his letters dated 15th and 18th September, 2011. The Judge, in my opinion, avoided getting into a position that would be in conflict with his appointment, and in observing **Rule 10 (a)** of the *Judicial Code of Conduct*, by obtaining permission from the Chief Justice to wind up any pending private matters. Notwithstanding the arguments by the Applicant that the award was given on 10th August, 2012 almost a year after the appointment, such does not in any way show that the Judge acted contrary to the provisions of **Rules 9 and 10** of the *Judicial Code of Conduct*, and was therefore in breach of public policy.
10. In the case of **Renusagar Power Co. v General Electric Co. AIR [1994] S.C 860**, the Indian Supreme Court Ruling as adopted by Ringera, J. in his said Ruling above, reiterated the principles upon which an Applicant in India, in an application for setting aside an arbitral award on the grounds of public policy, should rely upon and which included such as being, contrary to fundamental policy of Indian Law, violation of India's laws and further that the enforcement of such an award would be contrary to justice and morality. In the words of Ringera, J in **Christ for All Nations v Apollo Insurance Co. Ltd** (supra):

"Justice is a double edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust…in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal 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 arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."

11. The upshot is that the application by the Applicant dated 3rd August, 2012 is without merit and is hereby dismissed with costs to the Respondent.
12. The second application is brought pursuant to **Section 36** of the *Arbitration Act*, as amended by the *Arbitration (Amendment) Act*, *Act No. 11 of 2011* and **Rules 6 and 7** of the *Arbitration Rules*. In the application dated 21st January, 2012, the Applicant prays for the following:

"(1) That the Applicant be granted leave to enforce the Final Award made on 10th August, 2012 by the arbitrator herein, Mr. Richard Mwongo as a Decree of this Honourable Court;

2. **That the Costs of this application be paid by the three (3) Respondents to the application, namely, Kobil Petroleum Ltd, Hass Petroleum (Kenya) Ltd and Intoil Ltd; and**

3. **That the Respondents be ordered to pay all such costs and expenses as are incidental to the enforcement and execution of the Final Award aforesaid".**

The application is predicated upon the grounds that the Final Award dated 10th August, 2012 was awarded in its favour as against the Respondents as aforementioned. The Applicant, in the applications, issued the requisite demand letters on 27th September, 2012 which were duly served upon the Respondents and that despite demand, the Respondents have refused, neglected and/or otherwise failed to comply with any of the Orders issued by the Arbitrator.

13. The application is supported by the Affidavit of Boniface Abala, the Legal Manager of the Applicant, sworn on even date. It is therein deponed that there was a dispute between itself and other parties, referred to arbitration vide the orders of Kimaru, J on 29th April, 2010. In a consent order issued by Kihara, J on 7th December, 2010, Mr. Richard Mwongo (as he then was) was appointed as the sole arbitrator, who then finally made an Award on 10th August, 2012. It is averred that the Applicant did issue the requisite demand letters to the relevant parties dated 27th September, 2012. Further, it is contended that despite the lapse of the twenty-one (21) day notice, the Respondents have refused, neglected and/or otherwise failed to comply with the orders issued in the Final Award.
14. It is not in dispute that the contractual terms and conditions stipulated that any dispute between the parties to the contract was to be resolved by arbitration. At Clause 15 – "Law and Arbitration", it provided:

"Terms and Conditions of this Agreement shall be governed by the laws of Kenya. Any dispute arising to be finally settled by Arbitration in Kenya in accordance with current Arbitration Act of the laws of Kenya".

The Arbitration Act and the Arbitration Rules provide for both the substantive and procedural manner in which matters referred to arbitration are to be dealt with. The role of the Court is only supervisory, and its jurisdiction may only be invoked in very specific situations as stipulated in the Act. Section 10 of the Act states and provides that:

"Except as provided in this Act, no Court shall intervene in matters governed by this Act".

By this Section, the jurisdiction of the Court is limited and restricted and may only be invoked in very clear and certain circumstances. This Section, as read together with **Section 32A** of the same Act, provides that the arbitral tribunal shall determine a matter referred to it and the intervention

of the Court will be limited, as in following **Section 10** of the Act. the latter Section reads:

> **"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act".**

15. In the Ruling of Ogola, J in **Nairobi High Court Miscellaneous Civil Application No. 130 of 2011 Kay Construction Co. Ltd v A.G & Another**, (which this Court adopts) it was found:

> **"It was held by the Court of Appeal in the case of East African Power Management Ltd v Westmount (K) Ltd [Nairobi Civil Appeal No. 55 of 2006] that the Court under Section 10 of the Arbitration Act had a limited role in intervening in matters where parties had agreed to refer a matter to arbitration except where the Act specifically provided for such intervention. The Court consequently held that the said provision was mandatory and that the Court's role in arbitration matters was merely a facilitative one."**

16. Having perused and taken into account the submissions made by counsel for the parties herein, and on perusal of the Application, affidavits in support and in reply, it is apparent that the parties had entered into an agreement in which their disputes were to be resolved by Arbitration. Once the parties had decided on this alternative mode of dispute resolution, which has been recognized under *Article 159 (2) (c)* of the *Constitution of Kenya, 2010*, the Court as reiterated in **Kenya Shell Ltd v Kobil Petroleum Ltd [2006] eKLR**, will let the process take its course. The Court's intervention, in the process proper or the arbitral award thereafter, is limited and restricted to matters that are provided for under the Act. The Respondent relied upon the provisions of **Section 35 (2) (b)** of the Arbitration Act to seek to have the matter set aside and/or stayed.
17. However, having determined that the application by the Respondent as above is unmerited, it is for this Court to determine whether the arbitral award was proper and should thus be enforced. Again following the Ruling of Ringera, J. in **Christ for All Nations v Apollo Insurance Co. Ltd** (supra), it is in the public interest that all matters come to a determinate end, and as such to quote the learned Judge:

> **"… On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all…"**

18. As a result of the above, I find no good reason put forward by the Respondents why this Court should not grant leave to the Applicant, in the application dated 21st January 2012, to enforce the arbitral Award made in its favour. Accordingly, I grant the prayers sought in the said application with costs to the Applicant.

DATED and delivered at Nairobi this 31st day of October, 2013.

J. B. HAVELOCK

JUDGE