



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL APPEAL NO. 13 OF 2010

KENYA PIPELINE COMPANY LIMITEDAPPELLANT
- VERSUS -
KENYA OIL COMPANY LIMITED1ST RESPONDENT
KOBIL PETROLEUM LIMITED2ND RESPONDENT

JUDGMENT

1. This is an appeal against an arbitral award dated 10th December 2009. The arbitrator granted the respondents, among other reliefs, the sum of **Kshs 2,000,000,000** and another **US \$ 43,290,085.70** in damages. He also awarded the appellant, by counterclaim, **Kshs 135,505,216.60** and another **US \$ 5,380,206.20**. The appellant, Kenya Pipeline Company Limited, is a state corporation under the **State Corporations Act**. It owns an assemblage of fuel storage facilities, pipelines and pump stations running from its Kipevu port station in Mombasa to various destinations on the countryside. The respondents are limited liability companies whose principal objects are the supply, distribution and sale of fuel products in Kenya.
2. The genesis of the appeal and the arbitral award revolves around the breach of a transportation and storage agreement. That agreement is dated 10th May 1999 and appears at pages 721 to 791 of volume 2 of the record of appeal. There are about 16 other parties (fuel companies) to that agreement but the dispute and the appeal relate to the appellant and the two respondents only.
3. The dispute was triggered in 2005 by an increase in the tariffs charged by the appellant to fuel companies, including the two respondents, for use of the appellant's facilities. The respondents contested the new tariffs. The appellant, in exercise of rights under the agreement, shut out the respondents from use of the storage and pipeline facilities. The respondents claimed that as a result of that shutdown, they could not transport their fuel upcountry which led to a near dry out of their petrol outlets.
4. The respondents claimed that the appellant was trying to strangle their business which led to losses claimed before the arbitrator. To avoid a complete meltdown of their business, the respondents filed **High Court Miscellaneous Case Number 1099 of 2005** to restrain the appellant from denying them use of the pipeline and storage facilities. An injunction was granted restraining the appellant. The court directed the parties to proceed to arbitration. The respondents were the claimants before the arbitrator.
5. The parties initially appointed **Mr. Nzamba Kitonga** as arbitrator on 6th March 2006 and commenced proceedings by way of *viva voce* evidence. On 15th May 2009, the arbitrator withdrew, having been appointed Chairman of the Committee of Experts on review of the Constitution. On 12th June 2009, the parties concurred in the appointment of **Mr. Ahmednasir Abdullahi** as the sole arbitrator. A written agreement appointing the arbitrator appears at pages 717 to 720 of volume 2 of the record of appeal.

6. It is material that under clause 2 of the latter agreement, the parties reserved their right to challenge the award by appeal. It is also instructive that the second arbitral proceedings were to be by documents only. Counsel for the parties were then to make submissions. That practice was well within **sections 24 and 25 of the Arbitration Act, 1995**, (hereinafter referred to as “**the Act.**”) In addition, the parties had agreed that the arbitration rules of the Chartered Institute of Arbitrators (Kenya) would apply.

7. On 10th December 2009, the arbitrator published his award in the following terms.

“a) I award the claimants US \$ 43,290,085.7.

b) I also award the claimants the sum of Kshs 2,000,000,000.

c) I award the respondent on its counterclaim the sum of US \$ 5,380,206.20.

d) I also award the respondent on its counter-claim the sum of Kshs 133,505,216.60.

e) I set off (a) and (b) for claimants against (c) and (d) for the respondent and I finally award the claimants the NET sum for:

f) US\$37,909,879.5 and Kshs 1,866,494,783. I make no award for interest.

g) I order that in light of the conduct of the claimants in failing to honor or obey the order of this tribunal coupled with their action to prejudge issues pending before this tribunal, and to help the respondent recover some money on the amount previously deducted or withheld by the claimants from what was due it at that point time, before a determination of the issue in contest was made, I order that the respondent do hold on account of the claimants the entire sum awarded to them at (f) hereinabove and start deducting future sums due from the claimants to the respondent for services that will be provided to them by the respondent from the date of this award or a date to be agreed by the parties, but in any case not later than 60 days from the date of this award.

h) I declare that the purported increase in tariffs by the respondent in 2005 and 2009 is invalid and contrary to the contract. I however, further order that for the reasons I give in this award, the parties must agree within 60 days of this award the date when the rate applicable to other shippers will be paid by the claimants. If the parties do not reach an agreement within 60 days then the rates paid by all the other shippers will automatically apply to the respondent 190 days from the date of this award.

i) I hold that there are no implied terms of the Agreement between the parties proved and the written terms of the Agreement are sacrosanct and apply strictly to both parties and in particular clause 3 and 14.2 of the Agreement.

j) I award the claimants costs of the arbitral proceeding.

k) I order that the parties shall be equally liable for the costs of the Arbitral Tribunal assessed at Kshs 6,880,000 plus VAT at 16%”.

8. By an amended memorandum of appeal dated 6th December 2010, the appellant prays that the award of US \$ 43,290,085.70 and Kshs 2,000,000,000 be set aside and that it be awarded costs of the appeal as well as of the arbitration. There are 23 grounds of appeal, namely;

- 1. The Arbitrator erred in law when he failed to determine the dispute in accordance with the contract between the parties;*
- 2. The Arbitrator erred in law when he exhibited clear bias against the Appellant by the use of injudicious language;*
- 3. The Arbitrator erred in law when he acted in excess of his jurisdiction by considering and making findings on matters not referred to him;*
- 4. The Arbitrator erred in law when failed to treat each party with equality contrary to the express provisions of Section 19 of the Arbitration Act, 1995 by undertaking extensive research into the law in support of the Respondents’ case;*
- 5. The Arbitrator erred in law by failing to give the Appellant a full opportunity of presenting its case contrary to the express provisions of Section 19 of the Arbitration Act, 1995 when he did not avail the Appellant an opportunity to respond to or comment on the numerous new authorities introduced in the Final Award in support of the Respondents’ case;*
- 6. The Arbitrator erred and misdirected himself in law when he found that the Transport and Storage Agreement dated 10th May 1996 provided for the allocation of ullage;*
- 7. The Arbitrator erred in law in finding that custom and usage in the oil industry did not apply to the Transport and Storage Agreement between the parties;*

8. *In the alternative, the Arbitrator erred in law when he failed to recognize that the Respondents had admitted and acknowledged the existence of a trade usage with respect to the allocation of ullage;*
9. *The Arbitrator erred in law when he imposed an onerous and unreasonable evidential burden on the Appellant in respect of the responsibility for the delay in the docking and berthing of the Respondents' ships and from which the liability for demurrage would arise;*
10. *The Arbitrator erred in law when he failed to appreciate the effect of the Kenya Ports Authority Act, Chapter 391 on the responsibility for the docking and berthing of vessels;*
11. *The Arbitrator erred in law when he purported to interpret clause 9.5 of the Transport and Storage Agreement as imposing liability upon the Appellant in respect of demurrage charges;*
12. *The Arbitrator erred in law when he held that the claim for demurrage by the Respondent was within the contemplation of the parties, such claim having been expressly excluded by the express provisions of the Transport and Storage Agreement;*
13. *The Arbitrator erred in law when he failed to apply the provisions of section 29(5) of the Arbitration Act, 1995 in finding the Appellant liable for the demurrage incurred by the Respondents;*
14. *The Arbitrator erred in his findings on the maintenance of stock which are contrary to the provisions of section 96 of the Energy Act, No.12 of 2006;*
15. *The Arbitrator erred in law in his application of the concept of mistake to the Transport and Storage Agreement between the Appellant and a third party, Triton Petroleum Company Ltd;*
16. *The Arbitrator fundamentally misdirected himself as to the provisions of the Transport and Storage Agreement on ullage allocation and thus erred in law by basing his findings on this misdirection;*
17. *The Arbitrator erred in law by finding that there was a "special relationship" between the Appellant and the Respondents despite the existence of an agreement between the parties, the Transport and Storage Agreement, and therefore, in his consequent findings on fraud, concealment and deceit;*
18. *The Arbitrator erred in law by failing to take into consideration all pleadings in the making of the Final Award;*
19. *The Arbitrator erred in law by making contradictory legal findings on the issue of Tariff Adjustment;*
20. *The Arbitrator erred in law by failing to assess the probative value of documents placed before him by the Respondents as evidence of loss suffered;*
21. *The Arbitrator erred in law in his assessment of damages; and*
22. *The Arbitrator erred in law by radically adjusting the contractual arrangements between the parties and imposing a new contract on the parties;*
23. *Although the parties had agreed to a 'documents only arbitration' the Arbitrator erred in law by failing to assess the probative value of each document placed before him by the Respondent as evidence of loss suffered as the evidential value of the documents were not admitted by their inclusion in the agreed bundle of documents. His failure to do so meant that the claim was not specifically proved as a claim of this nature should be.*

9. It is important to observe that in its initial memorandum of appeal dated 18th January 2010, the appellant had sought to set aside the award in its entirety. The latest pleading in the amended appeal thus sought to set aside only part of the award and to retain the favourable portions of the award. In a rather awkward and irregular final submission to us, the appellant's counsel prayed to set aside the entire award. This, the respondent has taken up cudgels on, and we shall revisit it later in our decision.

10. We wish to observe that both parties have made extensive written submissions and cited various decided cases and authorities in support of their respective cases. In view of the substantial award and voluminous submissions, we heard both parties on oral submissions for 3 days between the 17th and 21st November 2011. We shall now briefly set out the key arguments by both parties.

The appellant's submissions

11. The respondents in this appeal were the claimants before the arbitrator. It was the respondents' case before the arbitrator that the appellant had, in breach of the transportation and storage agreements, failed

to allocate **ullage** to the respondents. As a result, their outlets had run dry causing loss of sales, profits, goodwill and so forth. The term “ullage” in the industry refers to the space allocated in the storage and pump system to the different oil companies for storage or transport in the pipeline.

12. The respondents had alleged that due to favourable treatment of **Triton Limited**, who had a similar agreement as that between the applicant and the respondents, the appellant’s system was being used as a storage system. This in turn had clogged up the pipeline and storage denying the respondents space to offload their cargo.

13. The appellant had countered that there is a formula that takes into account market share. It was the appellant’s case that that formula was applicable even before the respondents’ ships arrived at the Mombasa port. The respondents had blamed the delay in discharging their cargo to the appellant which caused them to incur demurrage and other charges. Those costs, losses and damages formed the core claims before the arbitrator.

14. The appellant’s response was that under the terms of the storage and transport agreement, a shipper was solely responsible for vessels’ arrival and berthing. There was a clause recognizing the powers of Kenya Ports Authority, an independent party, on allocation of berths for discharge of cargo and the appellant could thus not be liable to the respondents.

15. The key pleading by the appellant before the arbitrator was at paragraph 26 of the further amended statement of defence and counterclaim (pages 605 – 606 of the record) regarding breach of contract. The appellant had pleaded that the respondents were liable for the delay because their ships had carried excess cargo beyond the ullage allotted to them. There was a responsibility on the arbitrator to demonstrate he had analysed the evidence in support of that position. The arbitrator did not consider the pleadings before him and thus failed to decide on terms of contract, it was alleged.

16. The appellant claims the arbitrator failed to appreciate or apply the trade usages with regard to allocation of ullage. The appellant submitted that the parties had in their pleadings conceded to the fact that the allocation of ullage is a function of the supply coordination meeting (SCM). The appellant contended that this trade usage had a 15 year history but the arbitrator concluded wrongly it was a “late” practice and only of a “mitigating mechanism”. The appellant’s submission was that trade usage and contract run parallel to each other and it was wrong for the arbitrator to place contract at a higher rank. To that extent, the arbitrator had failed to decide the matter in terms of the contract between the parties and against the clear provisions of **section 29** of the **Arbitration Act**.

17. The appellant’s counsel then proceeded to argue the principal grounds of appeal as follows;

Grounds 2, 4 and 5

The appellant claimed the arbitrator had a clear bias and failed to treat parties equally contrary to **section 19** of the **Arbitration Act 1995**. The bias is demonstrated by the arbitrator’s extensive research of the law in favour the respondents. Every new authority was in support of the respondents. Page 459 of the record has the respondents’ initial list of authorities containing 5 decided cases. The appellant said it identified 20 new authorities cited by the arbitrator and it had no opportunity to respond to them as they appear for the first time in the award. It contended that in arbitration law and practice, it was wrong for an arbitrator to cite those other authorities. Reliance for that proposition was placed on **Russel on Arbitration**, 1997, London, Sweet & Maxwell, page 195, paragraph 5 – 060 and Mustill and Boyd **The Law and Practice of Commercial Arbitration in England**, 1989, London, Butterworths.

The appellant submitted that bias was also apparent from the arbitrator’s reference to it as an “inefficient monopolist” with “wanton failures” which conclusions were not supported by evidence.

Ground number 17

On this ground, the appellant alleged that contrary to the express terms of the transport and storage agreement, the arbitrator found there was a “special relationship” between the parties. That finding was

largely as a result of research undertaken by the arbitrator. Based on that concept of a special relationship, the arbitrator found breach of a duty of care in tort. This was part of the grounding for award of damages. The appellant submitted that in arbitration, the parties frame the issues. Tort was not pleaded by the respondents and accordingly, the arbitrator erred in awarding damages in tort. Where parties are in contractual relationship it is improper to hold a party liable in tort, counsel submitted and cited *Tai Hing Cotton Mill Ltd Vs Lieu Chong Hin Bank Ltd* [1986] 1 AC 80 in support thereof.

Grounds 9, 10, 11, & 12

These grounds were premised on the provisions of the **Kenya Ports Authority Act** (Cap 391). The appellant's principal submission was that before a vessel docks, there is no duty on the appellant to empty the cargo. The arbitrator failed to take that into consideration and that it was the statutory responsibility of Kenya Ports Authority to undertake docking and berthing of vessels at Mombasa.

Ground No 14

The appellant submitted that the arbitrator erred in his findings on the maintenance of stocks. The provisions of **section 96** of the **Energy Act, No 12 of 2006** which are mandatory were ignored by the arbitrator. The section states:

“It shall be the duty of a person licensed to import petroleum to maintain such quantities of petroleum and at such locations as may be prescribed by the Minister in consultation with the Commission”.

The appellant submitted that the onus should have been on the respondents to prove their allegations on maintenance and stocks. It was the appellant's case that contractual provisions cannot override statute.

Ground No. 15

The appellant submitted that the transport and storage agreement had about 22 parties. The arbitrator erred by finding that the agreement between the appellant and Triton was discriminatory to the respondents. The appellant had contended at the arbitration that that agreement had typographical errors and was not meant to give Triton any advantage. The appellant submitted that it had then used the term “mistake” in a non-legal sense, but the arbitrator used it as known in contract. There was thus a complete misconstruction of the agreement amounting to an error of law.

Ground No 18.

The appellant submitted that the arbitrator failed to consider all pleadings and particularly the request for particulars that was received by the arbitrator and served on the claimant. The appellant's position was that the response to the request was inadequate. The failure by the arbitrator to consider all pleadings was submitted to be an error of law.

Grounds 20, 21 and 23

These grounds relate to assessment of damages. The appellant states that since the arbitrator at paragraph 33 of award says parties did not address the arbitrator on what damages would be payable, he was ill-placed to make any assessment. The appellant submitted that general damages are unavailable in breach of contract. Reference was made to the Respondents' amended claim at page 684 of the record. The liquidated claim was for demurrage for US \$ 73,422,399 and Kshs 3 Billion. Loss of market share is shown at the box on page 705 of the record. But in the prayers is a claim for loss of reputation, goodwill and market share. The loss of finance is given as an estimate of between 6 to 12 million. The appellant submitted that this was all muddled up.

18. Breach number 3 in the claim related to demurrage. The appellant submitted that the arbitrator was not addressed on the breach or level of damages. According to the appellant, there was no basis for the award on that head. With respect to the breach number 5 that formed the basis for award of US \$ 47,433,067 and Kshs 2,582,267,508, the appellant submitted it was subject to **section 96 of the Energy**

Act. It was then the obligation of the licence holder to maintain adequate stocks.

19. The appellant challenged the award of 2,000,000,000 and US \$ 30,000,000 since the arbitrator says the respondents were not “gravely injured”. The appellant also took issue with the reduction of those damages at paragraph 225 (e) of the award.

20. The award of US \$ 11.98 million (paragraph 225 (e) of the award) for loss of consumer and investor goodwill is impugned for want of probative value of the report by Vista Capital Limited. The appellant says the issue of Vista capital Limited was not raised by any of the parties. The appellant submitted that this was an erroneous award constituting general damages.

Ground No 22

This ground posits that paragraph 240 (g) of the award amounted to creation of a new contract between the parties. The award is also challenged there as being ambiguous and unenforceable contrary to the requirements of a decree. By postponing payments by the respondent to the appellant, the arbitrator was imposing a new contract on the parties. This runs counter to section **29 (5)** of the Act as well as clause 16.2 of the contract. It has also affected the termination clause of the transportation and storage agreement appearing at page 742 of the record. Mr. Ohaga cited the case of *Gitonga Warugongo Vs Total Kenya Limited* Civil Appeal No 113 of 1998 (unreported) which related to an application to set aside an award. There, the Court of Appeal agreed that by imposing new terms, the arbitrator had overreached and imposed a new contract on the parties.

21. In the final analysis, the appellant submitted it had made out a case under **section 39 (2) (a) (b)** of the **Arbitration Act** for setting aside of the award. We were implored not to vary the award as we do not have the evidence and this is an appeal on points of law. And the appellant did not want the matter referred back to the arbitrator as it says he was biased. The appellant also sought costs.

22. The respondents contested this appeal. We now summarize their key submissions in rebuttal. **The respondents’ submissions.**

This appeal was attacked as unsustainable and based on red herrings. We were reminded that this appeal has been brought under **section 39** of the Act as read together with arbitration rules. It is through those rules that the Civil Procedure Rules are incorporated and our jurisdiction was so limited. The respondents submitted that **Article 165** of the **Constitution of Kenya, 2010** cannot apply as this court is neither sitting as a constitutional court nor are constitutional issues raised.

23. The respondent then attacked the foundation of the appeal being paragraph 33 of the award. The respondents submitted that the arbitrator was methodical and had captured the history and materials placed before him at paragraphs 32 and 47 of the award. From paragraph 57, onwards he dealt with breach by breach. The respondents submitted that the arbitrator was concerned whether those breaches brought out the contest between the parties clearly. The conclusion at paragraph 46 of the award sets out the full thoughts of the arbitrator. The respondents stated that the arbitrator appreciated that parties wanted to proceed with their relationship, which explains the award made at paragraph 240(g). The respondents submitted that the interpretation by the appellant of paragraph 33 is overstretched and out of context.

24. The respondents stated that the arbitrator had pleadings as well as evidence that explains the basis of his award. Our attention was drawn to paragraphs 32, 42, and 57 with respect to breach number 1. At Paragraph 59 the arbitrator analysed “Fair Treatment” clauses. Paragraph 61, 62 and 64 capture the submissions of the parties including the cases submitted to the arbitrator. At paragraphs 68, 69, 70 and 71 of the award, the arbitrator makes a consideration of the materials and his decision and so forth. The materials before the arbitrator thus came from pleadings and material before him and evidence adduced.

25. The respondents’ position then was that the arbitrator followed the law under **section 25** of the Act as the parties had agreed to proceed by documents only. This meant that parties dispensed with cross-examination. Part of the evidence included a report by Vista Capital Limited that is the basis of award of

damages. The respondents submitted that the appellant did not present a counter report or submit on the Vista Capital report and accordingly, the tribunal had no other option but to believe it. The respondents submitted that the appellant is not challenging the facts and this court should thus not set aside the award.

26. The respondents challenged our jurisdiction to set aside the award. Mr. Oyatsi submitted that since the appellant has elected to restrict itself to challenging quantum of damages only without a corresponding prayer to set aside, the court lacks jurisdiction to grant the prayers sought. Reliance was placed on the decision in *Kobil Petroleum Limited Vs Wabidonge* Civil Appeal 36 of 2004, Court of Appeal, (unreported) that an appellate court will only interfere with a lower court's assessment of damages in limited cases such as where the award is either inordinately high or low as to reveal an error of principle. Since the facts in this appeal are unchallenged, the respondents averred that we have no jurisdiction because, first, we have no evidence and second, because there is no prayer in the amended appeal laying the basis for setting aside. The respondents' position is that setting aside would only have been tenable if the appellant had stuck to its original memorandum of appeal.

27. On the claims of bias by the arbitrator, the respondent submitted that nothing could be further from the truth. Since the appellant is not challenging the facts, it cannot in the same breath raise the issue of bias. The respondent drew our attention to paragraphs 11 to 15, 17 to 20, 22 to 28 and 31 of the award to demonstrate that the arbitrator considered all the pleadings, issues and submissions by the parties without bias. As earlier stated, the arbitrator had proceeded to deal with breach by breach at paragraphs 57 to 220 covering all the 9 alleged breaches. The respondent submitted that the arbitrator analysed all the evidence in a clear and methodical manner devoid of bias guided by the law and rules.

28. Lastly, and on that point, the respondent submitted that the award contains a substantial award in favour of the appellant being the counterclaim at items (c) US\$5,380,206.20 and (d) Kshs 133,505,216.60 which then discounts the element of bias.

The respondent defended the extensive research on the law by the arbitrator. It submitted that **section 32 (3)** of the Act requires the arbitrator to give reasons for his conclusion and hence the research.

The arbitrator, like any tribunal, must decide on grounds advanced and evidence, not on the authorities. It was submitted that the arbitrator was simply overzealous and this neither constituted bias nor contravened the arbitration rules.

29. The respondents submitted that breaches number 2 and 3 were clear in respondents' own documents. The pipeline is not for storage and it is the only such pipeline in the country. Triton Limited had converted it into a store as established by a report from Deloitte produced by the appellant before the arbitrator. So when the appellant shut out the respondents from use of the system, it clamped on their business. The respondents submitted that were it not for the order of injunction, the appellant would have strangled the respondents. This was the platform for the damages for breach. The respondents' case is that they are not high considering the damage and that the arbitrator's language was justifiable in the circumstances.

30. The respondents' case is that breaches number 1, 2 and 3 were established by exhibits CB1 and CB7 in the documents before the arbitrator. The blame could not be pushed to the door of Kenya Ports Authority because it is the appellant who refused to discharge the respondents' products leading to a near dry out at the latter's outlets. Here, the respondents said that the arbitrator's citation of the decisions in *Cory vs Thames Ironworks Company* (1868) LR 3QB 181 and *Herold II, Kouffos Vs Czanikow Limited* [1967]3 All E.R 691 was correct. The award at paragraph 240(g) of the award is simply payment by installments, and the arbitrator, like a court, was entitled to postpone payment. The respondents thus submitted there was no ambiguity.

31. The respondent addressed us at length on the election made by the appellant in, first, amending its memorandum of appeal and, second, in its counsel's final prayer before us that the entire award be set aside. Relying on Spencer Bower & Turner, *The Law Relating to Estoppel by Representation* 1966, London, Butterworths at paragraph 303, the respondent submitted that the appellant, by departing from its

latest pleading was estopped from setting aside the award or seeking to retain the benefit of the award on the counterclaim. In the respondents' view, the appellant elected to challenge the award by way of appeal under **section 39** of the Act instead of **section 35**. It then elected to amend the appeal on 6 December 2010. On 18th November 2011, in open court, the appellant's counsel in his final submissions prayed that the entire award be set aside. The respondent submitted that the net effect of those elections disentitle the appellant to the prayers sought in the amended appeal.

32. The respondents finally asked us to dismiss the appeal to bring this litigation to a close. They submitted that arbitral proceedings are meant to be final and that this dispute running back to the year 2005 should come to an end. Reliance for that proposition was laid on the decision in *Anne Mumbi Hinga Vs Victoria Njoki Gathara*, Court of Appeal, Civil Appeal 8 of 2009 [2009]eKLR. The respondents in the result prayed that this appeal be dismissed with costs on the higher scale.

Our decision

33. We have heard the rival arguments. We take the following view of the matter. The respondents have taken up cudgels on our jurisdiction. Jurisdiction is everything. If we do not have jurisdiction in this appeal we must lay down our tools immediately. The Honourable Justice Nyarangi delivered himself thus in *Owners of the Motor Vessel "Lilians" Vs Caltex Oil (Kenya) Limited* [1989] KLR 1 at 14;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

34. Clause 2 of the agreement appointing the arbitrator expressly provided the right of either party to appeal the award. It stated:

"That the parties shall be at liberty to make application to a court to determine any question of law arising in the course of the arbitration and to prefer an appeal to a court on any question of law arising out of the Award".

35. This appeal has thus been predicated upon that clause as well as **section 39** of the Arbitration Act that sets out the right of appeal. Under the rubric of that section, the arbitrator remains the master of facts. Section 39 provides.

"39. Where in the case of a domestic arbitration, the parties have agreed that;

- a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or**
- b) an appeal by any party may be made to a court on any question of law arising out of the award;**

such application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under subsection (1) the High Court shall –

- a) determine the question of law arising;**
- b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration".**

We are called upon to examine the challenge on points of law to the arbitrator's decision under section 39 as read together with the arbitration rules. See *Geogas SA Vs Trammo Gas Ltd* (The Balears) [1993] 1 Lloyd's Rep. 215

36. In the amended memorandum of appeal dated 6th December 2010, the appellant only seeks to set aside the award to the Respondent in the sum of US \$ 43,290,085.70 and Kshs 2,000,000,0000. Those sums

constituted the damages awarded. The appellant, by inference, sought to retain the part of the award that granted its counterclaim. The respondents thus submitted before us that as an appellate court, we are being asked to interfere with the assessment or quantum of damages, an exercise that is futile in the absence of the evidence before the arbitrator. Secondly, it was submitted, the appellant has accepted the facts by seeking to retain the part of the award allowing the counterclaim. The parameters within which an appellate court can interfere with an award of damages are well settled. We accept the general proposition in *Kobil Petroleum Vs Patrick Wabidonge* Civil Appeal No 36 of 2004 (Court of Appeal, Nairobi, unreported) where the court stated;

“an appeal from the High Court to this Court is by way of a re-trial and as this Court has pointed out on various occasions, it is not bound necessarily to accept the findings of fact by the court below but this Court must re-consider the evidence, re-evaluate it and make its own conclusions, although always bearing in mind that it has not had the advantage of the trial Judge in seeing and hearing witnesses.

In *Selle vs. Associated Motor Boat Company* [1965] E.A. 123 at page 126 Sir Clement De Lestang VP stated:-

“..... An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”

The above was cited by this Court in its later decision in *Jivanji vs. Sanyo Electrical Company Ltd.* [2003] KLR 425 but the Court went on to state:-

“As we are asked to interfere with the trial judge’s award of damages, we are also guided by settled principles as stated by Law JA in *Bashir Ahmed Butt Vs. Uwais Ahmed Khan* [1982-88] 1 KAR 1, at page 5:-

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.....”

37. Counsel for the appellant drew our attention to **Article 165 (6)** of the **Constitution** for his proposition that we have supervisory jurisdiction over the arbitrator. We are not sitting as a constitutional court moved under Article 22. If we were being called upon to call for the record of the arbitrator, we have no doubt we have residual powers. But we have before us an appeal to an award pure and simple. In that case the narrow confines within which a challenge to the award can be mounted are clear from the reading of **section 39** of the Act.

38. Having said so, the decision in *Bashir Ahmed Butt Vs Uwais Ahmed Khan* [1982 – 88] 1 KAR 1 at page 5, (supra), is instructive. This court, in the exercise of an appellate function may interfere with an award of damages if, either, it reflects an entirely erroneous estimate, or, where we are shown the arbitrator proceeded on wrong principles or misapprehended the evidence in some material respect and so arrived at an erroneous decision.

39. To do so, we must delve deeper into the considerations the arbitrator made in view of the evidence or materials that were before him. We have not been given that evidence ourselves. But the award itself gives a clear impression of the considerations that the arbitrator made and the benchmarks he set for his award.

40. In the result we have not seen a challenge to our jurisdiction *in limine* to hear the appeal. We have understood the respondents to warn us that by a consent recorded on 15th June 2011, the parties to this appeal agreed that the appeal would be restricted to points of law. By the same consent, the parties agreed that the evidence tendered before the arbitrator shall not be produced in this appeal. We would to an extent agree with the respondents that we are slightly encumbered in reconsidering, re-evaluating or drawing certain conclusions on the arbitrator’s findings of fact. However, an award of damages is often a

mixed basket of fact and law and that is why the decision in *Bashir Ahmed Butt Vs Uwais Ahmed Khan* (supra) becomes an important guide as to when and in what circumstances we can interfere with the award of damages.

41. Finally on that point, it is also not lost on us that the respondents, by a notice of motion dated 4th November 2010 had sought to strike out the appeal on precisely the same ground. In a considered ruling delivered at the interlocutory stage by the court dated 21st December 2010, that objection was dismissed. We find that we are properly seized of jurisdiction to look at the merits of the arbitrator's award and make appropriate orders in terms of **section 39 (2) (b)** of the Act.

42. We must observe that courts should restrain themselves from interfering with arbitral awards. That is the spirit of **section 10** of the **Arbitration Act**. It states:

“Except as provided in this Act, no court shall intervene in matters governed by this Act”.

Again section 32 A of the Act provides;

“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”.

Recourse to the High Court is then left within the narrow confines of the Act, in this case section 39 which the appellant has elected. We also agree that courts should recognize the finality of awards. See generally *Anne Mumbi Hinga Vs Victoria Njoki Gathara* Civil Appeal 8 of 2009, Court of Appeal [2009] eKLR. The Court of Appeal held as follows;

“The superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all other applications purporting to stay the award or the judgment/decree arising from the award. In this regard we note that because of the number of the applications filed in the High Court outside the provisions of the Arbitration Act the award has not yet been enforced for a period close to 10 years now. The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate.....Had the superior court played a supportive role as contemplated in Section 10 of the Arbitration Act and the other provisions in the Act which invite courts intervention, the consequential delay of close to 10 years in enforcing the award the subject matter of this appeal would have been avoided”.

See also on that point *Transworld Safaris Limited Vs Eagle Aviation* Nairobi HCCC Misc. 238 of 2003 (unreported), *Nectel (K) Ltd Vs Development Bank (PTA Bank)* Nairobi HCCC Misc. 859 of 2010 [2011] eKLR, *Century Oil Trading Company Limited Vs Kenya Shell Limited* Nairobi Miscellaneous Civil Application No 1561 of 2007 (unreported) and *Erad Suppliers & general contractors Limited Vs National Cereals and Produce Board* Nairobi High Court Civil Case No 639 of 2009 (unreported).

We are well guided because the parties here expressly reserved their rights to appeal the arbitral award and because we are properly seized of the appeal under **section 39** of the Act.

43. Learned counsel for the respondents addressed us at length on the principle of estoppel by election. That principle posits that where a litigant by conduct or inaction represents to the other of his intention to adopt one of two alternatives or inconsistent positions and encourages the other party to adopt or persevere in a position he would have otherwise abandoned, the first party is estopped by his election to resile. See Bower and Turner; *The Law Relating to Estoppel by Representation* 1966 London, Butterworths page 305 to 323. The election must be unequivocal. In addition the other party must suffer some detriment. Without those conditions, there can be no estoppel by election. We would accept readily that by its amended memorandum of appeal dated 6th December 2010, the appellant elected formally and unequivocally to depart from its earlier pleading dated 18th January 2010. It also elected, through the appeal, to abandon the general action to set aside under **section 35** but to challenge the award on appeal under **section 39** of the Act.

44. We mentioned earlier that at the close of his submissions before us on 18th November 2011, learned counsel for the appellant prayed to set aside the entire award. We stated that this was an awkward submission because he had not re-amended his amended memorandum to accommodate that prayer. Counsel for the respondent had then submitted that the appellant had made yet another election that was fatal. In our considered opinion, there could be no such election on 18th November 2011 because, first, the latest pleading before us remained the amended memorandum of appeal dated 6th December 2010 and, secondly, because this court could not grant it any relief not prayed for. Thirdly, whether it was a slip of the tongue or a genuine mistake, it would not also amount to an election because no prejudice or material detriment to the respondent occurred.

45. The cornerstone of the appellant's case revolves around the arbitrator's remarks at paragraph 33 of the award. In it, the arbitrator expressly conceded that he had a dearth of information from either party on the key matters of the breach of the transportation and storage agreement and the nature of damages that can be awarded. It is important to set out *in extenso* the arbitrator's perception at paragraph 33;

“An issue that is of pivotal importance to the determination of the dispute herein but was not addressed at all by both parties is the nature of the alleged breach of the agreement by the respondent, the effect of that on the agreement and the nature of damages that can be awarded to the innocent party. Both parties have overlooked this important aspect of the dispute and have used the term “breach” in a liberal or non legal context. They didn't bother to define the nature of the alleged legal breach of the agreement. Equally fundamental was their failure to enlighten the arbitral tribunal on the legal consequences of the “breach” they addressed the tribunal so extensively in terms of evidential issues. I doubt whether their omission to address that critical aspect of the dispute is a rare agreement between the parties herein, at least subconsciously of the acceptance that a breach indeed occurred, resulting in the claimants going direct for the consequences of the breach and the respondent defending itself as a reflex response from the more dire consequences of breach”.

46. It is precisely for that reason that the appellant attacks the award for considering matters not before the arbitrator. The appellant's position was that the arbitrator should have summoned the parties to provide the information or to address him on the breach or basis for award of damages. If the arbitrator did not have the information or submissions by the parties on the key aspects set out at paragraph 33, the appellant's position is that there was no basis for the award of damages.

47. We do note however that at paragraph 31 the arbitrator acknowledges that lengthy submissions were made before him defining the dispute. Paragraphs 57 to 81 of the award analyze breach number 1 while paragraphs 82 to 97 deal with the second breach. Paragraphs 98, 139 to 145 deal with breach number 5. Paragraphs 163 to 175 of the award deal with the 7th breach. Paragraphs 176 to 220 deal with breaches numbers 8 and 9. Fundamentally, at paragraph 58 of the award, the arbitrator analyzes the evidence before him. At paragraph 118 to 119, the arbitrator found as a fact that the appellant had shut out the respondent from its pipeline and storage system. The arbitrator then dealt with the issues of damages leading to the final award set out earlier at paragraph 240. The respondents' case on that aspect was that paragraph 33 cannot be read in isolation and that on the totality of the award, the arbitrator had all the necessary evidence and submissions to arrive at his award.

48. The arbitrator at paragraphs 32, 42 and 57 dealt with breach number 1. The latter paragraph contains a fair analysis leading to his finding at paragraph 58 of his award. At paragraph 59 there is a deliberation of the “fair treatment” clauses. The submissions by the parties and their consideration by the parties is captured by the arbitrator at paragraphs 61, 62, 64, 68, 70 and 71 of his award. Paragraphs 22 to 28 of the award identify the key claims by the respondent or breaches of contract by the appellant. The arbitrator extensively dealt with the first breach from paragraphs 57 to 81. Paragraphs 82 to 97 dealt with the 2nd breach. Paragraph 98, 139 to 145 dealt with the 5th breach while paragraphs 163 to 175 dealt with the 7th breach. Then at paragraphs 176 to 179 the arbitrator's award considered breach number 8. Paragraphs 209 to 220 dealt with the 9th breach while paragraphs 180 to 208 of the award considered breach number 10.

49. We are thus faced with an award that is written in a methodical and clear version. Why then was the

arbitrator emphatic and categorical at paragraph 33 that the parties did not “address at all” the nature of the alleged breach of the agreement, the effect of those breaches and the nature of damages? Was he referring to scarcity or paucity of submissions, information or materials on those matters? The respondents asked us to look at those paragraphs to find that the arbitrator’s remarks at paragraph 33 were not conclusive and that the arbitrator had sufficient material before him to assess the damages.

50. We also bear in mind that the arbitration proceeded entirely on the basis of documents. *Ipsa facto* the parties dispensed with cross-examination. The appellant did not present an expert report to counter the respondents’ report by Vista Capital Limited and which would seem to have largely informed the arbitrator’s assessment on damages. But even admitting that the arbitrator is the master of the facts, we hold the view that in an arbitration by documents, the mere presentation of documents by a party is not conclusive as to the fact sought to be proved. It remains incumbent on the arbitrator to be satisfied as to the probative value of those documents or reports particularly in the absence of cross-examination.

51. For example, the arbitrator at paragraph 225 (e) of the award considers the report by Vista Capital Limited titled *Damage quantification on loss of consumer and investor goodwill*. He states that at page 1558, the report said the loss to the respondents was US \$ 11.98 million. The arbitrator then just awards the respondents that sum. Again, the respondents had prayed for Kshs 6 – 12 million as likely loss of financier goodwill and commercial paper holders. There the arbitrator says he found that claim “both remote and speculative” and declined to award it. In our considered opinion, the arbitrator’s wording and views of the impugned paragraph 33 has cast a long shadow of doubt on the foundation of the arbitrator’s findings. Either the arbitrator had been fully addressed by the parties on the nature of the alleged breaches or damages or was not. He says expressly he was not and that those matters were pivotal to a determination of the matters before him.

52. From the arbitrator’s platform at paragraph 33, a real risk arose of going beyond the agreement between the parties and particularly **rule 8 of the Arbitration Rules of the Chartered Institute of Arbitrators of Kenya**. It was open to the arbitrator at that stage to order the parties to produce other documents or to address him further on those pivotal matters of the breaches or damages.

53. We do not lose sight of the fact that this is an appeal on a question of law. The arbitrator remains the master of the facts. Both parties concede the latter statement. It is thus important to consider what is meant by a question of law and whether the arbitrator’s comments at paragraph 33 would be a good platform to impeach the award. A good starting point are the words of Steyn L J in *Geogas S.A Vs Trammo Gas Ltd* [1993] 1 Lloyd’s Law Rep 215 at 227.

“This is an appeal under s. 1 of the Arbitration Act, 1979 on “a question of law arising from an arbitration award”. For those concerned in this case that is a statement of the obvious. But it matters. It defines the limits of the jurisdiction of the Court hearing an appeal under the 1979 Act. The arbitrators are the masters of the facts. On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators’ award on the facts. The principle of party autonomy decrees that a court ought to question the arbitrator’s findings of fact”.

But even Steyn LJ conceded at page 231 that “what is a question of law in a judicial review case may not necessarily be a question of law in the field of consensual arbitrations”.

54. We find the passage in *Edwards Vs Bairstow* [1956] AC 14 at 36 more illuminating and persuasive.

“I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous

in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law”.

55. There is another important matter of law in the award of damages. This was a substantial award which under the current exchange rates is substantial and one of the highest awards in Kenya. Earlier, we set out in full paragraph 240 of the award. There, the arbitrator grants the respondent Kshs 2,000,000,000 and a further US \$ 43,290,085.70 among other reliefs. It is important to trace the basis of that final award and why the award troubles us. A good starting point is paragraph 225 (c) of the award where the arbitrator states;

(c) “Breach Number 3 – This breach concerns breach of clauses 3 and 9.5 of the agreement between the parties. In this claim, the claimants rely on CB-9 from pages 2758 to 2759 and Annexure A. They also rely on CB1-pages 680 to 735 and lastly 736 to 737. I have found hereinabove that the respondent is in breach of these provisions of the agreement. Here I award the claimants all the loss or damages they suffered as result (sic) of their ships being delayed in off loading the cargo. The claim I award herein is for US \$ 11,290,085.67. I hold and find that the claimants to the satisfaction of this tribunal have proved this claim. The evidence adduced in CB-1 at pages 816 and 841 clearly prove the loss suffered by the claimant and the demurrages reimbursement or losses charged. CB-7 pages 1850 to 1911 again clearly show that the claimants have suffered the loss relating to demurrage charges and are thus entitled to reimbursement. Later, when addressing this issue from the respondent’s perspective, I will say a word or two”.

56. We have looked at clauses 3 and 9.5 in the agreement which is at pages 721 to 791 of the record of appeal. One aspect that we believe the arbitrator failed to take fully into account was the Kipevu Oil Storage Facility operating procedures at Appendix III to the agreement between the parties. At clause 3 is provided.

“Receiving and Delivery Conditions

Shippers shall advise KPC on intention to deliver petroleum products to Kipevu Oil Storage Facility (KOSF) at least 14 days prior to the estimated arrival date of the vessel. The Shipper will then provide the estimated time of arrival in the discharge port 72, and forty eight (48) hours prior to the vessel’s arrival.

A Shipper will be solely responsible for the vessel’s port arrival, berthing and other related arrangements. Communications between the Shipper, Kenya Ports Authority and other parties concerned on matters related to Shipper’s vessel’s arrival, handling, berthing etc are to be done on direct basis and do not involve KPC. A Shipper, however will provide timely information to KPC regarding the estimated time when the vessel will be ready to discharge”.

57. Clause 3.6 of the agreement between the parties provided that;

“under no circumstance will KPC (the appellant) accept to reimburse a shipper for costs incurred due to testing or delays in the discharge operations”.

In addition, there was then the matter of trade and customs of the port. The arbitrator paid little regard to trade and usage. Yet both parties had conceded in their pleadings to application of trade and usage. This for example is clear at paragraph 9 of the defence before the arbitrator. The allocation of ullage by the

supply coordination meeting (S.C.M) as well as the arrival, docking and berthing of vessels are important trade and usage elements. Under **section 29** of the Act, the arbitrator should decide the matter based on contract and trade and usages of the parties applicable to the transaction.

58. We are persuaded that the parties had a relationship running for nearly 15 years and for the arbitrator to have found that the relationship came “lately” or that the vote of S.C.M in allotting ullage was a mere “mitigating mechanism” was a misdirection. When this is juxtaposed against clause 7 of the transportation and storage agreement at page 730 of the record and appendix III clause 3 aforementioned, it becomes apparent that the arbitrator outwent the boundaries of the contract in his analysis at paragraphs 109 to 138 of the award.

59. The decision in *Associated Engineering Company Vs Government of Andhra Pradesh & another* [1991] R.D.S.C 153 (1992 AIR 232 15th July 1991) has an enlightening passage that we find persuasive to the facts before us. It states;

“In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outwent the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary”

See also *National Housing Corporation Vs Intex Construction Limited Nairobi* HC Misc Application 131 of 1996 (unreported), *Oltukai Mara Limited Vs Conservation Corporation (Kenya) Limited* Nairobi HCCC No. 666 of 2006 (unreported) and *Express Kenya Ltd Vs Peter Titus Kanyago* HCCC Misc 963 of 2002 (unreported) as well as *Anne Mumbi Hinga Vs Victoria Njoki Gathara* Nairobi Civil Appeal 8 of 2009 [2009] e KLR.

60. Taking those matters into consideration, it is our view that the arbitrator clearly erred in assigning liability for those delays to the appellant and in condemning it to damages. We are well guided by the decision of the Court of Appeal in *Mediterranean Shipping Co S A Vs Wheat Board of Kenya: The MV Pantera* [1988] KLR 80. At page 84, Platt J.A. says;

“The first of these aspects to be considered is the customs of the Port of Mombasa since any stipulation as to unloading is always construed as made with reference to the custom of the port of discharge Then following *Good & Co V Isaac* where it was held, following *Tharis Sulphur & Copper Co Ltd Vs Morel Bros* [1891] 21 QB 647, that the obligation upon the Chatterers to unload did not commence until the ship was berthed, that meant berthed with the assent of the harbor authorities. Moreover, it was held that “as fast as steamer can deliver” as customary, meant that discharge and delivery must be as fast as custom of the port would allow. In applying this decision to the facts of this case, it would seem that one must observe how the ship came to berth, after which the duty of the consignee to unload would commence”.

61. We are thus of the view, that under the **Kenya Ports Authority Act**, (Cap 391) and as held in the above decision, the Kenya Ports Authority reserves to itself overall discretion to decide when and which ship will occupy which berth. The arbitrator thus failed to apply the provisions of the Act abovementioned and the agreement of the parties on the responsibility and liabilities for arrival, docking and berthing of the respondent’s shippers at the port of Mombasa.

62. If there was any doubt that the arbitrator did not take into full account or did not find any trade usage or custom, it is removed by his remarks at paragraph 56 of the award when he states;

“I make a finding that there can be no implied terms into the Agreement between the parties along the lines suggested by the respondent. No evidence has been placed before the courts to show that the dealings between the parties have been accepted willingly or at all as the norm by the industry players.

The absence of another option on their part negates the establishment of a custom or trade usage or trade practice that is adhered to. The dictates of an inefficient monopolist like the respondent to powerless parties on the other side of the bargain cannot be termed as a custom or trade usage. Like most contracts, there must be a meeting of the minds to establish custom or a trade usage and practice. Moreover, as shown by the cases cited hereinabove, it is certainly not an obvious term that can be met with the answer, “of course!”

We thus find that grounds number 1, 7,8,9,10, 11 and 12 as well as ground number 16 of the appeal have merit.

63.Regarding breach number 5, the arbitrator found at paragraph 225 (e) that under clause 3 and 9.5 of the agreement, the appellant had “covenanted to ensure” it had “enough stock”. He found it was in breach. He thus awarded under that heading US \$ 47,433,067 and Kshs 2,582,267,508 on the basis of evidence found in claimant bundle 6 pages 158 to 1740. The arbitrator then says, and this is material;

“In this regard, the damages I award under this heading are (i) US \$ 47,433,067 and Kshs 2,582,267,508. The evidence adduced in CB-6 at pages 158 to 1740 proves the contention of the claimants. The claim has various heads. I am of the view that, in light of the symbiotic relationship between the parties, and the fact that dispute has not snowballed to a level gravely ruinous to the business of the claimants, I exercise my judgment and discretion and reduce the US Dollar award to a round figure of US \$ 30,000,000 and the Kenya shillings to Kshs 2,000,000,000 all inclusive which I award as damages. I thus deduct therefore US \$ 17,433,067 and Kshs 482,267,508 from the sum I award for the reasons I give”.

We have already expressed our opinion that the arbitrator had erred in his finding of the effect of clauses 3 and 9.5 in light of the customs of the port and the annexure to the agreement of Appendix III clause 3 as well as the duties and obligations of the Kenya Ports Authority under its parent Act (Cap 391). There is no clear legal basis for the discounts on damages that he liberally grants thereby shaking the foundation of the initial award.

64.The appellant in grounds 2, 4, and 5 urged us to find the arbitrator was biased. Ground 18 in turn alleged the arbitrator failed to take into consideration all pleadings. **Section 19** of the **Act** provides that parties shall be treated with equality and be granted a fair and reasonable opportunity to present their cases. An arbitrator cannot be said to be biased merely because he has found in favour of one of the parties. That is the nature of litigation and arbitration. There is no allegation before us of misconduct by the arbitrator. We have found that the arbitrator did undertake extensive research on case law to support his decision on the alleged breaches and compensation. Those authorities may as well have been in favour of the respondents. But we find that that in itself cannot be a firm foundation for a claim of bias. There has to be an actual bias inconsistent with impartiality of an arbitral tribunal. The party alleging bias has the onus to prove it. It can be established by direct evidence or it must be clearly inferred from a set of facts. Bias means a “predisposition or prejudice against one party’s case or evidence on an issue for reasons unconnected with the merits of the issue”. See *Porter Vs Magill* [2001] UKHL 67, [2002] 2 AC 357.

65. At paragraphs 137, 169 and 199 of the award, the arbitrator refers variously to the appellant as an “inefficient monopolist”. Those are the words that anchor the appellant’s claim of bias. We take judicial notice that the appellant owns and runs a fuel pipeline and storage facility of its only kind in the Republic. To that extent, it has a monopoly over certain services. As to whether it is efficient or not, the arbitrator formed the opinion rightly or wrongly on the evidence before him.

But we find that in terms of the pleadings, their amendments, discovery and inspection as well as the actual hearing, both parties received similar treatment. In the final award, the arbitrator even awarded the appellant its counterclaim for Kshs 133,505,216.60 and US \$ 5,380,206.60. We are unable in the absence of clear and direct evidence to draw any inference of bias that tainted the award.

66.Before we leave this matter, we are minded to comment further on the research on case law by the

arbitrator. The appellant, relying on passages in *Russel on Arbitration*, 21st edition, London, Sweet & Maxwell page 195 and Mustil and Boyd; *The Law and Practice of Commercial Arbitration in England*, 1989 Butterworths London page 312, submitted that the arbitrator, on finding a new authority or case, should have re-summoned the parties for arguments. Russel, at paragraph 5 – 60 and 5 – 061 states;

“The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award and if the tribunal are minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point”.

Mustill and Boyd in turn state at page 312 that;

“If the arbitrator decides the case on a point he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the case which they have to answer”.

67. We disagree with the appellant’s submission. Once an arbitrator retires to make a decision, he cannot be encumbered on reasons for his decision. He may recall the parties to submit additional documents or clarify certain matters. Certainly, the arbitrator can only make a decision based on the evidence, pleadings and materials by the parties. But **section 32 (3)** of the Act, the **Arbitration Rules** thereunder as well as **rule 9 (5)** of the **Arbitration Rules of the Chartered Institute of Arbitrators (Kenya)** all require that the arbitrator gives reasons for his decision unless the parties have agreed that no such reasons be given. If the authorities cited or reasons for the award are not sound, then the aggrieved party may have some remedies in certain cases to question the decision.

68. Under those circumstances, it cannot be the case that when the arbitrator who has retired to make a decision finds a new case law, he must summon the parties. It would fly in the face of conventional decision making. The arbitrator cannot possibly be writing and reasoning through his award together with the parties. We thus find grounds 2,4, and 5 of the appeal unmerited.

69. Regarding ground 14 of the appeal, we find that **section 96** of the **Energy Act, Number 12 of 2006** was material to the matters before the arbitrator. That section places the duty of maintaining certain amounts of stock of petroleum products on the licenced holder. A licenced holder would be the oil importer. Section 96 of the Energy Act provides;

“It shall be the duty of a person licensed to import petroleum to maintain such quantities of petroleum and at such locations as may be prescribed by the Minister in consultation with the Commission”.

The arbitrator acknowledges at paragraph 147 of the award that the issue of adequacy of stocks “is the most serious claim that is being made by the claimants” and that “all the issues raised by the claimants end up here”. In deed, the substantial claims on damages were anchored on that alleged breach. At paragraph 151 the arbitrator acknowledges that his attention was drawn to the provisions of section 96 of the Energy Act. We do not see in the award any analysis by the arbitrator of the impact of that provision. What we see is a sudden conclusion at paragraph 153 of the award that the claimant had established breach.

70. The arbitrator in condemning the appellant for failing to maintain adequate stocks at paragraph 146 of the award thus failed to take into account a mandatory and clear provision of the **Energy Act**. This ground of appeal succeeds.

71. We were addressed at length on ground 15 of the appeal on mistake. The arbitrator had dealt with that matter at paragraphs 62 to 80 of the award. As stated earlier, the transportation and storage agreement had other parties (fuel companies) who are not parties to this appeal. There was also a separate but similar agreement with a company called Triton Limited. The respondent had in its claim before the arbitrator alleged that Triton had received a preferential agreement at clause 14.2. It was contended that clause 14.2 of the respondents’ agreement with the appellant was worded differently. The appellant told us that its

case before the arbitrator was that that was a mistake or typographical error.

72.The respondents' position was that it was deliberate and meant to give a seat for Triton at the high table; accommodate its special needs; and set new industry benchmarks. The arbitrator dealt with the issue of "mistake" as a legal term and as a defence for breach of contract. In fact, the arbitrator says at paragraph 64 that he "must confess" and "got the feeling" that the appellant used the term "almost in a popular non-legal sense". As mistake had then not been pleaded and did not sit well with the decided cases on the element of mistake that the arbitrator dealt with, the defence was baseless. The arbitrator found that clause 14.2 was material as it related to ullage and it was a deliberate intention to give Triton an unfair advantage.

73.From the findings of a report prepared by Deloitte and submitted by the appellant, the arbitrator found there was unfair and unequal treatment of shippers and that Triton got preference. That conclusion is well explained by the arbitrator at paragraph 81;

"It might be prudent to address the submission by the claimants that future entrants on the contract signed between the claimants and the respondent must according to clause 27 sign the same contract as co-signatories of the contract. I don't find that to be persuasive either from the construction of the clause or even on a common sense approach. The respondent, on the other hand would have been in stronger position if it merely allowed Triton to sign the same contract and continue to assert the word "shippers" instead of Triton. By inserting "Triton" in clause 14.2 it makes one reach the inescapably (sic) conclusion that the contract elevated the needs of triton to a high pedestal than that enjoyed by all the industry players who signed the initial contract with the respondent. Such a breach of an agreement usually has consequences".

74.We are encumbered ourselves as we do not have the primary evidence to determine whether or not Triton got any preferential treatment. On the face of the pleadings however, it is clear to us that clause 14.2 of the Triton contract was worded differently from the contract between the parties to this appeal. The appellant may as well be right that they were typographical errors but there would be no denying that they gave Triton an advantage. In that event, the arbitrator was perfectly entitled to reach the conclusion that this breached clauses 2 and 27 of the agreement. What is material before us is that the appellant had not pleaded mistake. It used the term "mistake" loosely and by its own admission in a "non-legal sense". We cannot thus shift the blame to the arbitrator. The arbitrator at paragraph 64 defines the three categories of mistakes. Clearly the arbitrator and the appellant had misunderstood each other on their use of the term "mistake". It is the appellant who introduced "mistake" as a shield to claims of unfair treatment. It had not pleaded it and if its submissions before the arbitrator were misunderstood, it cannot escape a share of the blame.

75.Where we part ways with the arbitrator is in his construction of the entire agreement and the design of remedies in the award. The arbitrator also introduced a concept of a "special relationship" between the parties. The appellant rightly questioned its basis in view of the fact that the transportation and storage agreement involved over 20 other fuel companies. That finding is at paragraph 193 of the award. We have found it a strained construction not borne out by the written agreement of the parties or the trade and usages applicable to the transaction.

76.The arbitrator had relied on the decision in *Esso Petroleum Company Limited Vs Mardon* [1976] 2 ALL E.R 5, but that decision can be distinguished as it was based on warranties or representations by one party to its antagonist.

In the present appeal, there was clearly a written agreement which had not been impeached setting out the rights and duties of the parties. But that was not the whole problem. The arbitrator used the term "special relationship" as employed in the *Esso* case (supra) to import tortious liability in a matter of contract. A concept of duty of care was then introduced whose breach by the appellants grounded the award for damages. This may as well have been beyond the contemplation of the parties to the transportation and storage agreement. We would thus find merit in ground number 7 of the amended memorandum of appeal.

77. Once the arbitrator accepted a mixed basket of contract and tort he began a treacherous journey. One danger was rewriting the contract for the parties or going beyond their contemplation. This is well brought out by his award at paragraph 240 (g) and which forms the basis of ground number 22 in the amended memorandum of appeal. The award there meant that the appellant was to withhold the sum of US \$ 37,909,879.5 and Kshs 1,866,494,783 awarded to the claimant at paragraph 240 (f). It was then to deduct monies from time to time for its services rendered to the respondents from the date of award or such other date agreed upon by the parties.

78. The appellant says this part of the award was ambiguous and incapable of enforcement as a decree. Our reading of it does not reveal serious ambiguity. What it does though is to bind the two parties to a long term contract; at least until when the appellant will have granted the respondent services to exhaust the sums mentioned. That clearly was an imposition by the arbitrator of new contract terms that offended clause 16.2 and that would fetter the right of either party to terminate the written transportation and storage agreement. That to us was clearly erroneous.

79. The arbitrator also stepped outside the clear written contract of the parties regarding tariff adjustments. At paragraphs 209 to 220 of the award, the arbitrator analyzes tariffs adjustments by the appellant. At paragraph 220 he says the arbitral tribunal was a tribunal of equity. He says;

“In my view, a tribunal of equity like this one cannot countenance to this scenario which may continue in perpetuity. Even though the respondent has failed to persuade me that its action to increase the tariff was legitimate, I cannot turn a blind eye to a scenario whereby the claimants may continue to enjoy certain financial advantage over their competitors in perpetuity. In this regard this award gives the parties herein time to agree on a date when the rates that is (sic) being applied across the board will be automatically applicable to the claimants herein notwithstanding my findings herein. If the parties herein do not so agree within 60 days from the date of this award, I make the order that the tariff rate applicable to other shippers will be applicable to the claimant automatically after 190 days from the date of this award. I make this order notwithstanding the fact that the respondent has failed and will probably fail to surmount a bona fide and reasonable rationale on why it should be allowed to increase the tariff. It is not really for its benefit that I make the said order. To contrary, (sic) it is to create a fair level playing field between the claimants and other industry players”.

The **Arbitration Act at section 29 (5)** mandates the arbitrator to decide the matter in accordance with the terms of the contract taking into account the usages of the trade applicable to the particular transaction. We are unable to say the award was truly faithful to that legal provision.

80. We would return briefly to the award of damages. The report by Vista Capital Limited titled *Damage quantification on loss of consumer and investor goodwill* is dealt with at paragraph 225 (e) of the award. The reason the arbitrator gave an award of US \$ 11.98 million was because “a party is entitled to the loss that is the direct and reasonable consequences of the breach of the contract”. The arbitrator then states;

“The above notwithstanding, I am of the view that since the claimants have quickly recovered from the above loss in terms of customers and goodwill, and since no evidence has been placed before me that the action or omission on the part of the respondent has left a scare (sic) in either the name and repute of the claimants or their general standing especially economically, I deduct US \$ 7.98 million and leave an award of US \$ 2 million. I think, that will be an adequate and fair compensation”.

The arbitrator’s views were also coloured by his views on a non-party known as Triton. He says at paragraph 238;

“The relationship between the parties herein has in a way been most fundamentally shaped by Triton. In fact, apart from the two parties herein, the third most important party has been Triton. Its activities has (sic) touched and shaped the industry so fundamentally that one should be forgiven in thinking that it was a party to this (sic) proceeding. (sic) It is indeed the determinant cause of the fallout between the parties. One may be forgiven to refer Triton as the “ghost” party in this (sic)

proceeding. (sic) The favors the respondent has accorded and showered it with and enduring and unconditional affection it has shown Triton has to the greatest extent been the direct cause of the issues that has (sic) caused the claimants to be so aggrieved. It is not the mandate of this arbitral tribunal, to go into that aspect of the nefarious relationship between Triton and the respondent but as a public institution funded by the tax payer a bigger and more encompassing audit of that relationship is most desirable”.

81. When focus is shifted back to paragraph 33 of the award, then the overreaching arm of the arbitrator is shown. Not lost on us is a body of case law that holds that some of the consequential and tortious damages awarded are unavailable in contract. See Dharamshi Vs Karsan [1974] E.A 41. See also Joseph Ungandi Kedera Vs Ebby Kangisah Kavai Civil Appeal No 239 of 1997 (Court of Appeal, (unreported).

82. Granted those circumstances, the counterclaim awarded to the appellant by the arbitrator at paragraph 240 (c) and (d) of US \$ 5,380,206.20 and Kshs 133,505,216.60 is equally tainted and for the same reasons. When an arbitrator has meandered beyond his boundaries of the contract between the parties, trade or usages applicable, it is safe to say he has exceeded his jurisdiction and gone beyond the contemplation of the parties. See Associated Engineering Company Vs Government of Andra Pradesh & another (Supra), Superior Enterprises Limited VS Union Insurance Company of Kenya Ltd Nairobi HCCC 5239 of 1990 (unreported). See also Airtel Network Kenya Limited Vs Nyutu Agrovet Nairobi HC Misc. Case No. 460 of 2011 (unreported). We thus find merit in grounds 3, 19, 20, 21, 22 and 23 of the amended memorandum of appeal.

83. The award given is substantial. The arbitrator states in paragraph 1 of the award that:

“The dispute between the parties herein is probably the biggest commercial dispute in Kenya between parties that have litigated on the dialectical sides of the adversarial process. It is a claim for about Kshs 9 Billion and a counterclaim for Kshs 1.6 Billion. That is just the quantifiable claims the parties make. They also plead in their respective pleadings a number of prayers in which they seek various other heads of unquantified damages and prayers”.

If the arbitrator conceded at paragraph 225 (e) quoted earlier that the respondents had “quickly recovered, from any loss of customers or goodwill” and that “no evidence” had been placed before him to show the appellants “left a scare [scar?] in the name and repute” of the respondent, the final award of such a high figure in damages, which at current exchange rates exceeds Kshs 6 Billion, is on the face of it, inordinately high. Awards must take into consideration the capacity of the economy to absorb them. From our deliberations, the method and legal basis for the award have been impugned. We are thus satisfied that we should disturb the award for being so inordinately high as to represent an erroneous estimate. We are well guided by the words of Law JA in Bashir Ahmed Butt VS Uwais Ahmed Khan (1982 – 88) 1 KAR 1 at page 5. We are entitled to so disturb the award where the arbitrator proceeded on wrong principles or “misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low”.

84. For all the deliberations and reasons above, we are minded to disturb the arbitral award dated and published on 10th December 2009. Having reached that conclusion, **section 39(2) (b)** of the Act mandates us to vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration. If a new arbitrator had been appointed, we would have remitted it to the new arbitrator. We are encumbered in varying the award for want of primary evidence that was before the arbitrator. We take cognizance of the fact that certain rights of either party may have accrued or crystallized out of the storage and transportation agreement. Granted those circumstances and the interests of justice, we should not leave the parties without a further remedy notwithstanding our impeachment of the award. We will not therefore set aside the award in its entirety.

85. The further order that then commends itself to us to grant, which we hereby do, is to remit the matter to the arbitrator for reconsideration, taking into account the findings of this judgment. We are alive to the fact that the appellant has expressed its reservations to such an order. However, in the absence of a new

arbitrator, our hands are tied. Secondly, we have found the claims of bias of the arbitrator to be devoid of merit.

86. Costs would ordinarily follow the event. We note however that the appellant has partially succeeded in this appeal by setting aside part of the award against it. The respondents have also partially succeeded and the appellant lost the gains of the counterclaim that had been awarded to it and which the appellant had sought to retain. To encourage the parties to resolve this old matter, and which they undertook by going into arbitration in the first place, and for the other reasons above, we order that each party shall bear its own costs.

DATED and DELIVERED at NAIROBI this 26th day of January 2012.

D.K. MUSINGA
JUDGE

G.K. KIMONDO
JUDGE

Judgment read in open court in the presence of

Mr. Ohaga for the Appellant.

Mr. Oyatsi and Mr. Ohenga for the Respondents.