REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 557 OF 2004

IN THE MATTER OF: THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF: THE ENFORCEMENT OF AN INTERNATIONAL ARBITRATION AWARD

FOXTROT CHARLIE INC…….……
APPLICANT
VS

AFRIKA AVIATION HANDLERS LIMITED…….1ST RESPONDENT

RAPHAEL MULLEI NZOMO…..
…….2ND RESPONDENT

RULING

The parties

1. The Applicant is a corporation registered in Panama with mailing address at 6, rye du Nant, 1207 Geneva, Switzerland.

2. The 1st Respondent is a limited liability company incorporated in Kenya and having its registered offices at Siginon Complex, Nairobi, JKIA with mailing address at Post Office Box 41266 Nairobi, Kenya.

3. The 2nd Respondent is the Managing Director of the 1st Respondent.

The Application before court

4. Before me is a Chamber Summons application dated 30th June 2009 and filed in Court on 16th July 2009. The application is brought by the Applicant under Section 2 and 36 of the Arbitration Act. The Applicant seeks the following orders:

1) That the Final Award dated 26th February 2009 rendered by the Arbitral Tribunal under the Rules of Arbitration of the International Chamber of Commerce (hereinafter called "ICC") in ICC International Court of Arbitration, Arbitration Cause No. 13487/FM, Foxtrot Charlie Inc vs. Afrika Aviation Handlers Limited and Mr. Raphael Mullei Nzomo annexed to the Affidavit of David Gatmon filed herein in support of the application be deemed as duly filed by the Plaintiff/Applicant;

2) That the said award dated 26th February 2009 rendered by the Arbitral Tribunal under the Rules of Arbitration of the International Chamber of Commerce ("ICC") in ICC International Court of Arbitration, Arbitration Cause No. 13487/FM, Foxtrot Charlie Inc vs. Afrika Aviation Handlers Limited and Mr. Raphael Mullei Nzomo be recognized as binding between the parties thereto;

3) That the said Award dated 26th February 2009 rendered by the Arbitral Tribunal under the Rules of Arbitration of the International Chamber of Commerce (hereinafter called "ICC") in ICC International Court of Arbitration, Arbitration Cause No. 13487/FM, Foxtrot Charlie Inc vs. Afrika Aviation Handlers Limited and Mr. Raphael Mullei Nzomo be enforced and a decree of this Court do issue in accordance therewith;

4) The costs of the Application together with the costs of this suit and all other expenses and costs as are incidental to the enforcement and execution of the said Award be paid to the Plaintiff by the 1st and 2ndDefendant/Respondents.

5. In essence, the Applicant seeks recognition and enforcement of the Award of the ICC Court by this court.

6. The application is based on grounds set out in the body of the application and is further supported two affidavits sworn on 2nd July 2009 and 1st July 2011 respectively by David Gatmon the Managing Director of the Applicant.

7. The application is not opposed by the 1stRespondent, apparently because it is no longer trading.

8. The 2ndRespondent opposes the application through Grounds of Objection dated 12thOctober 2009as well as a replying affidavit sworn on 11th December 2009. The grounds upon which the application is opposed are rendered as follows:

1) The Application is brought in breach of the mandatory provisions of the Arbitration Act, 1995 and the Arbitration Rules, 1997 and so is bad in law and should be dismissed;

2) The Jurisdiction of this court has not been properly invoked;

3) The Application is brought in a manner that is contrary to statute and is therefore an abuse of the court process;

4) The Application seeks to enforce an award which is contrary to International Public Policy and National Policy of the Republic of Kenya;

5) The Application seeks to enforce an award which is contrary to the positive law of Kenya in that

a) the Arbitral Tribunal lacked jurisdiction;

b) the arbitration agreement was between the Claimant and the 2nd Respondent was implied by the Arbitral Tribunal contrary to law;

c) the Arbitral Tribunal dealt with disputes not falling within terms of the arbitration and incorporated decisions on matters beyond the scope of the arbitration;

d) the Arbitral Award resulted from commission of a crime; bribery contrary to Section 39 of the Anti-Corruption and Economic Cries Act No. 3 of 2003;

e) the Arbitral Award was procured by fraud and/or active concealment of material facts;

f) the Arbitral Award was in restraint of trade contrary to Section 2 of the Contracts in Restraint of Trade Act, cap 24 of the Laws of Kenya;

g) the Arbitral Award was biased under Kenyan law;

h) the Arbitral Award was not stamped in pursuance of the provisions of the Stamp Duty Act, cap 480;

i) the Arbitral Award was by an Arbitral Tribunal that ousted the jurisdiction of Kenyan courts and restricted the right of the 2nd Respondent to access Kenyan courts;

j) the Arbitral award infringed upon the freedom of association of the 1st and 2nd respondent by the provisions of the Partnership Agreement contrary to Section 80(1) of the Constitution of Kenya.

6) The Principle of public policy ex dolo malo non oritur actio (No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act) applied to this case and the Honourable Court had the power and jurisdiction to consider the issues of illegality, even on its own motion.

9. The 2nd Respondent therefore urges the court not to recognize or enforce the Award.

Background to the application

10. At all material times, theApplicant was involved in the business of buying capacity on cargo aircrafts operating between Africa and Europe and selling such cargo capacity to individual shippers of cargo in Africa selling their produce to Europe and within Africa. The 1stRespondent was a designated cargo carrier registered in Kenya holding traffic rights for Inter-Africa cargo flights as well as flights between Kenya and Europe.

11. The services offered by each of the parties appear to have been complementary of each other. In that regard, by a Partnership Agreement entered into between the Applicant and the 1stRespondent in December 2001, the parties agreed to formalize their relationship in offering the complementing services.

12. It was an express term of the Partnership Agreement that all disputes arising in connection with the Agreement would be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) in Geneva, Switzerland by one or more Arbitrators appointed in accordance with the said Rules.

13. Sometime in the year 2004, a dispute arose between the Applicant and the Respondent regarding their relationship under the Partnership Agreement and the Applicant referred the dispute to arbitration in Switzerland in accordance with Article 6 of the Agreement. The Applicant further filed a suit, being the suit herein, seeking measures of protection pending the determination of the appeal. The court duly issued orders restraining the Respondents from undertaking certain acts pending determination of the arbitral proceedings.

14. The dispute was thereafter submitted for arbitration in Switzerland.

The Arbitral Proceedings

15. From the awards annexed to the supporting affidavit of David Gatmon sworn on 2nd July 2009 as 'DG7' and 'DG8' the Arbitral proceedings commenced with a Request for Arbitration dated 17th September 2004 addressed to the International Chamber of Commerce (ICC). This was followed by a

letter dated 26th November 2004 from the 1stRespondent to the ICC Court intimating that it did not wish to participate in the arbitration proceedings. By a Reply from the 2ndRespondent to the ICC court dated 16th August 2005, the 2ndRespondent contested the jurisdiction of the Court over him essentially on the grounds that he was not a party to the Partnership Agreement.

16. Constitution of the Arbitral Tribunal was accomplished on or about 6th May 2005 with the Applicant having appointed one of the co-arbitrators but the Respondents declining to nominate a co-arbitrator. This constrained the ICC Court to directly make the appointments of the Chairman of the Tribunal and the other co-arbitrator. The Respondents also indicated inability to pay their share of the advance costs of arbitration and this was met by the Applicant as directed by the Arbitral Tribunal.

17. The arbitral proceedings themselves were two-phased. In the first phase which took place between 17th January 2006 and 24th November 2006, the Arbitral Tribunal considered the preliminary issue of whether or not it had jurisdiction over the 2nd Respondent. In its Partial Award delivered on 24th November 2006, the Tribunal held that it had jurisdiction over the 2nd Respondent,based on several grounds set out in the Award and which we shall revisit later.

18. The second phase of the Arbitral proceedings took place between 2nd April 2007 and 26th February 2009. The Applicant claimed a number of reliefs based on a claim for shareholding in the 1st Respondent and damages breach of contract and loss of earnings.The quantum of damages claimed was in the region of US$ 2,800,000/-. In response, the 2nd Respondent argued that the sums demanded were based on deceit on the part of the Applicant and claimed that the Applicant had drawn revenues of up to US$ 2,700,000/- over the period. The 2nd Respondent claimed he was owed a sum of US$ 1,625,810 but chose not to counterclaim.

19. A Final Award was made in favour of the Applicant on 26th February 2009. The Arbitral Tribunal awarded a total sum of US$ 3,510,376.59 plus interest at 5% per annum running from various dates.

Submissions by counsel for the parties

20. Counsel for either party put in detailed written submissions to buttress their rival positions. The submissions were highlighted before this court on 18th April 2012. These have been duly factored in the analysis of the application below.

Legal framework

21. The application before the court is based on the provisions of Section 2 and Section 36 of the Arbitration Act, 1995. Section 2 of the Act provides that the Act applies to both domestic and international arbitration.

22. The Award the subject of the present proceedings is an international arbitration and thus falls within the purview of the Act.

23. Section 36 of the Arbitration Act, 1995 provides the legal parameters governing recognition and enforcement of arbitral awards, as follows:

“36. (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court shall enforced subject to this scion and Section 37.

(2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish-

a) The duly authenticated original arbitral award or a duly certified copy of it; and

b) The original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

37. (1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only-

(a) At the request of the party against whom it is involved, if that party furnishes to the High Court proof that –

(i) 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, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked 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 it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law. Of which, that arbitral award was made; or

(b) If 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) (ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

24. The procedure for bringing applications seeking recognition and enforcement of arbitral awards is then set out in Rule 9 of the Arbitration Rules 1997. The applications should be brought by way of a Chamber Summons application.

25. It is further worthy of note that the award sought to be enforced being the product of international arbitration is subject to the legal framework for recognition and enforcement set out in the United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Arbitral Award, 1958, also known as the New York Convention. This Convention enjoins Contracting States to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other Contracting States. Article IV and V of the Convention stipulates the parameters for recognition and enforcement of international arbitral awards, including the grounds upon which such recognition and enforcement can be declined. This Convention has been ratified by Kenya. The

Convention is also now part of the law of Kenya by virtue of Article 2(5) and (6) of the Constitution of Kenya, 2010. In any event, the grounds for refusal of recognition of an international arbitration award set out in the Convention have been substantially adopted in Kenya's Arbitration Act, 1995. Section 37 of the Kenyan Act, mirrors Article V of the Convention almost word for word.

26. Finally, the Partnership Agreement between the Applicant and the 1st Respondent contained an arbitration clause providing that all disputes arising in connection with the Agreement would be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. These rules govern the arbitral proceedings themselves and may not directly apply at this stage of recognition and enforcement of the arbitral award.

Judicial/scholarly approach

27. Both courts and legal commentators have expressed varied views on the jurisdiction of the court in relation to "recognition" and "enforcement" international arbitral awards. On the one hand, there is a school of thought that favours enforcement of awards and takes the inclination that recognition and enforcement should be a matter of course, with the enforcing court having a very limited window for application of the exceptions and caveats set out in Article V of the New York Convention, or, in our case, Section 37 of the Arbitration Act, 1995. This school propagates the view thateven where grounds for refusing recognition exist, the court should interpret such grounds as permissive and not mandatory and should still exercise discretion in favour of enforcement. This pro-enforcement bias is discussed in *inter alia* an article by Alex Baykitch and Lorraine Hui *"Celebrating 50 years of the New York Convention" Volume 31(1) UNSW Law Journal page 364* where the authors conclude as follows:

"The concept of a final and binding award capable of enforcement is of paramount importance in international commercial arbitration. It is fair to say that there is an overall bias towards the enforcement of awards, which ensures a level of predictability in international arbitration that is crucial to international trade. Although approaches to the enforcement of awards varies from State to State, the majority of cases acknowledge that an award will only be set aside in the rarest of circumstances and usually on overriding international public policy concerns".

28. The above approach was applied in *inter alia* the case of ***China Nanhai Oil Joint Service Corporation Shenzhen Branch vs. Gee Tai Holdings Limited (1995) 2 HKLR 215*** where it was held that even if a ground of opposition is proved, the court had a residual discretion to enforce nonetheless.

29. In support of the above approach, counsel for the Applicant, Mr. Okon'go urged this court to adopt the approach and exercise its discretion in favour of recognition and enforcement of the award of the ICC Court rendered on 26th February 2009 notwithstanding any grounds that may exist for non-recognition under Section 37 of the Arbitration Act, 1995.

30. On the other hand is a school of thought that takes the view that a court to which recognition and enforcement of international awards is sought must have jurisdiction to scrutinize the award and make its view on whether or not such an award meets the fundamental thresholds of justice within its own jurisdiction.

31. In support of this view, counsel for the 2nd Respondent Mr. Ochieng' Oduol submitted that the High Court of Kenya cannot as a matter of course "recognize" and "enforce" an international award of the nature before the court and must examine it and pass its own judgment on whether it passes the test of recognition and enforcement under Kenyan law. He submitted that as a court of a Contracting State, the High Court of Kenya has jurisdiction on whether or not to allow enforcement of the award within its jurisdiction. He therefore urged the court to reject the Applicant's contention that the issues raised in opposition to recognition were technical issues and to consider them as fundamental to the Court's jurisdiction to recognize and enforce the award.

32. My own view on the above rival schools of thought is as follows: the jurisdiction bestowed upon this

court under Section 36 of the Arbitration Act, 1995 in relation to recognition and enforcement confers a statutory mandate enjoining the court to recognize and enforce an international award except where such an award is afflicted by any of the grounds set out in Section 37 of the Act. I do not think that Parliament in its wisdom enacted Section 37 of the Act without any intent that the defences set out therein should apply where the facts of a given case availed any of the defences set out in the section.The court cannot therefore overlook these defences altogether in favour of a pro-recognition residual discretion.The grounds are cast in statute and override residual judicial discretion.

33. In addition, my understanding of the term "recognition" is that it carries an intrinsic duty upon the enforcing court to place the award on a scale and evaluate its consonance with the country's minimum thresholds of justice prior to recognition. A court of law at the minimum should not allow enforcement of an award that is inimical to basic ends of justice. As it were, "***An arbitration award is a determination on the merits by an arbitration tribunal in arbitration and is analogous to a judgment in a court of law" (see www.wikipaedia.org)***. The effect of recognitionisto convert an award into an executable judgment of the court and the court should give assurance that within its own jurisdiction, the award meets the minimum tenets of a reasoned judgment and can be comfortably adopted into the family of final decisions the court. The court cannot just recognize an award at face valueor merely rubberstamp its affirmation. The court has a constitutional duty to expend substantive justice under Article 159(2) of the Constitution. This cannot be done without jurisdiction to subject international arbitration awards to some level of judicial appraisal.The court's jurisdiction in this regard is, in any event, well anchored within Sections 36 and 37 of the Arbitration Act, 1995.

34. In the present application, the duty of this court would be discharged if the court is able to weigh the need to sanctify arbitration as a constitutional avenue for dispute resolution against the need to ensure that any awards brought before it for recognition and enforcement are not vitiated by the grounds that the law stipulates as militating against recognition.

Issues for determination

35. The court'sduty towards the application before me is to subject the Partial and Final Awards of the ICC Court to the legal threshold set out in Sections 36 and 37 of the Arbitration Act, 1995 and on which the grounds of objection to the application by the 2nd Respondent are premised with a view to determining whetherrecognition of the award is tenable in the face of the defences relied upon.

36. The 2nd Respondent's grounds of objection are set out in paragraph 8 of this ruling.

37. I shall consider thegrounds of objection under three main heads, namely,

(i) Whether application is brought in breach of the mandatory provisions of the Arbitration Act, 1995 and the Arbitration Rules, 1997; whether this court's jurisdiction has been properly invoked and whether application is brought contrary to statute as to constitute abuse of the court process.

(ii) Whether the award is contrary to International Public Policy and National Policy of the Republic of Kenya.

(iii) Whether the Application seeks to enforce an award which is contrary to the positive law of Kenya.

(i) Invocation of Court's enforcement jurisdiction

38. The 2nd Respondent contends that the application before the court has been brought in breach of the mandatory provisions of the Arbitration Act, 1995 and the Arbitration Rules 1997 and further that the jurisdiction of this court has not be properly invoked. This contention is based on a number of grounds, namely, that the award has been filed in an existing civil suit; that the award ought to have been filed and served under Rule 4(1) and Rule 5 and given a distinct number before an application could be made under Section 36 of the Arbitration Act; and that the Partnership Agreement, Partial and Final Awards have not

been stamped as required under Section 19 of the Stamp Duty Act. The 2nd Respondent contends that Article 159(2)(d) of the Constitution of Kenya, 2010 did not abrogate all rules of procedure and is not a panacea for breach of procedural requirement under a statute.

39. In response, the Applicant submits that it has properly moved the court for enforcement of the Awards in that it has brought the application by way of Chamber Summons as required under Rule 9 of the Arbitration Rule 1997 andhas filed the documents required to be filed under Section 36(2) of the Act for enforcement of an arbitral award, namely the arbitration agreement and a certified copy of the arbitral award have been furnished. The application therefore satisfies the conditions required under the Arbitration Act for enforcement of the award. The jurisdiction of the court has also been properly invoked as enforcement is sought under the UN Convention on Recognition and Enforcement of Foreign Awards 1958 as as adopted in Sections 36 and 37 of the Arbitration Act 1995.

40. I reviewed the procedure of approaching the court for enforcement of an arbitral award under the Arbitration Rules, 1997. Rule 4(1) of the Rules states that any party may file an award in the High Court. Rule 5 requires the party filing the Award to give notice to all parties of the filing of the award giving the date thereof and cause number and the registry in which it has been filed and to file an affidavit of service. In this regard, the Arbitration Rules do not appear to contemplate that an Award can be filed in an existing suit. Such an Award should in my view be filed under a Miscellaneous Cause as the purpose of filing is purely enforcement. No other pleading should be filed as that would constrain the court to look beyond the award and consider the merits of the suit before enforcement.Similarly, the award cannot sit on an existing suit for the same reasons.

41. The above argument holds in this matter as while the Applicant brought the present application by way of a Chamber Summons as required under Rule 9 of the Arbitration Rules, 1995, the application was brought under the suit HCCC No. 557 of 2004 which the Applicant had filed seeking interim protection measures pending arbitration. The issue is therefore whether the Award is enforceable within the existing suit.My considered view is that the present set up invites complication in that the court is being asked to adopt the Award as a judgment of the court in respect of the existing suit. Yet the suit sought injunctive and other reliefs that are completely at variance with the Award. As submitted by counsel for the 2nd Respondent Mr. Oduol, adopting the award within the present suit would amount to making it a judgment on the substantive matters pleaded in the Plaint without according the Defendants in the suit an opportunity to be heard. The ensuing judgment would then not tally with the award. In any event, an arbitral award cannot supersede prayers sought in a plaint. This complication in my view is not a mere procedural technicality as applying it would result in a legal absurdity where a completely strange judgment is imposed upon untested pleadings. That judgment cannot be enforced without infringing upon the rules of natural justice. Further, I also doubt if the Award is capable of being deemed as having been duly filed and served under Rules Rules 4(1) and (5) of the Arbitration Rules, 1997 given that the award was merely annexed as an exhibit to the affidavit in support of the application seeking enforcement and was not distinctly filed and served. In the circumstances, the invocation of the court's enforcement jurisdiction in this matter is flawed and the court would not be in a position to enforce the award within the precincts of the existing suit. Nevertheless, the procedural flaws should not hamper consideration of the merits of the application for recognition and enforcement of the award as the same can be remedied through fresh filings, in the event that the award is recognized.

42. With regard to the contention that the Award is not stamped and therefore should not be received or acted upon in these proceedings,my perusal of the Partnership Agreement is that the same is duly stamped in Kenya. The Partial and Final Awards are also stamped in Switzerland. Although Section 23 of the Stamp Duty Act requires that instruments executed out of Kenya by any person should be stamped before being acted upon, the same Act at Section 117(1)(i) exempts arbitral awards from stamp duty hence the necessity for stamping is obviated in respect of the Partial and Final Awards. I therefore find that the two instruments in do not contravene the Stamp Duty Act.

43. As to whether the application itself is brought contrary to statute, I find the contention unsubstantiated as the application is founded on Section 2 and 36 of the Arbitration Act, 1995 which provide the jurisdiction for lodging applications seeking recognition and enforcement of international

arbitral awards.The Court is satisfied it has jurisdiction to consider the merits of the application.

(ii) Alleged breach of Public policy

44. Section 37(1)(b)(ii) of the Arbitration Act is explicit that an award that is contrary to the public policy of Kenya should not be recognized and enforced.

45. What constitutes public policy is a subject that has engaged commentators and courts alike and there appears to be no entrenchedsingle definition of the concept.For instance, Wikipedia Encyclopedia defines the term as follows:

"Public policy is generally the principled guide to action taken by the administrative or executive branches of the State with regard to a class of issues in a manner consistent with the law and institutional customs. In general the foundation is the pertinent national and substantial constitutional law and implementing legislation. Further substrates include both judicial interpretations and regulations which are generally authorized by legislation".

Public policy has also been defined as ***" a system of laws, regulatory measures, courses of action, specific legislation and more broadly defined provisions of constitutional or international law"*** *(see www.musc.edu/policy/definition).*

46. Courts have nonetheless simplified the concept by breaking it down into two fundamental attributes: morality and justice. In the case of ***Parsons & Whittemore Overseas Co. Inc.vs. Societe' Generale de l'industrie du Papier RAKTA 508 F 2d 969 (2nd Cir.1974),*** it was held that a foreign award may be denied only when enforcement would violate "the forum state's most basic notions of morality and justice". Similar holding was made in the case of **Hebei Import and Export Corp vs. Polytek Engineering Co. Limited (1999) 1 HLRD 665.** Courts have however been quick to point out that the defence of public policy should be construed narrowly in the enforcement of foreign awards. In the old case of **Richard vs. Mellish (1824-34 All ER Rep 258,** the court's caution on the limits of the defence of public policy was rendered as follows:

"I protest against arguing too strongly upon public policy. It is a very unruly horse and when you get a stride you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when the other points fail".

47. Within the Kenyan jurisdiction, the leading case on the defence of public policy is **Glencore Grain Kenya Limited vs. TSS Grain Millers Limited (2002) KLR 606** where **Onyancha J** held at page 628 as follows:

"This court however, is in addition, conscious of the fact that the Arbitral Tribunal and not this court is ordinarily seized with the full jurisdiction to consider and determine the contractual issues arising therefrom… Under ordinary circumstances therefore, this court may not have the legal authority to question the Arbitral Award made by the Tribunal. But in issues concerning public policy of Kenya, this court will in addition to what has been held hereinbefore, examine the award even at the stage of enforcement to determine whether or not the Arbitral Tribunal had jurisdiction in respect of the disputes relating to the underlying contract."

The court further quoted with permission the case of **Westcare Investments vs. Jugoimport [1998] 4 All ER 570** where Colman J held:

"When at the stage of enforcement of an award it is necessary for the court to determine whether the arbitrators had jurisdiction relating to the underlying contract, the court must consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was undisputedly illegal at common law, an award in favour of the claimant would not be enforced, for it would be contrary to public policy that arbitrators should not be entitled to ignore palpable and indisputable illegality".

48. The attention of this court has also been drawn to the case of ***Christ for All Nations vs. Apollo Insurance Co. Limited [2002]2 E.A. 366*** where **Ringera J** (as he then was) held that the court will not interfere with an award of the arbitrator on the question of public policy on the ground that there is an error of law apparent on the face of the record even if the view taken by the arbitrator does not accord with the view of the Court. However, the court in that case went on to hold that a domestic award could be set aside on grounds similar to those set out in Section 37 of the Arbitration Act, 1995 for being inconsistent with the public policy of Kenya if it was shown that it was (i) inconsistent with the Constitution or other laws of Kenya or (ii) inimical to the national interests of Kenya or (iii) contrary to justice and morality. The court then explained the categories as follows:

"The first category is clear enough. In the second category, I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations and the economic prosperity of Kenya. In the third category, I would again without claiming to be exhaustive include considerations as whether the award was induced by corruption or fraud or whether it was founded on contract contrary to public morals".

49. In the face of the clear delineations of the public policy defence by this court in the two cases of ***Glencore*** and ***Christ for All Nations***I am emboldened that this court has jurisdiction to subject the Partial and Final Awards herein to judicial filtration to re-confirm that the awards are consistent with written Kenyan law as well asthe country's basic notions of justice and morality. This filtration in my view extends beyond a mere "gloss over" and binds the court to ask itself whether the conclusions reached by the arbitral tribunal would have been consistent with a decision of the court had the same facts of the underlying dispute been placed before the court for determination.

50. In the present application before the court, the 2nd Respondent contends that there are strong grounds in support of the contention that the Partial and Final Awards are against the public policy of Kenya andshould not for that reason be recognized and enforced. These are:

1) The Arbitration Agreement in which the dispute referred to the Arbitral Tribunal arose was between the Applicantand the 1st Respondent. This was conceded by the Applicant. As no arbitration agreement existed between the 2nd Respondent and the Applicantin which he agreed that any dispute between him as a shareholder or director of the 1st Respondent or individually should be settled through arbitration in Switzerland, the finding of the Arbitral Tribunal that he was an implied party to the arbitration agreement went against the legal distinction between a limited liability company and an individual shareholder. This distinction was espoused in the case of **Salomon vs. Salomon (1897) A.C. 22 HL** and is applicable to the Kenyan jurisdiction as confirmed by **Azangalala J in Hezekiah Ogao Abuya vs. Thrust & Engulf Limited (2006) eKLR**. Counsel for the Applicant argued that the assets of a limited liability company do not belong to the directors or shareholders and construing the opposite would negate a lot of laws in the Kenyan jurisdiction hence would be contrary to the public policy.

2) The Arbitral Tribunal merely glossed over issues of bribery and violation of traffic rights by the Applicant. The Kenyan High Court has jurisdiction to evaluate these illegalities and if satisfied, refuse to recognize the award on grounds that doing so would offend the public policy of Kenya. The 2nd Respondent cited the case of ***World Duty Free Company Limited (Claimant) vs. The Republic of Kenya (Respondent) (ICSID Case Bo. Arb/00/7)*** where it was held that illegality would vitiate an award and render it unenforceable. He also cited **Chitty on Contracts 26th Edition Vol 1 1989 London Sweet & Maxwellat paragraph 1260 page 779** where the authors state:

"Closely akin to the maxim ex turpi cause non oritur action is the rule that neither a party nor his representative is permitted to found rights upon his deliberate commission of crime."

Counsel for the 2nd Respondent submitted further that the illegality comprised by the allegations of bribery and violation of traffic rights rendered the awards analogous to an award in favor of a drug trafficker issued in Brazil which is sought to be enforced in Kenya, and urged the court to ask the question whether a Kenyan Court would enforce such an award.

3) The Arbitral Tribunal refused to give any weight to claims of breach of fiduciary duties by Mr. David Gatmon whose position as the principal person in the Applicant as well as Applicant's representative of the company at the 1st Respondent placed him in a conflict of interest situation.Counsel for the 2nd Respondent submitted that it was simplistic to argue that he was never a director in the 1st Respondentas he was the person who influenced the 2nd Respondent to commit the 1st Respondent to enter into the contentious Partnership Agreement. Mr. Gatmon did this in breach of his fiduciary duties. The court should not therefore enforce an award based on a cause of action founded on an illegal act, and should reject the same under the public policy defence.

4) Other public policy concerns raised by the 2nd Respondent included non-disclosure of material facts e.g. the existence of an agreement between the Claimant and Cargolux; false evidence given in favour of the Applicant; the Partnership Agreement being in breach of the Contracts in Restraint of Trade cap 24 of the Laws of Kenya and the Arbitral Tribunal being biased by assuming that the 2nd Respondent was personally a party to the Arbitration Agreement while not making a similar assumption over Mr. Gatmon.Counsel for the 2nd Respondent Mr. Oduol submitted that Article 159 (2C) while recognizing proper and legal arbitration proceedings was not a panacea for enforcing illegal undertakings through the court. Article 159(2D) in his view, provided no justification for enforcement of awards that were either tainted with illegality or were contrary to public policy.

51. In response, counsel for the Applicant Mr. Okong'o submitted that all the grounds based on public policy were raised before the Arbitral Tribunal and the Tribunal had overruled all of them.

52. I have had studied both the Partial and Final Awards of the ICC Court that the Applicant wishes this court to recognize and enforce.

53. With regard to the Partial Award which restricted itself to the question of whether or not the Arbitral Tribunal had jurisdiction over the 2nd Respondent, the Arbitral Tribunal in paragraph 88 of the Award underlined that Article 18 of the Swiss Code of Obligations provided that contracts and any agreements were to be interpreted according to their plain meaning with a view to ascertaining the real and common intent of the parties. The Arbitral Tribunal then made the following finding at paragraph 91 of the Partial Award:

"As aforementioned, the arbitration clause as well as the whole Partnership Agreement have been signed by Mr. Gatmon as well as Respondent 2 in their capacity as managing directors of Foxtrot Charlie Inc. and AAH (Afrika Aviation Handlers Limited), respectively. It is undisputed between the Parties and was revealed during the deposition of Mr. Gatmon as well as Mr. Montavon during oral hearing in Geneva that Mr. Nzomo did not consent speficially to arbitration clause. The arbitration clause rather was agreed to as part of the Partnership Agreement. Accordingly, the true intent of the parties as to whether Respondent 2 personally should be bound by the arbitration clause has to be assessed".

54. In spite of the above strong findings leaning heavily towards the conclusion that the 2nd Respondent never consented to the arbitration clause and therefore Arbitral Tribunal did not have jurisdiction over him, and in spite of the Tribunal having clearly observed in paragraph 59 of the Award that **"only if such common intent of the parties cannot be found, must the Tribunal resort to a second interpreting step, a normative or objective interpretation"**, the Tribunal for completely unexplained reasons went on to subject the question of jurisdiction to a second interpreting step after which it concluded that the 2nd Respondent was personally bound by the arbitration agreement. The reasons advanced for this conclusion were as follows:

1) The conduct of the parties prior to entering the Partnership Agreement pointed to an intention of the 2nd Respondent to be personally bound by the Agreement;

2) The Partnership Agreement made "substantial" mention of the 2nd Respondent in his personal

capacity;

3) Certain payments were made pursuant to the Partnership Agreement into the personal account of the 2nd Respondent;

4) The 2nd Respondent was the main shareholder of the 1st Respondent and there was intermeddling of assets and funds between the 1st and 2nd Respondent as to render the latter personally the face of the former;

5) The Partnership Agreement would not have existed had the 2nd Respondent not been personally a party to the Agreement; and

6) The 2nd Respondent made key decisions over the 1st Respondent such us in the appointment of directors.

55. My take on the above conclusions is that it was completely inexplicable for the Tribunal to deem it necessary to subject the question of jurisdiction to a second tier interpretative step when the Swiss law was categorical that the Partnership Agreement was to be interpreted based on the plain wording of the terms. That plain meaning had been acknowledged by the Tribunal to be unequivocally that the 2nd Respondent was not bound by the arbitration agreement set out in the Partnership Agreement. There was no ambiguity in the Agreement as to who the parties to the Agreement were to constrain the Tribunal to stretch its interpretative efforts to secondary facts and tools of interpretation.

56. Further, it is plainly clear to me that the conclusion reached by the Arbitral Tribunal as to its jurisdiction over the 2nd Respondent went outrightly against very basic principles of law including the principle of company law in relation to separation of legal personality of a company from its shareholders and directors, as well as the trite principle of privity of contract that decrees that only parties to a contract can be bound by its terms. The reasons relied upon in my view were incapable of bringing the 2nd Respondent within the purview of the arbitration agreement. They were also insufficient to merit the lifting of the corporate veil the 1st Respondent. To ignore these trite legal postulations and extend consideration to extraneous grounds from which the Tribunal found as suggesting an intention on the part of the 2nd Respondent to be bound by the arbitration clause was simply absurd.

57. In addition, having perused the chronology of events at the jurisdictional level of the arbitral proceedings, it does emerge that the 2nd Respondent did not initially intent to participate in the Arbitral Proceedings based on the same ground that the Arbitral Tribunal did not have any jurisdiction over him. However, for some unexplained reasons, the 2nd Respondent changed his mind and decided to fight the question of jurisdiction by putting in a reply to the Request for Arbitration. This is discernible from paragraph 30 of the Partial Award. The Tribunal in the course of the proceedings consistently agreed that the 2ndRespondent maintained that he was not personally bound by the arbitration agreement. It was therefore very clear to the Tribunal that the only reason why the 2nd Respondent decided to put in an answer was to reaffirm his said position. Unfortunately, the Tribunal in making its aforesaid conclusion appears to have taken advantage of the naivety of the 2nd Respondent's decision to put in a response in a matter where he should not at all have participated in individually. By hindsight, it would appear that the Tribunal misconstrued the 2nd Respondent's magnanimity to challenge its jurisdiction to amount to submission to the jurisdiction. No wonder the Tribunal had to gather every straw to justify its conclusion that he was subject to its jurisdiction.

58. As to why the 2nd Respondent chose to participate in the main proceedings of the Tribunal, the ICC International Chamber of Commerce Arbitration Rules, 1998 provide that the Arbitral Tribunal is not divested of jurisdiction by virtue of non-participation of a party. The proceedings would therefore have proceeded without the 2nd Respondent and an award binding upon him granted even without his participation. However, whether or not he participated is not a matter that goes to determine whether the

award is enforceable under the Kenyan jurisdiction.

59. In the circumstances, the conclusion reached by the Arbitral Tribunal as to jurisdiction over the 2nd Respondent is, in my view a shocking legal farce and an unfortunate concoction of facts and the law geared at a premeditated destiny. At most, the conclusion was an outright travesty of basic notions of justice not only in Kenya but also under Swiss law. The Awards should therefore be rejected *in limine* for offending Kenya's public policy.

60. With regard to the Final Award, I take the view that the Arbitral Tribunal should not have delved into looking at the merits of the Applicant's claim, the moment the facts of the dispute overwhelmingly tilted in favour of the finding that the Tribunal had no jurisdiction over the 2nd Respondent. The Final Award based on the exercise of jurisdiction that did not exist was severely eroded in its legitimacy and effect. Jurisdiction has been said to be everything and the Tribunal ought to have downed its tools the moment it was clear that the 2nd Respondent was not bound by the arbitration agreement. The importance of jurisdiction was aptly considered in the case of in ***The Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited*** [1989] KLR where the court held as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decisions. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must enquire into the existence the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

61. It is therefore open for this court to make the finding that the Final Award was of no consequence to the 2nd Respondent on the ground of lack of jurisdiction on the part of the Arbitral Tribunal. On that basis alone, the court can and should refuse to recognize the award.

62. Pertinently though, a perusal of the Final Award reveals that the Arbitral Tribunal wavered time and again in its interpretation of facts and the law. For instance, the interpretation at paragraph 121 of the Final Award was that the claims of bribery alleged by the 2nd Respondent did not relate directly to the subject matter of the Partnership Agreement when such bribery was in relation to grant of traffic rights, which issue was at the very core of the Agreement. Corruption is not only an offence under the Anti-Corruption and Crimes Act of Kenya but is also offensive from a moral standpoint. The Tribunal should not have paid lip service to the complaint. Similarly, the Arbitral Tribunal made a finding that the Partnership Agreement did not breach the Restrictive Trade Practices, Monopolies and Price Control Act when indeed Article 3 of the Agreement contained a non-competing obligation binding upon the Respondents not to compete with the Applicant during the pendency of the Agreement. Contrasted with the Tribunal's conclusion with regard to determination of the question of jurisdiction over the 2nd Respondentwhich was amazingly based on peripheral facts and assumptions, one cannot help but read bias, veiled contempt and blatant disregard of the laws and morality of Kenya.

63. Ultimately, the above analysis leaves little doubt that both the Partial and Final Awards are laden with legal and factual misapprehensions that go into the core of the ingredients of public policy, both international and Kenyan. The basic notions of justice and morality that this court is enjoined to safeguard under the public policy defence stipulated in Section 37 of the Arbitration Act, 1995 have been numerously trampled upon in the awards. It is manifestly clear that the awards go against Kenya's public policy. This court cannot wish away those public policy concerns as mere vagaries of an unruly horse as they go into the fundamentals of legitimacy and acceptability of the whole award to the enforcement

court. To adopt an award laden with such deficiencies and to convert the same into a judgment of this court would be atrocious to the court's constitutional mandate to do justice to all.

(iii) Alleged Breach of positive law of Kenya

64. Under this head, the Applicant has claimed that the Arbitral Award sought to be enforced is contrary to the laws of Kenya and has cited a raft of legislations that the Award is said to have infringed or ignored. The alleged contraventions include breach of Section 39 of the Anti-Corruption and Economic Cries Act No. 3 of 2003 as there were claims of bribery; restraint of trade contrary to Section 2 of the Contracts in Restraint of Trade Act, cap 24 of the Laws of Kenya; failure of stamping in pursuance of the provisions of the Stamp Duty Act, cap 480; bias under Kenyan law; and infringement upon the freedom of association of the 1st and 2nd Respondent by the provisions of the Partnership Agreement.The 2nd Respondent further asserts that the Principle of public policy *ex dolo malo non oritur actio* i.e. no court will lend its aid to a man who founds his cause of action upon an immoral or illegal actshould be applied to this case.

65. A finding has been made in the foregoing analysis that there was no breach of the Stamp Duty Act. The illegalities inherent in the Award under the Anti-Corruption and Economic Crimes Act and Contracts in Restraint of Trade Act have also been discussed. The apparent breaches under the two Acts were not given effect by the Arbitral Tribunal. The issue of bias against Kenyan law has also been highlighted above. In the premises, I make the finding that the ensuing Award is tainted with illegality.

66. Consequently, I am persuaded that this is a proper case for application of the principle of *ex dolo malo non oritur actio* as the court should not lend its aid to the Applicant, in view of the attendant illegality.

Conclusion

67. This court has painstakingly established that the Partial and Final Awards of the ICC Court dated 24thNovember 2006 and 26th February 2009 respectively fail to meet the legal threshold set out in Section 36 and 37 of the Arbitration Act, 1995 for being afflicted by legal and factual flaws which go against the laws and public policy of Kenya.

68. While the court is enjoined by the principle of comity of Contracting States to the New York Convention to act in favour of enforcement of foreign awards, the court also has an equal duty to uphold the law of this country by refusing to recognize and enforce awards that are the result of contraventions of Kenyan law and public policy.

69. In the result,I declare that the Partial and Final Awards of the ICC Court dated 24th November 2006 and 26th February 2009 respectively are incapable of recognition and enforcement in the Kenyan jurisdiction.

70. The application dated 30th June 2009 therefore fails and is hereby dismissed with costs to the 2nd Respondent.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF MAY 2012.

J.M. MUTAVA

JUDGE