REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

MISCELLANEOUS CIVIL APPLICATION NO. 859 OF 2010

NECTEL (K) LTD……..…….....……..…….. APPLICANT

VERSUS

EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK (PTA BANK)…….....…… RESPONDENT

RULING

Before the court is an application by Notice of Motion dated 26th August, 2010, and taken out under Section 35 of the Arbitration Act; Rule 7 of the Arbitration Rules, 1997; Order 21 Rule 22 of the Civil Procedure Rules, and all enabling provisions of the law. The Applicant moves the court for Orders that –

(1) That the Honourable court be pleased to set aside the arbitral award herein dated 28th May 2010.

(2) That there be a stay of execution of the arbitral award and the consequential orders of this Honourable court pending the hearing and determination of this application.

(3) That in any event, the costs hereof be awarded to the Applicant.

The application is supported by the annexed affidavit of JACOB JUMA, the Chairman and Chief Executive Officer of the Applicant. It is predicated the grounds that –

(a) The agreement for Arbitration is neither valid nor enforceable under the Laws of Kenya.

(b) That the Arbitral Tribunal misdirected itself in law and fact by dealing with matters which went beyond the scope of the reference and/or of the jurisdiction of the arbitral tribunal.

(c) That the Arbitral Tribunal misdirected itself in law and fact by failing to address its mind to the main issue in controversy namely the effect of the corruption allegation on the loan application process.

(d) That the Arbitral Tribunal misdirected itself both in law and fact by dealing with a dispute not

contemplated by the parties.

(e) That this application has been brought without delay and within the time provided by Section 35 (3), Arbitration Act No. 4 of 1995.

(f) The Respondent with a view to the execution of the Award has un-procedurally filed the said Award in HCCC No. 487 of 2010 and is seeking for its adoption as a decree of this Honourable Court.

(g) The Applicant will suffer irreparable loss and damage should the Respondent succeed in the un-procedural step aforesaid. In any event, the execution thereof will render the outcome of this application nugatory.

To this application, the Respondent filed a Notice of Preliminary Objection dated 11th October, 2010. It is couched in the following terms –

"**TAKE NOTICE that at the hearing of this application the Respondent herein shall raise a preliminary objection to the application herein on the following grounds.**

(i) The Application herein is made without jurisdiction, the Applicant having entered into an agreement annexed to it to its application and dated 30th May 2007, to be governed and construed in accordance with the Laws of England.

(ii) Any dispute or difference between the Applicant and the Respondent was to be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce the Award in respect of which has been filed in court.

(iii) The application is in breach of the Arbitration Rules 1997 4 (2) the Respondent having filed the Award in court and served the same on the applicant on 14th July 2010.

It is this Notice of Preliminary Objection which is the subject of this ruling.

At the hearing of that preliminary objection, Mr. Kyalo appeared for the Plaintiff/Applicant while Mr. Oraro appeared for the Defendant/Respondent. Mr. Oraro made two main points which were that the agreement between the parties was to be construed in accordance with the Laws of England, and that the Arbitration Award was final and binding on all the parties. He also argued that all applications in respect of awards require to be made by Chamber Summons and not by Notice of Motion as in this case. Finally, he submitted that the setting aside of foreign awards should be made under Section 37 and not Section 35 of the Arbitration Act.

On his part Mr. Kyalo for the Respondent opposed the application and referred to Rule 4 (1) of the Arbitration Rules, 1997 and submitted that the Respondent should have filed the award in a Miscellaneous Cause, and that under Rules 4 (2) and (3) such an award should be filed by Chamber Summons in the cause in which the Award was filed. While conceding that an application to enforce an award should be made under Section 37, he argued that Rule 7 makes reference to Section 35 of the Act and in a rush to come to court, Counsel might have restricted himself to the wording of Rule 7. He submitted that the omission was not fatal as it could be cured even by way of oral application. Mr. Kyalo further agreed that the agreement between the parties showed that the parties chose English Law to govern the matter. However, his point of departure was that the Applicant is not asking the court to construe the agreement. The Arbitration has already taken place and the Law of England took the centre stage. We were now at the enforcement stage and the Respondent un-procedurally come to court and ask the court to adopt that Award as if it were a decree of this court. He submitted that the challenge to an Award is governed by the procedure of the place of enforcement of the Award. Finally, Counsel took the point that there is estoppel by convention and referred to **J K Chatrath & anor** v **Shah Cedar Mart** [1967] EA 93. He also referred to **Mukisa Biscuits Manufacturing Co Ltd** v **Westend Distributors Ltd** [1969] EA 696 and submitted that the Preliminary Objection raises mixed points of facts and law and

therefore the objection could not be sustained. He therefore asked the court to dismiss the preliminary objection with costs.

In his reply, Mr. Oraro submitted that the only grounds upon which a party can come to this court are set out under Section 37 and none of the grounds therein are in this application. The corollary was that this application was not based on any of those grounds and therefore it had no basis and should be dismissed with costs.

After considering the Preliminary Objection, the arguments of both Counsels and the authorities cited, I note that the agreement for Arbitration entered into between the parties is dated 30th May, 2009. I also note that the application now before the court is made under Section 35 of the Arbitration Act which provides that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3) thereof. A critical appraisal of this section shows that the provisions thereof apply to those arbitral awards which are made by a Domestic Tribunal. However, the proceedings in this matter do not relate to a domestic tribunal but to a foreign tribunal. In that context, the relevant Section under which to come for recognition and enforcement of the award would be Section 37 of the Arbitration Act which provides as follows –

"37.(1) the recognition or enforcement of arbitral award, respective of the state in which it was made, may be refused only if –

(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 sate 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 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

(v) 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

(vi) The making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.

(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) The recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

The first ground upon this application is based is that the agreement for arbitration is neither valid nor enforceable under the Laws of Kenya. This is due to the fact that the said agreement is not stamped for duty. Unfortunately, the Laws of Kenya neither apply to nor govern this matter. Clause 16.10 of the Arbitration Agreement in this matter states as follows –

"This agreement shall be construed and governed in accordance with the laws of England."

This statement shows conclusively that this matter is governed by the Laws of England exclusively, and the Laws of Kenya have no part to play. To the extent that ground 1 of the reasons under which this application is made is based on the impression that the Arbitration was subject to the laws of Kenya, that ground is totally misconceived.

The grounds for the setting aside of a foreign Arbitration Award are succinctly set out in Section 37 of the Arbitration Act as stipulated herein above. The grounds canvassed for setting aside the award in this application do not fall within any of those set out in Section 37 of the Arbitration Act. Therefore the court has no jurisdiction to set aside the award on the basis of any other grounds such as those advanced in this application.

Furthermore Clause 16.12 of the Arbitration Agreement states as follows –

"Any dispute or difference which may arise between the parties hereto or as to the rights or obligations of either party hereunder or otherwise in connection with this Agreement which shall not have been settled by mutual agreement of the parties shall 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. The Arbitration award shall be final and binding on both parties".

It is noteworthy that the phrase used in respect of the effect of the Arbitration process is that the said process "**…shall be final and binding on both parties."** These are strong words. The award becomes final, conclusive and binding on both parties the moment it is pronounced and signed by the arbitral tribunal. Thereafter, it is not open to either of the parties to unilaterally challenge the award having abdicated the right to do so in Clause 16.12. Either the award was final and binding as the parties had intended pursuant to that Clause, or it was not. If it was binding, then there is no room for challenging it. If it was not, then that would defeat the express intention of the parties as enunciated in the said Paragraph 16.12; and it is not possible to say at the same time that it was final and binding and that it was not.

All the above are points of law and not mixed points of facts and law as stated by learned counsel for the Respondent. In the circumstances, I find that the application challenging the arbitral award is in direct conflict with the terms of the express agreement freely and voluntarily entered into by the parties, and that it cannot be sustained. I accordingly uphold the preliminary objection and hereby dismiss the same with costs to the Respondent.
Orders accordingly.

Dated and **Delivered** at **Nairobi** this 17th day of February, 2011.

L NJAGI
JUDGE