REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC CAUSE NO. 400 OF 2011

AIRTEL NETWORKS KENYA LIMITED
(Formerly known as CELTEL KENYA LIMITED)……..…...APPLICANT
- VERSUS -
NYUTU AGROVET LIMITED ……..……RESPONDENT

RULING

1. I have before me a notice of motion by the applicant dated 8th April 2011 brought under sections 7 and 35 of the Arbitration Act 1995 and rule 7 of the Arbitration Rules 1997. The applicant is hereinafter referred to variously as "Airtel", "Celtel" or "Zain" or just "applicant". The principal prayer is that the arbitral award dated 17th February 2011 and published on 2nd March 2011 between the parties be set aside in its entirety.

2. The motion is founded on three key platforms: that the arbitral award has dealt with a dispute not contemplated by the parties, has dealt with a dispute outside the terms of reference to arbitration and that finally, it is in conflict with public policy. Those grounds, among others, are buttressed in the supporting affidavit of Ivy Ngana, a legal officer of the plaintiff, sworn on 8th April 2011 and the annextures thereto. The deponent has also sworn a supplementary affidavit of 26th April 2011.

3. The motion is contested by the respondent. I shall refer to the respondent as "Nyutu" for ease of reference. A replying affidavit sworn by Josphat Muchai Mathare on 18th April 2011 has been filed as well as grounds of opposition dated 19th April 2011 setting out the factual and legal basis of the respondent's objections.

4. Before I delve further into the averments in those depositions and the arguments before the court, it is instructive to set out a few preliminary matters. This is not the only contest between the parties. There are at least 3 related matters in these courts which are pending or touch on the issues at play in this cause. They are Winding up Cause No 4 of 2011 *in the matter of the Companies Act and in the matter of Airtel Network Kenya Limited* in which parties recorded a consent that the file as well as the ones next mentioned be placed before this court when deliberating on the present matter. There is then HCCC No 350 of 2009 *Nyutu Agrovet Limited Vs Celtel Kenya Limited* as well as High Court Miscellaneous Cause No 604 of 2011 *Nyutu Agrovet Limited Vs Airtel Networks Kenya Limited.* For various reasons urged to the courts in those matters, the matters were not consolidated nor are they being heard together. But there was general agreement that the present motion be determined in this cause as it would affect substantially the result of the said suits.

In view of that consent and the provisions of order 14 rule 6 (1), the records of the court in those matters were called and placed me and I have studied them in the cause of this ruling. Secondly, the applicant herein confirmed that it was abandoning a challenge of the award on grounds of misconduct of the arbitrator set out at paragraphs 23, 24, 25 and 26 of the supporting affidavit of Ivy Ngana aforementioned. Accordingly, the arbitrator was not represented at the hearing of the application.

5. I will now return to the averments and submissions by the parties in this motion. It is common ground that by arbitral award dated 17th February 2011 and published on 2nd March 2011 by Fred Ojiambo S.C. in arbitration proceedings between the respondent and the applicant (then known as Celtel Kenya Limited) was made. There is also no dispute that the applicant and respondent were parties to a distributorship contract dated 20th December 2007 marked "IN2" to the supporting affidavit. On or about 5th June 2009, the distributorship agreement was terminated by Airtel on basis of fraud of Kshs 11,000,000 committed between 9th and 16th March 2009 at the Zain shop on Koinange Street Nairobi. Clause 18.0 of that agreement contained an arbitration clause. When the material dispute occurred between the parties they all executed the agreement to appoint the said sole arbitrator marked "IN5". Clause 3 of the arbitration agreement on terms of reference provided, and this is material,

"The Arbitrator shall determine any dispute or claim arising out of or relating to the contract and/or breach thereof"

Beyond those plain facts the parties seriously contest each others claims under the motion.

6. The plaintiffs case in a synopsis is that the procedures in the arbitration were laid out in the latter agreement. The respondent, (hereinafter "Nyutu") who was the claimant there, filed a statement of claim challenging termination by the applicant (hereinafter "Celtel", "Zain" or "Airtel") of the distributorship contract. It was claiming Kshs 11,000,000 being an alleged debt, Kshs 2,921,417.31 being sums unlawfully appropriated by the respondent and Kshs 2,600,000,000 as damages for breach of contract. The respondent in turn filed a statement of defence and counterclaim denying the alleged fraud or breach or liability under the contract. It also contested award of damages under contract and asserted its unpaid sellers right to the purchase price for goods sold and delivered.

In a nutshell, those were the principal pleadings. The arbitrator then settled the following issues for determination;

a) Whether products worth Kshs 11,000,000 were fraudulently obtained from the Respondent on or about March 2009.

b) If the answer to 1 is in the affirmative, whether the Respondent in consequence thereof suffered loss of Kshs 11,000,000 and interest thereon of Kshs 1,593,347.70.

c) If the answer to 1 and 2 are in the affirmative whether the fraud and the loss is attributable to the Claimant.

d) If the answer to 3 is in the affirmative whether the Respondent lawfully called up the guarantee issued by or on behalf of the Claimant.

e) Whether in any event and in the circumstances of this case the Respondent lawfully terminated the Distributorship Agreement dated 20th December 2007.

f) What damages and or losses are due and payable in the circumstances.

There were some interlocutory applications in the arbitration but suffice it to say that after hearing the parties the arbitrator awarded Nyutu Kshs 541,005,922.81. This sum comprised Kshs 2,921,417.31 from reconciliation of account, Kshs 227,349 as marketing support, Kshs 136,458 as ZAP remuneration, Kshs 11,000,000 as amounts wrongly deducted and lastly Kshs 526,720,698.50 as damages for breach.

7. It is that award that is sought to be set aside by the plaintiff on the broad grievances set out earlier. I will set out in a broad summary the positions taken by both parties.

8. On the award of Kshs 526,720,698.50 as damages, Airtel submitted that the arbitrator went beyond the dispute contemplated by the parties as the sum was based on damages for negligence in tort whereas the claim before the arbitrator was founded on breach of contract or recovery of anticipated profits by Nyutu. The foundation for the award of damages was attacked for going outside the contract and assuming that the gross amounts for the period 2009 to 2013 as the basis for assessment of damages. The applicant asserts that whereas the distributorship agreement was for a year, the arbitrator held it was renewable automatically for a term of 5 years. Nyutu had alleged that it was earning Kshs 5,000,000 per month.

The arbitrator then took the gross amounts for that period and equated them with the claim for anticipated profits by Nyutu to assess the damages. This the applicant submits went beyond the contemplation of the parties, was erroneous and amounted to rewriting the contract of the parties. The applicant submitted that as the reliefs sought by Nyutu in the arbitration were damages for unlawful termination of contract and that claim was not amended, the arbitrator overreached his jurisdiction and went beyond the boundaries of contract into the realm of tortious liability for negligence.

These matters were pleaded to at length at paragraphs 13 to 18 of the supporting affidavit. In any event, the applicant submitted that damages are not available for breach of contract and that this error of principle is good ground to overturn the award.

9. Airtel also contests the award of interest at 16% p.a. backdated to 8th May 2009, a date it says is mythical. It submitted that interest on the damages should only apply from the date of the award. By backdating it, a miscarriage of justice occurred because the period included also the time between conclusion of the arbitration as of 30th June 2010 to the date of publishing of the award on 2nd March 2011 thereby giving Nyutu a windfall of Kshs 159,272,143.68. This Airtel says was beyond the agreement and contemplation of the parties.

10. The award of Kshs 11,000,000 was based on the fraud referred to earlier. Between 9th and 16th March 2009 an agent of Nyutu known as George Changa had presented two bank deposit slips for Kshs 11,000,000 to the Zain shop on Koinange Street and collected goods equivalent to that value. The slips were found to be fake. Nyutu itself blamed Zain for the fraud. Zain then debited Nyutus account for that sum and terminated the distributorship agreement. The applicant says that since it held guarantees for Kshs 8,000,000 from Nyutu to secure indebtedness, it was entitled to liquidate them.

By awarding Nyutu Kshs 11,000,000 on grounds that Nyutu had been wrongly debited, Nyutu got a windfall of Kshs 3,000,000 despite Nyutus admission of the fraud. Finally on this point Airtel submits that the finding by the arbitrator was against the distributorship agreement and the trade usages of the parties.

11. Regarding the award of Kshs 2,921,417.31 that the arbitrator held “Airtel unlawfully appropriated” the applicant submitted there was no proof by Nyutu and that this burden was shifted unfairly to the applicant and the arbitrator thereby exceeded his jurisdiction.

12. The applicant contests the award of Kshs 227,349 and Kshs 136,458 being “Kit activation” and “Zap remuneration”. The arbitrator had allowed the sums on the basis that “they flow from the holding that the termination of the agreement was wrongful”. The applicant denies the termination was wrongful and that accordingly Nyutu was not entitled to those sums and that in any event, that part of the award went beyond the contemplation of the parties.

13. Lastly the applicant submitted that the entire award offends the public policy of Kenya. To that extent, it is averred at paragraphs 19 to 26 of the supporting affidavit that the parties to the arbitration were not treated equally, the arbitrator re-wrote the contract to arrive at a favourable decision for Nyutu and that the entire award was contrary to known principles of law and precedent. The applicant in

addition relied further on a list and bundles of authorities dated 5th April 2011, 19th October 2011, 24th October 2011 and its oral and written submissions dated 5th April 2011.

14. The respondent, (Nyutu) as earlier mentioned contests the motion. There are grounds of opposition dated 19th April 2011. There is then the replying affidavit of Josphat Muchai Mathare sworn on 18th April 2011 which sets out the primary objections. Firstly, the respondent avers that actual documentary evidence given before the arbitrator has not been placed before the court. It runs into thousands of pages and 8 volumes of documents and also that a full transcript of the oral evidence is unavailable. Accordingly, the respondent says the court is ill equipped to make a just finding on the integrity of the award.

15. The respondent averred that clause 18 of the distributorship agreement dated 20th December 2007 as read together with the agreement to appoint an arbitrator dated 24th August 2009 provided for two key matters. Firstly, that the arbitrator would determine any dispute or claim arising out of or relating to the contract and or/breach thereof. Secondly, that the arbitrators decision shall be final and binding upon the parties without recourse to an appeal to the High Court.

16. The respondents case is that the arguments presented before the court now are the same ones presented to the arbitrator and are being cleverly re-litigated as an appeal to the High court.

17. With regard to the award of damages, the respondent avers that it was arrived at on the basis of expert evidence of 2 witnesses. Nyutu had prayed for an award of Kshs 2.6 billion which, counsel submitted before me, had been proved to the necessary standard. The respondent asserted that it is not true that the parties had a relationship for only 1 year 5 months: the parties had related for over 6 years. The assessment of damages for anticipated losses by Nyutu arising out of termination had thus a factual and legal basis and well within the contemplation of the parties.

18. Nyutu also avers that it had pleaded negligence before the arbitrator, presented documents and submitted on an award of damages. Airtel had in turn pleaded in its defence before the arbitrator that it was not liable. The claim before the arbitrator was thus a mixed basket of tort and contract and since the negligence occurred in the course of the contract, nothing precluded the arbitrator from making an award of damages in tort. And that was also within the contemplation of the parties and accordingly, it cannot be said that the arbitrator went beyond his boundaries.

19. Nyutu asserts that the award does not run against the public policy and it is not high because, as stated, it had a claim for Kshs 2.6 billion before the arbitrator. It is the arbitrator, who against public policy, denied it the proved damages and substituted it for the lower sum of Kshs 526,720,698.50.

20. The respondent also submitted that in view of section 10 of the Arbitration Act and the fact that the findings of the arbitrator were to be final with no recourse to an appeal, the present application is an abuse of court process meant to delay conclusion of proceedings and to escape payment of the award. The respondent avers that when the applicant failed to pay the sums in the award, it issued a winding up notice. As default persisted, it filed winding up proceedings against Airtel in Winding up Cause No 4 of 2011 earlier mentioned in which Airtel filed an application for injunction premised on its intention to file this motion.

In sum, the respondents case is that the motion lacks merit, has no legal support, is an abuse of process and should be dismissed. Lastly, Nyutu relied on its written submissions dated 13th May 2011, its list and bundle of authorities dated 18th May 2011 and a supplementary list of authorities dated 25th October 2011.

21. I have heard the rival arguments. I have also considered at length all the affidavits by the parties I have mentioned earlier, the pleadings on record, the written submissions and lists of decided cases referred to as well as submissions by both learned counsel in court on the hearing of the motion. I am grateful to both counsel for their well researched briefs and presentations to the court. I have formed the

following considered opinion of the matter.

22. Although voluminous pleadings and submissions have been made to the court, this application revolves around one key aspect: whether this court should, under section 35, of the Arbitration Act set aside the award. In short, has the applicant met the threshold for grant of a prayer to set aside an arbitral award?

23. Clause 18.1 of the distributorship agreement expressly provided that "any dispute or claim arising out of or relating to this agreement and/or breach thereof shall be determined by a single arbitrator to be appointed by agreement between the parties". The parties, by a written agreement appointed Fred Ojiambo, S.C. as sole arbitrator. It is instructive that under clause 3 of the latter agreement "the arbitrator shall determine any dispute or claim arising out of or relating to the contract and/or breach thereof". The claim by Nyutu is set out at annexture "IN 6" to the supporting affidavit. Its principal prayers in the statement of claim were;

(a) Damages at Kshs 11,000,000 on account of the Alleged Debt captured in the First Head of Claim together with interest thereon from 8th May 2009 until full payment thereof.

(b) An account for unlawful appropriation of sums due to the claimant and the payment of the entire said sum together with interest from 5th June 2009 as captured in the Second Head of Claim herein.

(c) Marketing Support for Kit Activation in the sum of Kshs 227,349.00 and the payment of the entire said sum together with interest from 31st May 2009.

(d) Zap Remunerations for the Month of May 2009 in the sum of Kshs 136,458.00 and the payment of the entire said sum together with interest from 31st May 2009.

(e) The rendering of a full account and an independent audit thereof in connection with all transactions relating to the Claimant's Account with the Respondent, including but not limited to all trading and revenues and an audit with regard to activations and revenue earned by subscribers between 1st November 2007 to 5th June 2009 together with an order for settlement of any and all sums found due from the date of the order to settlement thereof.

(f) Damages in for the unlawful termination of the contract in the sum of Kshs 2,600,000,000.00 and/or such other alternative sum as can be reasonably and empirically computed on the basis of historical business data and the specific strategies for growth implemented by the claimant and captured under the Third Head of Claim.

(g) Costs incurred in connection with the High Court precipitated by the Respondent's Actions as captured in the Third Head of Claim.

(h) An order that all costs of the Arbitration proceedings herein be borne by the Respondent.

24. The claim was traversed with a counterclaim pleaded for;

(a) The sum of Kshs 4,082,846.46 together with interest thereon at commercial rates or such other rate of 18% as the Arbitrator finds just from the date due until payment in full.

(b) The sum of Kshs 1,593,347.70 being the remuneration earned and received by the claimant on the sum of Kshs 11,000,000/- together with interest thereon at commercial rates or such other rate of 18% as the Arbitrator finds from the date due until payment in full.

25. There were other pleadings but the two above capture the key positions taken by the parties. In the meantime, parties agreed on the issues set out at length earlier. The arbitrator in a considered award dated 7th February 2011 and published on 2nd March 2011 and for reasons in that award, gave judgment in

favour of Nyutu as detailed at the beginning of this ruling. The elephant in the room is whether that entire award can be overturned.

26. Section 10 of the Arbitration Act provides;

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

There is a general principle captured therein to reduce intervention by the court in the arbitral process. Recourse to the high court is thus limited. It is within very narrow confines. When parties enter into commercial agreement, such as the distributorship agreement herein, they should be held to their bargain. See *Morris & Company Ltd Vs Kenya Commercial Bank* [2003] 2 E.A. 605. Thisis important because clause 18.1 of the distributorship agreement provided further that the "Arbitration shall be carried out in accordance with the provisions of the Arbitration Act, 1995 or any statutory modifications or enactments thereof. The arbitrators decision shall be final and binding on the parties". The provision is repeated in the arbitration agreement aforementioned at clause 3 and 4 with the addition that the rules of Kenya Institute of Arbitrators and the procedures agreed upon by the parties at clause 4 (1) to (7) were to apply.

I have already stated that parties had settled the issues for determination before the arbitrator. I am then of the considered opinion that it was in the contemplation of the parties when they executed the commercial agreement aforementioned that the finding of the arbitrator would be final and binding.

27. That is the reason why the applicant has come to court to set aside the arbitral award under section 35 and not by way of appeal. And that is why Nyutu has urged the court that the motion before the court is a disguised appeal regurgitating the same arguments that were before the arbitrator.

28. Section 35 of the Arbitration Act provides in the material part as follows;

(1) 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).

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

(a) the party making the application furnishes proof –
(i) that a party to the arbitration agreement was under some incapacity; or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
(b) the High Court finds that –
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
(ii) the award is conflict with the public policy of
Kenya:

I have already stated that the applicant abandoned the ground of misconduct by the arbitrator set out at paragraphs 23, 24, 25 and 26 of the supporting affidavit. There is no other ground for setting aside an arbitral award except those set out at section 35 see *Trans World Safaris Limited Vs Eagle Aviation*

Limited Misc. Appl No 238 of 2003 (unreported).

29. So what are the grounds put forth in setting aside the award. I had set out the 3 key platforms or grounds for the motion being that the arbitrator dealt with a dispute not contemplated by the parties, went out of his jurisdiction or boundaries of the arbitration and lastly that the award is inimical to the public policy of Kenya. I also set out at length the 4 key issues in the award that the applicant has taken up cudgels with. I will now interrogate them further as well as the principal objections by Nyutu to the prayers to set aside the award.

30. To determine whether the arbitrator went beyond his boundaries and outside the agreement of the parties, a good starting point is section 29 (5) of the Act. It provides;

"in all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction".

31. The contract herein is the one founded on the distributorship agreement aforementioned. There is no dispute that on or about 2003 the parties entered into the agreement under which Nyutu would distribute and sell the products of Celtel including scratch cards (airtime) bundles, handsets, sim cards etc within the specified territory. The territory was Donholm. At clause 12.1, it was provided;

"This Agreement shall continue in full force and effect from the date of signing this Agreement for a period of one year and shall be renewed automatically for further periods of one year at a time unless determined by either party in accordance with the provisions of this Agreement".

It is thus not true as the arbitrator found at page 1 that "the contract was renewable automatically". It was renewable as such only when not determined by either party in accordance with the agreement. The mode of termination in turn was provided at clause 11. As stated earlier, any dispute *arising out of or relating to the agreement* was then to be referred to a sole arbitrator at clause 18 whose decision was to be final. The words in italics above also appear in the arbitration agreement itself at clause 3 on terms of reference. I find that the parties developed a trading practice captured at clause 4.0 of that agreement. Under that clause, Celtel would only deliver up products to a distributor (such as Nyutu) upon either receipt of funds in advance in Celtel's bank account or on credit in situations where the distributor had a valid guarantee under the agreement. Under clause 15, the agreement was not assignable. The events of 9th and 16th March 2009 that led to termination and that are germane to the dispute then must be understood against that backdrop. A third party known as Changa presented two bank slips to Celtel for Kshs 5.6 million and Kshs 5.4 million (all totaling Kshs 11,000,000) and for the two respective dates purporting them to be valid bank slips into Celtel's Barclays bank account. A receipt was issued by Celtel. Changa and Nyutu had an understanding that since Changa was already making substantial orders under a company known as Sell It from Nyutu, then Changa could make orders through Nyutu's account with Celtel. In respect of the transactions of 9th and 16th March 2009, the arbitrator finds at page 2 of the award that "it is not denied that the goods were then ordered by the claimant from and delivered by the respondent on the strength of those bank slips ……. it is in evidence that method of transaction was not unusual, and was infact acceptable and common between the parties".

Those deposit slips were forgeries. Apparently, Nyutu had called Celtel to confirm whether payments by Changa had been made to its account. Nyutu upon that confirmation then released goods to Changa. It is a classic fraud. So why did the arbitrator apportion liability to Celtel? He found at page 6 that under clause 4.1 (i) Celtel needed to notify the distributor of receipt of the funds. Having confirmed receipt to Nyutu, it was then barred by estoppel from resiling from that commitment. The arbitrator, while noting that Changa was charged for the criminal offences arising out of the fraud and that Mr. Muchai, a director of Nyutu, had appeared as a witness said as follows on agency at page 7 of the award;

"there seems to be little point in addressing the issue of whether Changa was or was not the claimant's (Nyutu's) agent when he presented the forged bank pay-in slips to the respondent. Clearly he was acting on his own, and fraudulently"

32. The arbitrator blamed Celtel and held at page 7 of the award that "it was not Changa's lie which caused the claimant to order for, and thereafter deliver, the respondents (Celtel's) products to him. The claimant was finally and significantly activated by the respondent's assurances that the funds had been received in its bank account".

33. It is this fraud that led to termination of the agreement. Obviously on those facts Celtel lost and so did Nyutu from Changa's fraud. I have already stated that it is Nyutu, by its relationship with Changa, that laid the foundation for Changa to present the forged bank pay in slips. The arbitrator found that assuming that position it would have been proper for Celtel to terminate the agreement at clause 13.1. The arbitrator however went on to say at page 12 that;

"Accordingly, I have no hesitation in concluding, as I hereby do, that the Respondent was in breach of the Agreement. Having, by its misrepresentation, induced the Claimant to order goods and release them to a fraudster, Chaga, to the Claimant's grave prejudice, the Respondent was thereby disabled in law from claiming that the loss had been occasioned by the Claimant. For those reasons, it was further not open to the Respondent to suspend and terminate the Agreement. Nor therefore was it permitted or entitled to have charged the Claimant the value of the goods which had fraudulently been obtained by Changa".

34. As a result of the fraud, Celtel had debited Nyutu's account with 11,000,000. The arbitrator found at page 18 of award that that was wrongful and accordingly awarded it the sum plus interest running back to the date of debit, 8th May 2009. On the basis of the unlawful termination the arbitrator also awarded Kshs 2,921,417.31 as an amount "unlawfully appropriated" and Kshs 227,349 for marketing support kit activation and Kshs 136,458 for Zap remuneration as "flowing from the holding that the termination of the agreement by the respondent was unlawful".

35. On all those awards, I may not entirely agree with the reasoning of the arbitrator. But I am minded to remember that this is not an appeal under section 39 of the Act. It is brought under section 35. On all the above heads, the arbitrator found them payable for wrongful termination. Whether or not the termination was lawful was within the four corners of the distributorship agreement, the commercial practice or even the arbitration agreement. They were matters arising *out of or relating* to the agreement. It might have been a wrong or unfair decision but the parties had agreed to finality of the arbitrator's decision. Here, section 10 of the Act is clear.

See *Anne Mumbi Hinga Vs Victoria Njoki Gathara* Civil Appeal No 8 of 2009 [2009 eKLR] where it is stated;

"The concept of finality of arbitration awards and pro-arbitration policy is something shared worldwide by the states whose Arbitration Acts such as ours have been modeled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of the Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation".

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).

36. Section 29(5) of the Act provides that the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction. I have already said the arbitrator accepted, fairly or unfairly, that the transactions of 9th and 16th March 2009 were not "unusual, and was in fact acceptable and common between the parties". He took that to be a trade usage under the agreement or practice by the parties. I do not agree with the arbitrators assignment of blame from George Changa for the fraudulent acts to blame on Zain. Nor do I support the logic that estoppel in this case turned from a shield into a spear in the arbitrators mind. Neither do I agree that where Nyutu had clearly by conduct assigned benefits under the agreement

to Changa, it was fair to say that Zain was to blame for the fraud of the third party.

37. This being not an appeal, and those matters having fallen within the purview of the distributorship agreement and the arbitration agreement, the authorities would point me away from disturbing the award on those heads. Under the proviso to section 35 (2) (a) (iv) if the decisions on matters referred to arbitration can be separated from those not so referred only that part of the award which contains decisions on matters not referred to arbitration may be set aside. Now I do not have the benefit of the full evidence that was before the arbitrator. I can see from the statement of claim that save for the claim of Kshs 11,000,000 where interest was prayed for from 8th May 2009, on all the other headings in the claim interest was prayed for diverse dates from 31st May 2009 to 5thJune 2009. The arbitrator has awarded interest on all heads at 16% from 8th May 2009 which was not pleaded or prayed for. The finding on interest payable on those heads can thus be said to either have been outside the contemplation of parties or to be outside the reference in the arbitration.

38. That then leaves the attack on the award of Kshs 526,720,698.50 as damages. A corollary issue is the award of damages on that sum dating back to 8th May 2009. The arbitrator found clause 13.7.1 of the agreement "absurd". That is strong language. That clause provided as follows on consequential damages for termination;

"Celtel shall not be liable for consequential damage of any kind as a result of the termination of the Agreement or otherwise, whether as a result of loss by the Distributor of present or prospective profits anticipated sales; expenditure, investments, commitments made in connection with the Agreement or on account of any other reason or cause whatsoever".

The arbitrator found this clause to be "so wide as to exclude any and all liability" (page 14 of award). At that stage the arbitrator, having found breach of contract had occurred was ready to award damages. Relying on the pleading by Nyutu in the statement of claim paragraph 51 (3) thereof and where Nyutu blamed Zain for "negligence, laxity and or collusion that permitted the success of the fraudulent transaction", the arbitrator concluded that damages were available.

And not just damages but general damages for the tort of negligence. For the avoidance of doubt the arbitrator states at page 15;
"General damages have always been available in respect of the tort of negligence".

Again he states at the same page;

"in that context there is no reason why the respondent (Zain) should be punished by paying more than was due as indicated on the statement. But the said clause would not apply in the case of negligence".

And at page 16, the arbitrator stated;

"Having arrived at that position, it is my respectful view that the Respondent is liable to compensate the Claimant in respect of the negligence and misrepresentation on the part of the Respondent, in the manner I have explained above".

And lastly at page 17, he states;

"In assessing the general damages payable therefore, I travel along the well beaten path of the principles to be applied. The claim here is for damages in tort".

The award of general damages was premised on the losses "from a pessimistic scenario" for the period 2009 to 2013 which Nyutu stood to suffer upon the termination of the agreement. It is important to remember my earlier statement that the arbitrator had found the yearly contract was renewable automatically which I stated to be a misinterpretation of the relevant clause of the term of the contract. It is important to set out his reasoning at pages 18 and 19 of the award;

"Taking account of both the established facts as well as the future imponderables, and doing the best I can in the circumstances, I am prepared to hold, as I do, that, for purposes of awarding damages in this case the period which will constitute the multiplier is half of the possible term of the Respondent's licence, and not the period of 10 years to which I have been invited to accede by the Claimant ……"in arriving at the figure for general damages payable, I have taken into account all the statements I have made in respect thereto, hereinabove. As a matter of law, and in good conscience, I feel unable to grant the sum of Kshs 2,660,232,238/77. I have taken cognizance of the testimony of Kigo Njenga, the Certified Public Accountant, practicing in the firm of Kigo Njenga & Company, as to the expected loss of the Claimant's business on the basis of historical data which was derived from statements from the Respondent, by which he recommends the sum of Kshs 2.6 billion as reasonable compensation. I have further considered the evidence of the actuarial, Abed Muriithi, whose tenor was that the Claimant's business was poised to grow exponentially, and that the expected loss of Kshs 2,737,938,171, which would be reduced to Kshs 1,782,440,215 on a discounted basis was well merited……"I am inclined to adopt a conservative scenario regarding the future growth and earnings of the Claimant's business, had it not been cut short by the termination of the Agreement with the Respondent ……"Thus, doing the best I can, I accordingly award to the Claimant's in damages the sum of Kshs 526,720,698.50 being the sum of the losses, from a pessimistic scenario, for the period 2009 to 2013. Interest will apply to that amount as from 8th May, 2009 until the date on which this Award will be delivered and will be payable as damages".

39. In my considered opinion once the arbitrator embarked on assessment of general damages for the tort of negligence and set up the contract period to run to the year 2013 and to employ the arithmetic and multipliers above, he expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the realm of contract into the world of tort and damages for negligence. It may well be that the claimant had pleaded negligence at paragraph 51 (3) of its statement of claim or that it had prayed for general damages of 2.6 billion shillings. The arbitration clause in the distributorship agreement had limited the dispute *to those arising out of or* relating to this agreement and or breach thereof. It was for breach of contract pure and simple. The agreement appointing the arbitrator at clause 3 on terms of reference provided "The arbitrator shall determine any dispute or claim *arising out of or relating to* thecontract and /or breach thereof". This is in my mind rhymes very well with section 29 (5) of the Arbitration Act. While it is true that in the course of breach of contract a tort may arise, I am prepared to hold that in this case it may well have been completely outside the contemplation of the parties. Having then meandered outside his boundaries, it is then safe to say that the arbitrator exceeded his jurisdiction. See *Superior Enterprises Ltd Vs Union Insurance Company of Kenya Ltd* Nairobi HCCC 5239 of 1990 (unreported).

The case of *Food Corporation of India Vs Surendra & Mahendra Transport Company* [2003] RD S.C. 54 (India 5 February 2003) explains well why mere pleading for general damages by Nyutu before the arbitrator did not by itself grant him jurisdiction. It is held in that case at page 102.

"in order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen in whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction".

I accept that jurisdiction is everything in litigation. This is not a novel proposition. It was so held in *Owners of the Motor Vessel "Lillians" Vs Caltex Oil Kenya Limited [1989] KLR 1* and without such jurisdiction the court must lay down its tools. 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 I find persuasive to the facts before me. 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 provision 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) and the decision I have already referred to of *Anne Mumbi Hinga Vs Victoria Njoki Gathara* Nairobi Civil Appeal 8 of 2009 [2009] e KLR.

40. The other obvious danger of the route undertaken by the arbitrator was to essentially rewrite the contract for the parties. I have already cited the decision in *Morris & Company Limited Vs Kenya Commercial Bank* [2003] 2 E.A. 605 to which I would now add *National Bank of Kenya Limited Vs Pipeplastic Samkolit & another [2001] KLR 112* for the general proposition that a court of law cannot re-write a contract between the parties. That must apply to an arbitral tribunal also. A related matter is whether those general damages were available in contract. The authorities hold that generally, there can be no general damages for breach of contract see *Joseph Ungandi Kedera Vs Ebby Kangisah Kavai* Civil Appeal No 239 of 1997 (Court of Appeal) and Dharamshi Vs Karsan [1974] E.A. 41.

The same may be said of the award of interests on the damages backdated to 8th May 2009. On that date, the damages had not been assessed or awarded and the applicant is thus aggrieved as the respondent here would then receive a substantial sum of interest running to nearly Kshs 159,272,143.68 as at 2nd March 2011. See generally, the decision in *Myron (owners) Vs Tradax Export S.A. Panana City* [1969] 2 ALL E.R. 1263 holding that awards should include an order that the respondent pay interest in the sum due from the date when the money should have been paid or the date of the award. Also see *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Limited* (No 2) [1970] E.A 469 at 475.

41. I must clarify that the offensive part of the award of general damages is in overreaching the jurisdiction of the arbitral tribunal by going beyond the boundaries of the contract between the parties and the terms of reference of the arbitration as earlier explained. On that score alone, I would find that the applicant is well within the purview of section 35 the Arbitration Act.

42. Lastly, the applicant urged the court to find that the award was contrary or inimical to the public policy of Kenya under section 35 (2) (b) (ii) of the Act. That is a very broad concept and imprecise. In *Christ for all Nations Vs Apollo Insurance Co Ltd* [2002] 2 E.A. 366 the Honourable Justice Ringera, as he then was, in equating that ground to an unruly horse, delivered himself thus at page 370;

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

I would agree entirely. I find nothing immoral or illegal in the award that violates the values of Kenyan society in the materials placed before me in this application. And I am fortified there by the general holding in *Glencore Grain Limited Vs T.S.S Grain Millers Limited* [2002] 1 KLR 606 as to when an award will be held to be offensive to public policy of Kenya. This ground to set aside thus collapses.

43. In the result, the notice of motion by Airtel dated 8th April 2011 succeeds purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for the reasons and deliberations above. In the premises, the order that commends itself to me to grant is to order that the arbitral award dated 17th February 2011 and published on 2nd March 2011 by Fred Ojiambo S.C. be and is hereby set aside in its entirety. Costs would ordinarily follow the event. The primary dispute between the parties is yet to be

resolved on the merits. To encourage the parties to resolve this matter, which they undertook by going into arbitration in the first place, and considering also the long litigation in the award now set aside, the existence or pendency of the other three suits particularized at paragraph 4 of this ruling and being Winding up Cause No 4 of 2011 *in the matter of the Companies Act and in the matter of Airtel Networks Kenya Limited*, HCCC No 350 of 2009 *Nyutu Agrovet Limited Vs Celtel Kenya Limited* and H.C. Misc Cause No.604 of *2011 Nyutu Agrovet Limited Vs Airtel Networks Kenya Limited* and in the interests of justice, I shall order that each party shall bear its own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 1st day of December 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of
Mr. Ngatia & Mr. Luseno for the Applicant.
Mr. Muriuki & Mr. Musheshwe for the Respondent.