REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Appli 1131 of 2007

BASELINE ARCHITECTS LIMITED …….....1ST CLAIMANT/RESPONDENT

REBMAN AMBALO MALALA

T/A UJENZI CONSULTANTS….....2ND CLAIMANT/RESPONDENT

NYAGAH BOORE KITHINJI & CHARLES MAINA MWANGI

T/A COSTWISE ASSOCIATES….....3RD CLAIMANT/RESPONDENT

AND

NATIONAL HOSPITAL INSURANCE

FUND BOARD MANAGEMENT.....RESPONDENT/APPLICANT

RULING

This case raises a fundamental problem of balancing or reconciling two kinds of public interest which may clash due to the stakes involved. On the one hand there is the public interest that harm should not be done to the nation or the public by disclosure of certain documents and on the other hand there is the public interest that administration of justice should not be frustrated by withholding of documents which must be produced in evidence if justice is to be done. The law is that no one should be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in his possession unless there is mutual consent. It is also important to note that disclosure of documents which would be injurious to public interest, because they contain certain confidential information about the affairs of an individual or an institution is a factor which would be considered by any judge called upon to determine those issues.

I must also point out that for purposes of public policy and protection, a client may consult an advocate for the purpose of his cause of action and of litigation which is pending and that the policy of the law says that in order to encourage free intercourse between him and his counsel the client has the privilege of preventing his advocate from disclosing anything which he gets when so employed and of preventing its being used against him, although it might otherwise be evidence against him. An Advocate for purposes of this ruling includes the Attorney General of the Republic of Kenya for he provides legal opinion and advise to the Government and all public corporations in areas where his intervention is sought or necessary.

In any event the nature of the harm would need to be clearly examined and I think it is wrong to adopt a procedure which would restrict and/or prevent a judge from making an independent evaluation of the issues before him for determination. All in all it is desirable that a judge should have all the relevant

materials before him, in order for him to limit/delimit the boundaries of what is eligible for production by a party. In my view the fact that the production of the document in a particular litigation prejudices a party's case or assist the other side is no such plain overruling principal of public interest. It is for that reason that judicial officers are expected to examine the documents in order to test that injury to the state would not result due to disclosure.

The applicant, the **National Hospital Insurance Fund** was established under the Hospital Insurance Fund Act No. 9 of 1998 with powers to manage, control and administer assets of the fund. By a letter dated 29th February 2002 the then chief Executive **Mr. Ibrahim M. Hussein** appointed the 2nd respondent as consulting quantity surveyor for a proposed resource centre on plot No. LR. 2.24968/2 **Karen Nairobi**. The 1st respondent was also instructed through a letter dated 22nd May, 2002 to be the lead consultant for the design and supervision to completion of a proposed training centre on Plot No. LR. NO.2.24968/2 Karen Nairobi. The extent and the nature of the work done by the respondents is not an issue for determination before this court.

However, it is clear that a dispute arose between the applicant and the respondents which was referred to arbitration. The parties thereafter agreed on an arbitrator **(Mr. Festus Mukunda Litiku)** to determine their alleged dispute.

On or about 18th May, 2007 an award was made and published in favour of the respondent as hereunder:

(a) To M/S Baseline Architects Limited an award of Kshs. 172,932,153.05 was made in its favour.

(b) To M/S Ujenzi Consultants a sum of Kshs.133,505,962/= in its favour.

(c) Costwise Associates a sum of Kshs.45,689,230/= was made in its favour.

The arbitrator also ordered that the above sums shall continue to attract interest at the current bank overdraft rates for the period they will remain unpaid and that they are subject to VAT at the rate current at the time of settlement.

The applicant is aggrieved by the decision of the arbitrator made on 18th May, 2007 and therefore has made an application dated 19th July, 2007. The prayers in the said application are:

(1) The arbitral final award dated 18th May, 2007 and made by Festus Mukunda Litiku be set aside in total on account of being in conflict to public policy of Kenya.

(2) The awards or the reliefs awarded as set out at page 49 of the final award be aside in their entirety.

(3) The recognition or enforcement of the award be refused or declined by this Honourable court.

Being served with the application, the 1st and the 2nd respondent/claimant made a lengthy replying affidavit through **Mr. Morris Gitonga Njue** on behalf of the 1st respondent and **Mr. Rebman Ambalo Malala** for the 2nd respondent/claimant. The applicant has now filed the present application for my determination which is the chamber summons dated 26th November, 2007. The prayers sought are:

(1) that paragraphs 25, 26, 27, and 28 of the affidavit dated 28th October, 2007 by Morris Gitonga Njue be struck out and the documents annexed to the said affidavit and marked as anenxtures MGN 8"a" & "b" and MGN 9 be expunged from record.

It is important to reproduce the averments contained in the replying affidavit by **Morris Gitonga Njue** and particularly as concerns the above prayers;

25. THAT after the Award was given the Respondents sought legal opinion from the Attorney General's office on the issue of setting aside the Award and in their request admitted that the contract herein had been sanctioned by their board of directors which means that the deponent of the affidavit in support of the application herein is deliberately misleading the tribunal. Annexed and marked "MGN 8 "a" and "b" are the letter requesting the opinion and the Attorney General's Reply in which there is an admission that the matter herein had the sanction of the Respondents board.

26. THAT the applicants have failed to reveal that after the Award and the self explanatory opinion above they called the claimants and made an offer to settle which the claimants accepted. Annexed and marked "MGN 9" are correspondences, minutes and a board papers done by the Respondents chief executive officer evidencing the discussion and agreement thereof and which reiterates that the matters herein had been sanctioned by the Respondents board. I am informed by our Advocates on record that once a settlement is reached previous without prejudice discussion and correspondences are admissible to prove the settlement agreement.

27. THAT in the course of the hearing the Respondent's advocates sought and adjournment to go and call a witness from the ministry of public works who was to testify on the validity and quantum of the claimants claim. After several weeks adjournment the said advocates came and stated that they no longer intended to call the said witness without giving reasons at the tribunal. The board paper above reveals that upon seeking the opinion afore said they received an unfavourable opinion and therefore elected not to call the said witness.

28. THAT from the above it is clear that the Respondents put forward a case at the tribunal that was not truthful and that the application herein has been brought on the basis of deliberate falsehoods on questions of fact and the deponent of the affidavit in support of the application is guilty of perjury. I am informed by my advocates on record which information I verily believe to be true that the copies of the letters to the attorney general, the reply thereof, the board paper by the respondents chief executive and the minutes of the settlement are admissible in this proceedings not only for being relevant to issues of fact but also as evidence of the deliberate falsehoods and perjury by Mr. Kirech.

(2) Paragraphs 23, 24, 25, and 26 of the affidavit sworn by REBMAN AMBALO MALALA dated 29th October, 2007 be struck out and the documents annexed thereto and marked RAM 8 "a' and "b" and RAM 9 be expunged from record.

It is important to reproduce the said paragraphs which are;

23. THAT after the Award was given the Respondents sought legal opinion from the Attorney General's office on the issue of setting aside the award and in their request admitted that the contract herein had been sanctioned by their board of directors which means that the deponent of the affidavit in support of the application herein is deliberately misleading the tribunal. Annexed and marked "RAM 8"A" and"B" are the letter requesting the opinion and the Attorney General's Reply in which there is an admission that the matter herein had the sanction of the Respondents board.

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The applicant challenges the above paragraphs on the grounds that:

(1) That the affidavits offend the provisions of Order 18 rule 3 (1) and (6) of the civil Procedure Rules.

(2) The evidence being adduced in the aforesaid paragraphs are neither part of or related to the award.

(3) The evidence aforesaid have been contrived and unlawfully obtained.

(4) The evidence adduced in the aforesaid paragraphs is in breach of the Evidence Act.

(5) The said paragraphs offend the provisions of the Arbitration Act.

(6) The documents annexed are in breach of privilege.

It is the case of the applicant that the letter dated 29th May, 2007 from the Chief Executive Officer and the response from the Attorney general dated 18th July, 2007 are internal confidential documents of the Fund relating to opinion sought by the Chief Executive officer and do not reflect on the position of the Board of the applicant in regard to the commissioning of the consultants without Board approval as required. And that the Board raised its concern on the matter of confidential documents being in possession of the respondent and resolved to commence investigations on the same. It is also the case of the applicant that the Board of the applicant had resolved in the meetings held on 20th August, 2007 and 27th September, 2007 that the matter proceeds in court with a view to setting aside the arbitration award made on 18th May, 2007 by **Festus Mukunda Litiku** on the grounds set out in the application before court.

The application was debated before me by **Mr. Oraro** for the applicant and **Mr. Njoroge Nani Mungai** on behalf of the 1st and 2nd respondents. **Mr. Oraro** learned counsel for the applicant submitted that the affidavits have introduced new evidence in an application to set aside the award and the same is composed of an opinion allegedly obtained from the AG by the Chief Executive officer of the applicant. And that the respondents have even purported to make statements in their affidavits concerning opinion given by the advocate to his client. In his view the respondents who are adverse parties, cannot rely on an opinion given by an Advocate. **Mr. Oraro** posed the question "**whether a respondent or claimant who wants to enforce an award can adduce additional evidence which was not before the arbitral when there was an application to set aside the arbitral award"**. He says section 2 and section 32 of Arbitration Act provides what is to be contained in an award. He also stated that the respondents have not made any application to adduce evidence and once an award is given, it is final in all respect and one cannot purport to bring any additional evidence once the arbitration is finalized.

Mr. Oraro submitted that a party cannot on an application to set aside an arbitral award adduce an additional evidence to defeat the case of the applicant. He contended that both in the statute and in common law, no evidence can be adduced on an application to set aside which was not before the arbitrator. And since all the documents attached to the subject paragraphs were made after the award, such a belated attempt should never be accepted by this court. **Mr. Oraro** criticized the Chief Executive

of the applicant as being a person in breach of his by trying to circumvent the legal process, by on one side, being the deponent to set aside the award and on the other side as creating evidence to confirm the award. It was also the submission of **Mr. Oraro** that the documents attached to the affidavit of **Mr. Morris Gitonga** and **Mr. Rebman Ambalo** are documents made in breach of Order 18 rule 3, in that the deponents do not show/disclose the source of their documents which are privileged and confidential to the adverse party. And that public policy is against parties obtaining public documents in proving their cases. He relied on the case of **Derby & co. Limited & others vs Weldon & others** Court of Appeal Civil Division 1990 3 All ER 672 where it was held;

"**Where privileged documents belonging to one party to an action were inadvertently disclosed to and inspected by, the other side in circumstances such that the inspecting party must have realized that a mistake had occurred but sought to take advantage of the inadvertent disclosure, the court had power under its equitable jurisdiction to intervene and order the inspecting party to return all copies of the privileged documents and to grant an injunction restraining him from using information contained in or derived from the documents, even if it was not immediately obvious that the documents were privileged. Since the conduct of the defendants' solicitors made it plain that they were seeking to take advantage of an obvious mistake, the court would order them to return all copies of the privileged documents which they had obtained as a result of the mistake, including the three documents in issue".**

He also relied on the case of ITC Film Distributors v Video Exchange Ltd and others (1982) 2 ALL ER 241 where it was held;

"**The public interest in the ascertainment of the truth in litigation, which was the reason for the rule allowing secondary evidence of privileged documents to be adduced even though improperly obtained, was outweighed by the public interest in the proper administration of justice in regard to a litigant being able to bring his documents into court without fear that his opponent would filch them by stealth or a trick. Furthermore, for a party to litigation by stealth or a trick to take possession of documents in court belonging to the other side was probably a contempt of court which the court should not countenance by admitting the documents in evidence in the litigation. Accordingly, the defendant would not be permitted to use in evidence in the action the copy documents exhibited to his affidavit of 1 October, except for those which the judge had already looked at and which had already been used in evidence and could therefore not be excluded".**

The application was strongly opposed by **Mr. Njoroge Nani Mungai** learned for the 1st and 2nd respondents who submitted as follows: That the illegality and source of documents cannot be a reason to refuse the admission of documents. In his view the fact that you are not told how the documents were obtained does not mean it was obtained illegally. And even if it was obtained in the manner it was obtained, the same is irrelevant to admissibility of the documents. He relied on the case of **Karuma s/o Kaniu vs Reginam**, **1955, AL ER** pg 236 where it was held;

"**In considering whether evidence is admissible, the test is whether it is relevant to the matters in issue, and, if it is relevant, the court is not concerned with the method by which it was obtained or with the question whether that method was tortious but excusable; this principle, however, does not qualify the rule that a confession can only be received in evidence if it is voluntary".**

In considering whether the evidence contained in the subject paragraphs hereinabove, **Mr. Mungai** was of the view that the test is whether they are relevant to the matters in issue. And that the court should not concern itself with the method by which documents were obtained. He also submitted that the documents had been tendered to address an issue that has been raised in the applicant's application to set aside the award. Specifically paragraph 14 of the supporting affidavit makes an averment that none of the minutes produced by the respondent was from the applicant. In essence the applicant wants to challenge the award because it was not authorized by the board of management by the applicant.

According to **Mr. Mungai** Advocate the paragraphs sought to be struck out addresses those issues. The deponents of the replying affidavits produce documents to show that there was a board approval by the

applicant. And that the reason why the said documents are being produced is to show that the deponent of the supporting affidavit to the application to set aside the award was false. He contended that if a party comes to court and makes averments which are false, the other party is entitled to counter and rebut the false allegations contained in the affidavit of the opposite party. In short the basis of the averments contained in the subject paragraphs and the documents annexed thereto is to impeach the veracity and character of the Chief Executive Officer of the applicant. **Mr. Mungai** further contended that there is nothing in law to prevent the averments in the paragraphs sought to be struck out and the admissibility of the said evidence.

I have considered the application, the supporting affidavit and the two opposing affidavits. In particular I have taken into consideration the paragraphs which are the subject of this determination. I have also considered the submissions made by **Mr. Oraro** learned counsel for the applicant and **Mr. Njoroge Nani Mungai** for the respondents. In the course of the arguments in this case, counsel on both sides referred to me a great number of authorities. I intend no discourtesy in not referring to them all. However, I can assure both counsel that I have re-read them with close attention but none of them appears to me, with the greatest respect to be dealing with a situation measurably close to the one arising in this case, although some of them, ofcourse lay down general rules and guidelines of great importance. It would be sufficient, I think for me to say that the general principles laid down in the authorities cited were of great importance to the decision, I shall make in this ruling.

The first ground in support of the application is that the paragraphs sought to be struck out offend the provisions of Order 18 rule 3(1). I think it is important to reproduce Order 18 rule 3(1);

"**Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:**

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof".

It is clear that the law places a duty on deponent to limit and/or confine facts in an affidavit to issues and/or facts and information within his own knowledge or which he is able to prove. In cases where the facts are within the knowledge of the deponent, it is mandatory for the deponent to disclose the source and grounds of information and facts in the affidavit. **Mr. Oraro** learned counsel for the applicant submitted that the deponent does not show the source of the documents attached to the affidavits which is privileged and confidential to the applicant. Having gone through the affidavits and the subject paragraphs which the applicant seeks to strike out, it is clear that there is no disclosure as to the source and how the documents annexed to the affidavits were obtained. That is a clear and fundamental departure from the mandatory provisions of Order 18 Rule 3(1).

The other issue raised by the applicant is that the evidence adduced in the subject paragraphs are neither part of nor related to the award. This case involves an arbitration award, in which the applicant intends to set aside on the grounds set out in the face of the application dated 19th July, 2007. In considering whether to set aside an arbitral award, the primary consideration is that the High court is usually reluctant and cautious to set aside an award reached by an arbitrator because the arbitrator is usually appointed on the mutual consent of the parties to the dispute. Secondly section 35 of the Arbitration Act No. 4 of 1995, the High Court considers the decision or the Arbitration award, at most times as being final due to the issues determined by the arbitrator. Thirdly one of the objectives of arbitration is the finality of settlement of dispute through limiting instances where the arbitral award could be taken to court for challenge and it is for that reason that the court is usually reluctant to interfere with an arbitral award. The point is that the boundary and latitudes given to the High Court in considering whether to set aside an award is limited and/or restricted.

The question is, can a claimant who wants to enforce an award adduce additional evidence which was not before the arbitrator, when there is an application to set aside the arbitral award? Section 32 of the Arbitration Act provides what is to be contained and the right of a party to apply to the arbitrator to adduce additional evidence.

Mr. Oraro learned counsel for the applicant submitted that once the award is given, it is final on all respects and one cannot purport to bring any additional evidence once the arbitration is finalized. **Mr. Oraro** submitted that there is an implied obligation on a party obtaining documents in an arbitration not to disclose or use them for any purpose other than the dispute in which they were intended/obtained. I must add that a party is allowed to make a disclosure that is reasonably necessary to establish or protect his legal rights against a third party by founding a cause of action or a defence to a claim. It is also my view where a matter has been referred to arbitration, the parties are required to put all matters and evidence before the arbitrator and once the arbitrator has decided on them, such determination shall be conclusive and binding on all the parties.

It means a party will not be allowed to bring additional evidence or material after the arbitrator has concluded/determined the dispute, unless with the leave of the court. It is also clear in my mind that an award will not be set aside upon any ground which in truth was not, a question between the parties at the time the arbitration proceedings were before the arbitrator. The proceedings and evidence before the arbitrator is like pleadings which crystallizes the issues available for determination. It is for that reasons that parties are not entitled to go outside the boundary of what transpired before the arbitrator.

It must be appreciated there is an application to set aside the arbitral award and I have to be cautious in making conclusive statements which may prejudice the interest of the parties in the pending application. However, it is my humble view that an application to set aside an arbitral award cannot be a basis to bring additional evidence without permission of the court. In short, you cannot on an application to set aside an arbitral award, adduce an additional evidence to defeat the case of the applicant. A party is only required to adduce additional evidence on an application to set aside an arbitral award only in limited circumstances and with the leave of the court. It is clear that the evidence adduced by the respondents was not before the arbitrator and all the documents annexed to the two affidavits of **Morris Gitonga** and **Mr. Rebman Ambalo** were made after the conclusion of the arbitration. I am in agreement with **Mr. Oraro** learned counsel for the applicant, that the documents are belated attempt by the Chief Executive of the applicant in breach of the trust bestowed on him to try and circumvent the legal process by on one side swearing an affidavit to set aside the award while on the other side creating evidence to confirm the award. With greatest respect, there is a great deal of justification in the sentiments echoed by **Mr. Oraro**. I therefore think, the intense criticism leveled against the employees of the applicant in the way the documents attached to the affidavits of the respondents were obtained is a matter of great concern. Perhaps it shows the lack of respect and trust by the said employees.

The other ground in support of the application is whether the evidence adduced by the respondents through the replying affidavits has been contrived and unlawfully obtained. It is clear that the applicant wants this court to strike out the document annexed to the two affidavits on the ground that they were illegally procured. The basis of the alleged illegality is because the respondents do not disclose how the documents were obtained. **Mr. Njoroge Nani Mungai** learned counsel for the respondents submitted that the fact that this court is not told how the documents were obtained, does not mean it was obtained illegally. And that, the manner the documents were obtained, that is irrelevant to the admissibility of the said documents. He relied on **Karuma s/o Kaniu vs Reginam** where it was held that in considering whether the evidence is admissible, the test is whether it is relevant to the matters in issue. And if the evidence is relevant, the court should not concern itself with the method by which it was obtained. **Mr. Mungai** advocate submitted that the documents had been tendered to address an issue that has been raised in the applicant's application to set aside the award, in that they want to challenge the award because it was not authorized by the Board of management of the applicant. He was therefore of the view that the court should not concern itself with the method by which the respondents obtained the documents subject of this dispute.

Mr. Oraro on his part was of the view that the case of **Karuma** is not relevant, since it was concerned with admissibility where there is trial while the present application concerns itself with instances under section 35 of the Arbitration Act. And that there is no issue of the admissibility of evidence at this stage, whether relevant or irrelevant. In essence he was saying the jurisdiction of the court in an application to set aside an arbitral award is limited to instances under Section 35 of the Arbitration Act.

My answer is that, first and foremost, the case cited by **Mr. Nani Mungai** is not relevant to the issues before court because that case involves a criminal trial and it is clear the principles applied in allowing evidence in a criminal trial is completely different from a civil trial. In any case there is no trial involved in this matter. The issues have been concluded by the arbitrator and in deciding whether to set aside an award or not, the court will only consider what transpired before the arbitrator and whether there is violation of the statutes. In short the issues before court had crystallized after the conclusion of the arbitration proceedings.

Section 5 of the Evidence Act Cap 80 states;

"**subject to the provisions of this Act and of any other law no evidence shall be given in any suit or proceedings except evidence of the existence or non existence of a fact in issue and of any other fact declared by any provision of this Act to be relevant".**

The evidence purportedly being adduced by the respondents is not evidence whose existence and/or non existence would be a factor in issue in the pending application to set aside the award. The simple point, I am making is that, in considering whether to set aside the award, the letter by the Chief Executive to the Board and the one to the Attorney General and the response from the Attorney General are not evidence which would be of value to the Judge who will determine whether to set aside the award or not. In short matters introduced and/or produced after the conclusion of the arbitration award and without leave of the court are not issues for consideration in the pending application. I therefore think, the issue of admissibility and relevance of the documents attached to the replying affidavits is primarily central to this application.

It has been argued by the respondents that the documents are being annexed to impeach the evidence of the deponent of the supporting affidavit **(Mr. Kerich)** to the application to set aside the award. In my humble view a party who wants to impeach anything contained in an affidavit has to summon the deponent and cross examine him. It is therefore my determination that the annextures attached to the two replying affidavits cannot be used to determine the real issues in dispute.

One thing that clearly comes out in the submission by **Mr. Njoroge Nani Mungai** Advocate is that the respondents are inclined to conduct a trial in an application to set aside an award. Such a procedure is untenable since the court will only concern itself with instances under Section 35 of the Arbitration Act. It is also my position that the truthfulness of **Mr. Kerich** and the veracity of his evidence cannot be used by obtaining documents which were to be presented before the Board of the applicant and which the Board has not adopted. The respondents have not demonstrated or shown that they can produce the evidence annexed to the two affidavits. And they made no attempt to adduce additional evidence either through the arbitrator or this court. I am therefore satisfied that the production of documents which were not subject of the arbitration proceedings and which is contrary to the Evidence Act and to the Arbitration Act cannot be produced in an attempt to impeach the evidence of **Mr. Kerich**.

It is clear that since the circumstances surrounding the disclosure of the documents is not clear, it can be safely concluded that the same were contrived or unlawfully procured.

The last point argued by the applicant in support of the application is that the documents annexed are in breach of privilege and therefore cannot be a basis of adjudication on the issues before this court. The Advocate for the applicant submitted that the evidence adduced in the two affidavits is not admissible because the documents attached relates to an opinion from the Attorney General in respect of an ongoing litigation or alleged advice given by an advocate to his client or an attempt by the Chief Executive of the applicant to circumvent legal process in order to pay the money. **Mr. Oraro** submitted that the information was privileged communication which could not be used against the applicant. And in addition to being confidential communication, it is against public policy for parties to obtain public documents in proving their case.

On his part **Mr. Njoroge Nani Mungai** learned counsel for the respondents submitted that section 137 and 134 of the Evidence Act Cap 80 permits the respondents to produce the evidence attached to the two

affidavits. He also submitted that the documents produced are exceptional to the rule of privilege and confidential information. And that the communication between **Mr. Kerich** and the Attorney General fall within the permitted exceptions of section 137 of the Evidence Act, hence the respondents are entitled to rely on such documents. .

The case of the applicant, is that the documents attached to the two affidavits would mirror/mar the mind of the Judge who would hear and determine the pending application and more so, they contain information and comments which would make the case of the applicant untenable. In essence the disclosure will be injurious to public interest, because the documents contain confidential information about the affairs of the applicant which greatly touch on the pending application. The applicant also suggested that the information so obtained by the respondents could not be disclosed by them and therefore cannot be used without their authority. In my understanding a party to a litigation is not obliged to produce documents which do not belong to him but which have been entrusted to his company by a third party in confidence. It would be an abuse of that confidence to disclose it, without the permission of the owner of the original documents. Let me also make an observation that where a document has been communicated voluntarily for a limited and restricted purpose, it would be unjust and unlawful to allow the original or a copy of it to be communicated in any manner except for that purpose.

The contention put forward by the applicant is that the production and use of its documents is likely to be injurious to the public interest. My humble view, a possible injury to public interest, must be balanced with another risk which is the frustration of administration of justice by such refusal. In some cases, a likely danger to the public interest is obvious. **In Konway vs Limmer (1968) 1 All ER 874 Lord Reid** held;

"**It is universally recognized that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it. with regard to such case it would be proper to say, as Lord Simon did that to order production of the document in question would put the interest of the state in jeopardy, but there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice".**

In paragraph 23 of the affidavit of **Mr. Rebman Ambalo Malala** and paragraph 25 of the affidavit of **Mr. Morris Gitonga Njue** contains evidence stating that the Chief Executive Officer wrote a letter dated 29th May, 2007 to the Attorney General seeking a legal opinion from the office of the Attorney General on the issue of setting aside the award. The Attorney General replied through a letter dated 18th July, 2007. No doubt the Attorney General is the Chief and supreme legal advisor to the Government of Kenya and all Government bodies in relation to legal matters.

Counsel for the respondents as I understand argues, that they are in possession of documents which belong to the applicant and obtained in unclear circumstances but nevertheless they are entitled to rely on them. That may sound pragmatic and realistic but there is substantial issue which need to be addressed, that is whether a party can be entitled to use to his advantage stolen or documents obtained in unclear circumstances in a manner to prejudice a pending suit and/or a pending application. As stated the documents were meant for the internal consumption and use of the applicant and other Government bodies who would be concerned or interested in the outcome of the dispute between the parties herein. The documents from the Chief Executive officer of the applicant to the Attorney General of the Republic of Kenya is marked as ***confidential*** in all the two pages. The Chief Executive officer of the applicant was seeking an opinion and/or advice of the Attorney General, nevertheless such an opinion had to be ratified or sanctioned by the Board of the applicant.

In my understanding, it is necessary, to secure freedom and canduor of communication between the office of the Attorney General and the applicant. The Board of the applicant was bound to take decision with the best advice and with fullest information. They sought a legal opinion from the Attorney General through the Chief Executive of the applicant. It is well settled that it is in the public interest that such communication should be written with utmost candour and freedom of expression. Perhaps it is necessary to mention that such candour and freedom of expression might be impaired documents exchanged between public servants could be ordered to be produced in an action and that accordingly their production would be so much to the prejudice of the public interest, however pertinent they might be to the issues in an action.

The question is, were the documents in question within the boundary of documents which any right minded person would say clearly ought not to be the subject of production in an action? And that public interest would obviously be prejudiced if the candour and freedom of expression in such communications were to be in any way inhibited, that such classes of documents ought to be and are free from production. In my humble view it is of utmost importance that public service should function properly and to my mind it cannot do so unless commonplace communications between one civil servant and another are privileged from production. It would also seem to me that it would be an injustice to civil servants to hold that they are so timid that they would not write freely and candidly unless they know what they wrote could in no circumstances whatsoever, come to the light of the day to be used by a person not intended to see or rely on the contents of such documents. However it is also important to ensure that claims of privilege are not used unnecessarily to the detriment of the vital needs of the court to have the truths put before it.

The point I am making is that judicial control over the evidence in a case cannot be abdicated to the caprice of privilege, yet we cannot say that courts may automatically require a complete disclosure. It is in the public interest that the material should be withheld if by its production and disclosure, the safety and wellbeing of the public could be adversely affected. It is, I think a principle which commands general acceptance that there are circumstances in which the public interests must be dominant over the interest of a private individual. To the safety or the well being of the general public, the claims of a private litigant motivated by profit may have to be subservient. It is therefore vital to protect the public from private interest peril – i.e. interests of a litigant must give way to that of the general public.

It is quite obvious that public policy requires that the most unreserved communication should take place between public servants and it should not be subject to restraints or limitations. But it is quite clear that if the document in possession of the respondents is allowed to be produced, used and relied upon in a court of justice, that would in essence restrain the freedom of communication and render public officers to proceed in a more cautious, guarded and reserved manner in their communication and concerns.

It is also clear in my mind that justice is administered in civil disputes on the principles that you cannot use an advantage obtained improperly or illegally in a manner prejudicial and/or detrimental to the interest of opposite party. That principle is based and/or founded on fair play and there can never be justice without a fair play. And in my opinion there cannot be fair play if we allow parties to steal a match by relying on documents improperly obtained from the other side.

It is clear that some of the annextures concern correspondences between the Chief Executive of the applicant and the Board of management. There are others which concern an opinion sought from and given by the Attorney General of the Republic of Kenya to the applicant. It may well be wondered why the Chief Executive of the applicant was writing such letters and opinions in a manner to prejudice the application made by the applicant in setting aside the arbitral award.

Nevertheless the contents of the documents clearly show that the documents belong to a class which on ground of public interest must, as a class be withheld from production. In my opinion the balance of public good in the circumstances of this particular case tilts in favour of refusing the production of the subject documents for it will properly make or mar the chances of the applicant's case. While on the other hand, the documents are not vital to the success of the respondents' case. It is clear that on the most cursory reading the documents fall within the scope of privilege and confidential correspondence in

the course of obtaining legal advice. It would be both wrong and dangerous if parties were allowed to intercept legal opinion between the office of the Attorney General and government department and to rely the same on the success of their case, because they think the documents are favourable to the success of their case.

As stated it is a general principle of law well founded on public policy and recognized by the constitution and Cap 80 Laws of Kenya that documentary evidence may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question will be injurious to the public. My position is that the production of documents should only be withheld where the public interest would otherwise be damnified. I agree that there is much to be said in favour of disclosure that is whether the documents subject to the dispute constitute an important part of the material on which the respondents would need to object to the setting aside application.

I do not think that the documents subject of this determination are in the least necessary in order that justice may be done to the pending application. Indeed it can therefore be reasonably argued that the documents were obtained and exhibited to influence the mind of the Judge who would hear the application to set aside the award. I therefore think that the misgivings expressed by the applicant are well founded and justified.

As a matter of good measure let me state that it cannot be said that all public documents of every sort including the letters and opinions exhibited by the respondents are to be produced and made public because the respondents think that their case requires such production or that because there is no need for the court to consider and determine the issues brought forward by the applicant in its application to set aside the arbitral award. It is manifest, I think that there must be a limit to the duty and power of allowing the production of evidence which is adverse to the party who authored or was a party to such document. I am of the opinion, that the production of the reports, letters, board minutes and opinion by the Attorney General exhibited by the respondents would be injurious to the interest of the applicant and the general public which must be considered paramount to the individual interest of the respondents. If those communications were to be produced in court, the effect would be to restrain the freedom of communication and to endanger the interest of the public.

It is therefore my decision that the documents which the respondents intend to rely and which are annexed to the two affidavits are documents which this court considers that their existence and contents are so probable that a prudent man ought not to allow for their production. The said documents if allowed to be produced would hinder the position of the Judge who will consider the case of the parties in determining whether to allow the application to set aside the award. In essence there is a great deal of possibility that the documents would prejudice the case of the applicant. I therefore think that justice does not require them to be produced.

All in all I have looked at the documents and have come to the clear conclusion that there is a likelihood of harm to the interest of the applicant and by extension to the public. I make a finding that the risk to the public interest is far greater to that of the respondents and to administration of justice. I would not be prepared to recognize the position advanced by the respondents through their advocate **Mr. Njoroge Nani Mungai** who submitted that the respondents had the right to use and rely on the documents no matter how they were obtained.

Having gone through the documents, one thing is clear, that the respondents are not entitled to use them to the advantage of their case for that will prejudice the interests of the applicant and by extension the public. I always thought that the Chinese wall doctrine was applicable in our public institutions but that appears not to be the case with the applicant.

Be that as it may, having considered all the issues I hold that the documents emanating from the applicant are privileged and confidential and it does not lie in the mouth of the respondents to say that we have obtained documents belonging to the applicant which is confidential and privileged and which is also prejudicial to the interest of the applicant, nevertheless we are bound to use them. Plainly such a conduct is in contravention of the law and a party cannot be allowed to use a benefit which he obtained in

contravention of the law. As stated the court has ultimate power in the interest of justice to fulfill the mandate given to it, to safeguard the interests of the public and in doing so, where there is reasonable grounds to protect and preserve the interests of the public. Such duty must be performed in order to do justice between the parties. It is also instructive to note that the court has a duty to safeguard genuine interest of a litigant but also ensure that the scope of privilege is not extended in matters which have strategic importance to members of the public.

In conclusion it is my humble view the documents were obtained in an illegal manner/means with the tacit support of the employees of the applicant or through the office of the Attorney General. Such a conduct is disturbing to public interest and is a manifestation of betrayal by public officers with a mandate to safeguard the general interest of the public. I do not think the parties who gave out the said documents were aware/understand that public duty and employment comes with a corresponding obligation to always and as far as possible to safeguard public documents from adverse parties. That is a fundamental duty on all employees of the applicants. It appears there has been an abdication of that duty on the part of the persons who gave away such vital and important documents to the respondents.

I make an observation that this case is a clear case of the vulnerability of our public institutions and lack of ownership by the employees in our public corporations. I think counsel for the applicant **Mr. Oraro** was justified in suggesting that the officers of the applicant were involved in the manufacture and leakage of the documents. I consider it as my duty to point out that the conduct of persons who gave away the documents to the respondents had no interest of the applicant at heart.

In short I have formed the view that the documents annexed belong to a class of documents which on ground of public interest ought to be withheld from production. It would be sufficient, I think for me to rest this ruling by saying the prayers sought are well merited and the complaint against the subject paragraphs is well founded.

Order: **The application is allowed with costs to the applicant.**

Dated, signed and delivered at Nairobi this 7th day of May, 2008.

M. A. WARSAME

JUDGE