



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Misc. Civ. Appli. 359 of 2007**

**IN THE MATTER OF: SECTION 84(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS & FREEDOMS UNDER S. 77(4) & (9), CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE ANTI CORRUPTION & ECONOMIC CRIMES ACT, 2003**

**BETWEEN**

**MIDLAND FINANCE & SECURITIES GLOBETEL INC .....PETITIONERS**

**AND**

**THE ATTORNEY GENERAL**

**KENYA ANTI CORRUPTION COMMISSION .....RESPONDENTS**

**JUDGMENT**

The two petitioners filed a petition on 4<sup>th</sup> April 2007. By a chamber summons of the same date they approached the court during the court vacation seeking conservatory orders but the court declined to give any orders vide a written ruling of 5<sup>th</sup> April 2007.

A brief outline of the facts leading to the filing of the Petition is that the petitioners and the Government of Kenya hereinafter called “**GOK**” entered into a contract on 29<sup>th</sup> May 2003 for the supply to the Government of telecommunication equipment. The contract is said to have been based on a legal opinion by the Attorney General (1<sup>st</sup> Respondent) that inter-alia represented that all pre contract authorisations had been obtained and that the contract was lawful. The petitioners claim to have supplied telecommunications equipment but “**GOK**” declined to pay for the equipment after making an initial deposit.

It is contended that on 17<sup>th</sup> January, 2007 the “**GOK**” through the Ministry of Finance contracted Price Waterhouse Coopers (**PWC**) to conduct forensic investigations into the contract of 29<sup>th</sup> May 2003 to inter-alia determine if there was corruption or economic crime committed in the procurement of the contract. It is claimed by the Petitioners Counsel that the petitioners became aware of the **PWC** contract in mid March 2007. The Petitioners are apprehensive that the findings of **PWC** may be wrongfully used by the respondents to commence criminal proceedings against them and that the **PWC** contract is illegal in that it is only the 2<sup>nd</sup> Respondent, “the Commission” which is statutorily empowered to undertake investigations and that the Ministry of Finance was by engaging **PWC**, acting without lawful mandate and that the engagement ultra vires the Anti Corruption and Economic Crime Act (**ACECA**) and also that the

investigations are intended to undermine any intended arbitration. The petitioner maintains that the investigations by **PWC** were not necessary because the contract of 29<sup>th</sup> May 2003 between the Petitioners and "**GOK**" has an arbitration clause to the effect that all disputes relating to the contract and in particular to the performance of the contract should be referred to arbitration.

All parties have filed affidavits and written submissions and have also filed lists of authorities in support of their respective positions.

The principal submissions of the 1<sup>st</sup> Respondent are

- (a) The alleged agreements have not been dated or signed by **GOK** and it is not clear how the petitioners obtained a signed agreement as exhibited by their advocates and that the unsigned or undated credit financing contract is the foundation of the dispute and that there are discrepancies concerning the account numbers into which payments were to be effected.
- (b) The arbitration clause No.13 in the Credit contract does not state the governing law for the contract and neither does it provide for the national court, that has jurisdiction over any arbitration although in the Petitioner's version of the contract the governing law is stated to be English law and the English courts have non-exclusive jurisdiction.
- (c) It is not known which contract was presented to the 1<sup>st</sup> Respondents for perusal before he gave the exhibited opinion.
- (d) The court cannot reasonably be expected to make binding determination on the basis of unsigned agreements. This contravenes the Law of contract, which is different from the English law.
- (e) The Petitioners are foreign companies not based in Kenya and they cannot therefore seek to invoke the protection of the Constitution. In addition there is no proof of the alleged contraventions of the constitutional provisions namely s 77(4), s 70(a) and (c), s75, and s 77(9). The 1<sup>st</sup> Respondent contends there is no such proof taking into account the ratio decidendi of the case of **JULIUS MEME v R**. No person as at the date of filing of the petition has been charged with any offence and therefore s 77(4) is inapplicable.
- (f) That PWC has expressed the need for the Commissioners involvement in the investigations.
- (g) That the supply contract article 23(1) on "Force Majeure" provides that neither party shall be liable for delay in performance, if the delay results from the occurrence of force Majeure. Force Majeure is defined in article 23(2) as including but not limited to, compliance with regulations or other Government rules.
- (h) That **GOK** is complying with regulations and other government rules in seeking to examine whether or not pricing and financing irregularities in the procurement of the Supply contract might exist, whether the value of goods and services that are already or were to be delivered under the Supply contract conform to specification and whether criminal activity might have taken place during the procurement process.
- (i) Investigations not to be equated to criminal trial
- (j) The 1<sup>st</sup> Respondent still has a constitutional discretion to refuse to charge the petitioners.
- (k) The **PWC** investigations were meant to assist the 1<sup>st</sup> respondent on whether or not to lay indictments against the Petitioners.
- (l) That the 1<sup>st</sup> respondent has a duty to defend the public interest in the matter.

- (m) To enable the 1<sup>st</sup> Respondent to exercise discretion PWC investigations would be necessary.
- (n) The 1<sup>st</sup> Respondent does not act on instruction from any person under s 26 (8) of the Constitution.
- (o) That the Petitioners rights or interest under s 70 of the constitution have to be balanced against the rights of the others or the public interest and that these two are permissible limitations and that the 1<sup>st</sup> respondent is acting to defend the public interest as defined in the **KAMANI CASE** which in turn means checking if there is full compliance with the relevant regulations and law. Petitioners cannot claim rights or interest without compliance and they also have no obligation to pay tax nor are they resident. They have no loyalty to the Country as a result there is the need to uphold the public interest and it is in the public interest to verify the supply contract.
- (p) S 75 has no relevance since there is no taking and that the allegation of mala fides is premature.
- (q) PWC is aware of the 2<sup>nd</sup> Respondent's mandate under s is of the Anti Corruption and Economic crimes Act (**ACECA**).
- (r) The Petitioner acknowledges payment of 1,489,500 Euros and Article 7.1(a) commits **GOK** to pay 4,000,000, Euros.
- (s) The real issues is whether or not there are sufficient grounds to permit **GOK** to rescind the contract between the parties, which issues are grounds for arbitration.
- (t) It is a misdirection to come to a constitutional court in an arbitration matter.
- (u) There are no proceedings under s 77(9) of the Constitution and no notice under Article 26 has been given to commence arbitration hence there is no commercial arbitration at this stage. An arbitration cannot preclude the 1<sup>st</sup> Respondent from conducting investigations through **PWC**.
- (v) The grant of the orders would give advantage to the Petitioners during the arbitration, as the 1<sup>st</sup> respondent would not know how much work and monies were expended in executing the supply contract.
- (w) As the arbitration is not likely to be held in Kenya s 77(a) of the Constitution does not apply.
- (x) The Petitioners were not induced by the 1<sup>st</sup> Respondent opinion.
- (y) The 2<sup>nd</sup> Respondent is not the only body with power to investigate corruption

The principal submissions of the 2<sup>nd</sup> Respondent are:-

- (a) That the Commission has been investigating the petitioners for corruption and economic crimes following the report of the Controller and Auditor General for the year 2003/2004.
- (b) The investigations are intended to establish whether any offences were committed in the procurement process for the contracts. And that the investigations are being carried out in exercise of its investigative function in accordance with the provisions of the Anti corruption and Economic Crimes Act 2003 (**ACECA**). The Petitioners have been aware of the investigations.
- (c) **PWC** who are parties to the contract have not been joined in the proceedings. This goes against the principle in **MEME v R (2004) I KLR 637** that the Constitution is a vital framework of governance that any litigation touching upon it ought to involve any interested parties. **PWC** are therefore an interested party.
- (d) The Petitioners have not raised any issue and/or complaints against the 2<sup>nd</sup> Respondent and

therefore cannot make any orders against the 2<sup>nd</sup> respondent.

(e) Investigations of corruption and economic crimes is not the 2<sup>nd</sup> Respondent's preserve to the exclusion of all other agencies be they private or public bodies eg Police Department, Efficiency Monitoring Unit, Public Accounts Committee or any other body. That **GOK** is at liberty to engage a private organisation including **PWC** to conduct investigations in any matter. **PWC** have not been engaged pursuant to **ACECA** and therefore **PWC** are not investigators under the Act.

(f) The agreement between **GOK** and **PWC** does not efficiently cede any of the powers of 2<sup>nd</sup> Respondent or its Director to **PWC** or any other body. And that **PWC** is well endowed with forensic capabilities and is well within its right to contract its services to any willing buyer including **GOK** and need not be appointed investigators by the Director of the 2<sup>nd</sup> Respondent and the definition of investigation under s 33 refers to an investigation appointed under the Act by the Director. **PWC** on the other hand is independently engaged by the **GOK**.

(g) The 2<sup>nd</sup> Respondent is mandated under section 12 of the Act to co-operate with other bodies. The section states!

**“The Commission may in the performance of its functions work in co-operation with any foreign government or international or regional organization.”**

(h) No details have been given on the alleged violations of the Constitution. The manner of violation has also not been given. This is contrary to **R v ANARITA KARIMI NJERU NO. 1 [1979] KLR 154 and R v MEME [2004] I KLR 637**.

(i) On the issue of transition, offences committed prior to the Act and after the Act are covered by the Prevention of Corruption Act and **ACECA** as held in the case of **R v THE CHIEF MAGISTRATE COURT, CACC & THE AG ex-parte ANTONIE AUMA OKOTH unreported HC MISC 994/2004** hence no violation of s 77(4) of the Constitution. Similarly there is no violation of s 70(a) and (c). No demonstration that any of the mentioned rights have been violated including the right to protection of the law, taking into account that the petitioners are corporate persons who are outside the Kenya borders. In any case the rights and freedoms are subject the rights and freedoms of others and the public interest. In addition there is no violation of s 77(1) and (9) as the petitioners have not been charged with a criminal offence in any criminal court in Kenya - see **R v ELMANN (1969) EA 357** followed in **DR MURUNGARU v KACC case HC MISC 54/2006 (UNREPORTED)**.

(j) There are no pending civil proceedings or any arbitral process yet.

(k) There is no deprivation of property rights under s 75 of the Constitution.

(l) The existence of an arbitration clause in a contract does not bar any criminal investigations. There should not be any bar against the Commission to undertake investigations. Any order barring investigations would deny **GOK** the opportunity of unearthing an otherwise tainted contract.

(m) Under s 193 A of the Civil Procedure Act cap 75 the fact that any matter is in issue in any criminal proceedings and is also substantially in issue in any pending civil proceedings shall not be a ground for any stay prohibition or delay of the criminal proceedings.

(n) It would be against public policy to bar investigations since **ACECA** was enacted due to the great public policy to fight graft and in tandem with wider global desire to end the vice.

(o) The petition is unconstitutional and should be dismissed.

## **ANALYSIS**

It is not in dispute that the Agreement between the parties herein has an arbitral clause and that the Applicants are based outside Kenya.

The Arbitral Article 13 in the Agreement reads:-

**“13.1 This contract is subject to the Laws of England and this contract together with any question concerning its existence or legality shall be governed by and interpreted in accordance with English law and shall be subject to the non-exclusive jurisdiction of English Courts.”**

**“13.2 In the event of differences arising between the Contracting Parties which cannot be amicably resolved within sixty (60) days of either of the contracting parties giving notice of the issue to be resolved to the other, the disputed issue(s) may be referred to arbitration.”**

**“13.3 Arbitration will be conducted in accordance with the *UNCITRAL* Arbitration Rules by a tribunal established pursuant to these Rules.”**

**“13.4 The decision of the Arbitrator(s) will be final and binding on the Contracting Parties.”**

It is common ground that the Agreement constitutes an international arbitration agreement as defined in the Arbitration Act of Kenya 1995.

An arbitration is international under s 3(2) of the Arbitration Act where:-

**(a) the parties to an arbitration agreement have at the time of conclusion of that agreement their places of business in different states**

**(b) .....**

**(c) .....**

The intended arbitration would when it commences be an international arbitration pursuant to s 3(2). Although the provision has other indicators of when an arbitration is international the parties herein come under (a) above.

Although the 1<sup>st</sup> Respondent denies that there is a signed and valid agreement between the parties prima facie the GOK's engagement of *PWC* is a recognition of an Agreement between the Contracting Parties. In any event, whether or not there is a valid contract is a matter for determination by the Arbitral tribunal.

Unlike in the *NEDERMER - Misc Civil Application No. 390 of 2006* case where the place of arbitration had been specified, the parties in this matter have not specified the place of arbitration and therefore the place of arbitration will be determined either by the Unicitral Rules which have been applied or the Arbitral tribunal shall determine the place of arbitration.

On the other hand Section 3 of the Arbitration Act of Kenya 1995 defines an arbitration agreement as follows:-

**“An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.”**

It is evident from the wording of section 3 of the Arbitration Act that the issues, an appointed arbitrator or arbitral body might deal with, are contractual and any other defined legal relationship between the parties.

It is also not in contest that a dispute has arisen as between the parties to the contract and this is clearly borne out by the correspondence exchanged between the parties and therefore the dispute is arbitrable

upon the request of any of the parties. The Agreement herein comprises of 2 contracts namely:-

(i) the Suppliers Credit Financial Agreement entered into between the Government of Kenya (**GOK**) and the 1<sup>st</sup> Petitioner on 29<sup>th</sup> May 2003.

(ii) The contract for installation of Nationwide Dedicated Digital Multi-channel Security Systems Telecommunications Network for the Kenya Administration Police and the provincial Administration entered into between the **GOK** and the 2<sup>nd</sup> Petitioner on 29<sup>th</sup> May 2003.

The first contract known as the “Credit Contract” provided for the financing of the 1<sup>st</sup> phase of the installation of the Security Systems under the second contract or the “Security Contract.”

The contract price was Forty Nine Million Six Hundred Fifty Thousand Euros (E49,650.00).

The Credit was to be repaid by the **GOK** within a period of 72 months of the date upon which the agreement became fully effective.

The Agreement as a whole was subject to the laws of England.

The Attorney General of Kenya gave a written agreement or assurance to the two foreign Companies and Petitioners as follows:-

- (i) **“The GOK had power to enter into the agreement.**
- (ii) **The Agreement was legally valid and a binding obligation on the part of the GOK under the laws of Kenya.**
- (iii) **All necessary approvals contractual authorizations necessary had been duly effected.**
- (iv) **All payments under the same Agreement were exempt from taxes in Kenya.”**

As regards performance it has not been denied in these proceedings that pursuant to the Agreement, **GOK** effected payment of the deposit of Euros Two Million Five Hundred Thirty Six Thousand on 29<sup>th</sup> May 2003 by way of a promissory note thereby rendering the agreement effective. As a consequence thereof the 2<sup>nd</sup> Petitioner claims to have purchased all the necessary equipment for installation and had it inspected and shipped in accordance with the agreement to Mombasa, Kenya. Thereafter the **GOK** is said to have breached the Agreement and the **GOK** received a 60 days’ notice of dispute and that the arbitral clause would be invoked.

In view of the above, the major complaint against **GOK** by the Petitioners, is that on or about 17<sup>th</sup> January 2007 the **GOK** through the Ministry of finance entered into a contract with Price Water House Coopers (**PWC**) a firm of auditors and forensic investigators based in Nairobi inter alia to:

- (i) **determine whether there had been pricing, financing and other irregularities in the procurement of the contract the subject matter hereof amongst others.**
- (ii) **Determine the market value of goods, works and services either delivered or yet to be delivered thereunder.**
- (iii) **Conduct forensic investigations to determine if criminal activity has taken place in relation to the contracting or contractors and (petitioner’s) performance.**
- (iv) **Conduct forensic investigations to determine if any corrupt or criminal acts had taken place.**

The Petitioners now claim that on the facts set out in the terms of reference of the **PWC** contract the

second Respondent has no mandate to cede its statutory mandate to investigate corruption and economic crimes to the Ministry of Finance, and that this violates clear provisions of the ECEA (2003.)

### Violation of the Constitution

1. That under s 77(4) of the Constitution of Kenya it is illegal for the **GOK** to proceed with an investigation whose express object is to find that the Petitioners herein had committed certain criminal acts in contracting as aforesaid when the agreement was represented by the Attorney General as being lawful under the Laws of Kenya.
2. That s 70(a) and (c) grants every person the equal protection of the law. In the instant case the petitioners entered into the agreement subject matter hereof on the strength of the legal opinion issued by the Attorney General and that it would be contrary to due process for the **GOK** to take a course contrary to its very own legal opinion which was issued by the Attorney General on 17<sup>th</sup> June, 2003.
3. The Legal Opinion by the Attorney General was acted upon by the Petitioners who committed funds and performed the first part of the Agreement. The **GOK** is therefore estopped debarred and or precluded from alleging that there may have been pricing, financing or other procurement irregularities or corruption or indeed criminal activity in procurement of the said agreement.
4. That there is a taking away of the Petitioners property contrary to s 75 of the Constitution.
5. That under s 77(9) of the Constitution the determination of the existence or extent of a civil right or obligation is by an independent and impartial tribunal. And that the attempt by the **GOK** to criminalize the said contract is an attempt by **GOK** to deny the Petitioners the right of hearing and determination of the existence or extent of a civil right or obligation by an independent and impartial tribunal of the parties, while herein namely an arbitral tribunal.
6. For the above reasons this Court has been invited to quash the **PWC** contract and all actions already taken pursuant therefore as the Supreme Court of Uganda did in the case of **BANK OF UGANDA v BANCO ARABE ESPANOL [2002] E.A. 333**.

### FINDINGS

As I have held before, our Constitution does assume the existence of other laws.

In this respect s 10 of the Arbitration Act states:-

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

As held by this Court in the case of **NEDERMAR TECHNOLOGY B v THE KENYA ANTI CORRUPTION COMMISSION AND THE ATTORNEY GENERAL Petition 390 of 2006 page 28** this is not a matter for this Court in that the Arbitral Tribunal of the choice of the parties to the Agreement is competent to apply the applicable laws of the Agreement or the law governing the contract. This in turn, means the law regulating the substance of the Agreement. This includes interpretation and validity of the contract, the rights and obligations of the parties, the performance and the consequences of the breaches of the Agreement.

I rule that section 10 upholds the autonomy of the parties and it is a respected international arbitration principle.

Under the principle of separability an arbitral tribunal is entitled to rule on its jurisdiction. This principle is enshrined in s 17 of the Arbitration Act of Kenya. Thus the Arbitral tribunal when appointed would be entitled to rule on fraud, corruption, bribery among other matters. This role of the arbitral tribunal is in line with the definition of Arbitration in section 3 of the Arbitrate Act 1995. Arbitrable matters could be contractual and/or other matters of any defined legal relationship.

The duty of the Courts including this one is to uphold the party autonomy and refer all arbitrable issues for determination by an Arbitral Tribunal. I did this severally in my tour of the Commercial Division of the High Court. However there is a twist to this matter that takes it out of the ordinary in that the matter before me has been brought under the Constitutional provisions. Basically what the Petitioners are asking this Court to do is to preserve their right to have the arbitral tribunal rule on the dispute between the parties instead of allowing a third party, namely the **PWC** to deal with the matter e.g. to what extent is there performance by either party or breach of the Agreement. They argue that this falls entirely within the mandate of an Arbitral tribunal and its judgment ought not be coloured by a third party (**PWC**). In other words the Petitioners contention is that the intended inquiry by **PWC** is intended to undermine the arbitral process and in order to uphold the party autonomy one party namely the **GOK**, should to be restrained from taking a unilateral action aimed at undermining the arbitral process.

In my judgment the invocation of the Constitutional provisions and jurisdiction of this court does not infringe s 10, in that, Petitioners who are foreigners have limited scope or avenues of seeking interim relief pending the determination of the actual dispute by an arbitral tribunal of choice.

My findings concerning the alleged constitutional violation is that no proof has been offered in support of any violations under s 77(4) of the Constitution since the Attorney General's opinion did not exclude public law from the Agreement (unlike in the **NEDMERMER CASE**) where he had specifically done so. Any alleged crimes prior to the commencement of **ACECA** could still be dealt with under the Prevention of Corruption Act as per the **AKOTH** case cited by the 1<sup>st</sup> Respondent.

Under s 70(a) I find that the Petitioners are entitled to protection of law and since delivery of the equipment to Mombasa by the Respondent has not been denied and the property in the goods still vests in the Petitioners as per the Contract, the Respondents deprivation of property is threatened as per s 70(c). Similarly s 75 deals with property of any description and I therefore find that in the circumstances a deprivation is threatened because, the **GOK** has yet to address the issue of compensation. Section 77(9) provides for an impartial and independent tribunal to adjudicate on civil right or obligations - this means a court of law or tribunal, whereas Contracting Parties herein have provided for arbitration by an independent and impartial arbitral body. By upholding the principle of party autonomy and referring the dispute to an arbitrator there cannot in my view, be any violation of section 77(9) of the Constitution. Moreover it is not known in advance what the findings of **PWC** would be and their legal impact on the Contract between the two Constructing Parties.

However as regards s 70 I find that the Petitioners are entitled to move a Constitutional Court to provide interim relief to preserve their rights under the agreement, until the dispute is determined by an arbitral tribunal the section provides no person shall be deprived of his property without compensation. The petitioner's fear is that their rights under the contract would be interfered with by the PWC contract. I find that the Petitioners have demonstrated that this could happen because they genuinely apprehend a deprivation based on the PWC contract and its terms of reference which include commission of crimes etc. Section 70 guarantees the Petitioners equal protection of law and this Court has powers under s 84 to give such orders as necessary and this would include preservation orders pending the determination of the matter by an arbitral tribunal of the parties' choice. In addition to this court's powers and jurisdiction under s 84 of the Constitution, section 7(1) of the Arbitration Act provides:

**“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”**

In terms of Arbitration law this court regards the Petition as a proceeding, seeking the relief described in s 7(1) of the Arbitration Act and the petitioners cannot be said to have waived their right to take the matter to arbitration under s 6 of the Act.

## **ILLEGALITY**

Both Respondents have argued that they are at liberty to enter into a contract with any other third

person concerning the carrying out of criminal investigations and whether or not internal procurement procedures were followed and also make inquiries on performance.

Concerning the issue of whether the necessary procurement laws or procedures were followed the petitioners have argued that the Attorney General's opinion did address this and the **GOK** cannot reopen this.

They have also argued that the Ministry of Finance had no power under the law to enter into the **PWC** contract because its function or mandate in law is not to carry out investigations and that this mandate has been specifically vested by Parliament in the Anti Corruption Commission, who are not parties to the **PWC** Contract and cannot properly delegate the mandate for which it exists as per the **ACECA** Act.

On the issue of procurement procedures and whether or not they were followed, this is a matter squarely on the shoulders of an Arbitral tribunal when appointed. In addition one of the points for determination both by the Arbitral Tribunal and this Court is whether on grounds of public policy and public morality the **GOK** should be allowed to resile from the advice given by the Attorney General. The Court is sufficiently persuaded by the holding on an almost similar point by the Supreme Court of Uganda in the case of **BANK OF UGANDA v BANCO ARABE ESPANOL [2007] EA 333** where Mr justice Kenyahaba observed:-

**“In my view the opinion of the Attorney General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature or any agreement contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents. Unless there are other agreed conditions, 3<sup>rd</sup> parties are entitled to believe and act on that opinion without further inquiries or verifications. It is improper and untenable for the government, the Bank of Uganda or any other public institution or body in which the government of Uganda has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interest of 3<sup>rd</sup> parties.”**

I could not agree more with the above holding because, this Court, in the **R v ATTORNEY GENERAL Ex-parte GEORGE SAITOTI** did walk the same path and held inter alia the Attorney General was bound by an opinion he and the Minister of Finance had in turn given, absolving Hon Saitoti and which opinion had been communicated to the IMF and who subsequently funded the Country on the strength of the Attorney General's opinion. The Court held that as a Country we must have and maintain an acceptable measure or standard of public morality. Consequently, Court held the Attorney General to his bargain, both on the ground of public morality and on the principle of good faith (pacta sunt servanda.)

Turning to the Ministry of Finance's role in the PWC contract, on grounds of public interest considerations which include adherence to the law by all public bodies including the **GOK** the PWC contract is tainted with illegality in that the Ministry is not empowered in law to enter into such a contract whereas under the Anti Corruption and Economic Crimes Act (**ACECA**) it is the Anti Corruption Commission which has the power. What the Ministry intends to do is outside the Act or contravenes the provisions and therefore ultra vires the Act. Thus the preamble to the (**ACECA**) which came into force in 2003 reads:-

**“ An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith.”**

Section 13 of the **ACECA** sets out the functions of the Commission as follows:

**13(1) The Commission shall have the following functions -**

**(a) to investigate any matter that, in the commission's opinion, raises suspicion that any of the following have occurred or are about to occur -**

**(i) conduct constituting corruption or economic crime;**

- (ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;
- (b) to investigate the conduct of any person that, in the opinion of the commission, is conducive to corruption or economic crime;
- (c) to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime;
- (d) at the request of any person, to advise and assist the person on ways in which the person may eliminate corrupt practices;
- (e) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures that, in the opinion of the Commission, may be conducive to corrupt practices;
- (f) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such bodies that the commission thinks necessary to reduce the likelihood of the occurrence of corrupt practices;
- (g) to educate the public on the dangers of corruption and economic crime and to enlist and foster public support in combating corruption and economic crime;
- (h) to investigate the extent of liability for the loss of or damage to any public property and  
-.....
  - i. to institute civil proceedings against any person for the recovery of such property or for compensation; and
  - ii. to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya; and
  - iii. to carry out any other functions conferred on the Commission by or under this Act or any other law.

(2) A matter may be investigated by the Commission under subsection (1) at the request of the National Assembly, the Minister or the Attorney-General, or on receipt of a complaint, or on its own initiative.

(3) The Commission may refer any offence that comes to its notice in the course of an investigation under subsection (1) to any other appropriate person or body.

Counsel for the Second Respondent submitted that there is nothing wrong with the Ministry entering into a contract with *PWC* but the view of the Court is that the Commission cannot delegate its core business to the Ministry of Finance who in turn contract it out to a private entity. It is a violation of the Commissions independence and mandate. It is parently clear that the Ministry’s initiative is outside the relevant Law and violates in particular S 13(2) of ACECA. Section 10 of *ACECA* reads:-

**“In the performance of their functions, the Commission and the Director shall not be subject to the direction or control of any other person or authority and shall be accountable only to Parliament.”**

An aggrieved party may therefore challenge the exercise of the Ministry’s powers in a situation where another body, namely the Commission is specifically empowered. Whether the Ministry in entering in the *PWC*, is exercising executive power or assumed power or statutory power, judicial orders would lie if the power is non existent or being improperly exercised - see Lord Diplocks observations in the case of

**COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR CIVIL SERVICE (1985) AC 37C.**

The Ministry has acted outside its powers as is clear from past decisions of this court, that public officers have only the power granted to them by law or statute. They cannot act outside the granted power.

The House of Lords in **BENNET v HORSE FERRY ROAD MAGISTRATE COURT** made the following holdings:-

(i) **“If the court is to have power to interfere with the prosecution, in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.**

(ii) **So also should it be in the field of criminal law and if it comes to the attention of the court this has been a serious abuse of power it should in my view, express its disapproval by refusing to act upon it.”**

The same point was made in one of the cases I have cited in at least four of my recent decisions on judicial review. This is the case of **R v SOMERSET (1995) QBD 513** where the holdings were as follows:-

**“But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake at every turn, all of its dealings constitute the fulfillment of duties which it owes to others indeed it exists for no other purpose.”**

Again on the same page the Court notes:-

**“But in every instance and no doubt many others whereas a public body asserts claims or defences in court, it does so, if it acts in good faith only to vindicate the better performance of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond the public responsibility, a responsibility which defines its purpose and justifies its existence, under our law that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.”**

On the facts the Commission cannot justify its existence in the face of the **PWC** contract and the Ministry of Finance’s initiative in the **PWC** contract, is patently ultra vires its powers and in particular the **ACECA**.

**ESTOPPEL**

Whereas the Attorney General or any other public authority cannot be estopped from performing their Constitutional or statutory duties, the Attorney General’s opinion was given in the context of an international commercial agreement, and the Court is of the view that the principle of estoppel would apply.

The other reason why the Attorney General cannot back out of the opinion he has given by turning a blind eye to the involvement of his client Ministry of Finance, entering into a contract (**PWC**) which purports to contradict his opinion, is that his opinion does constitute estoppel in favour of third parties including the Petitioners as held in both the **BANK OF UGANDA CASE AND THE SAITOTI CASE**. It is now accepted by many jurists and courts that waiver and estoppel are part of the general law which is in turn grounded on the foundation of public policy. Estoppel is a principle of good morals as well as of law. It works in many situations where aggrieved parties would leave courts without any remedy. Take the case of the Petitioners who have entered into an international agreement with an arbitral clause and who before entering into the Agreement knew nothing of the domestic requirements before they could enter into an international Agreement. The first thing they ever thought about was the Attorney general’s opinion to assure them on the essentials, before committing themselves. Having relied on the opinion it would be

contrary to good morals and also public policy for the Attorney General and the GOK to be allowed to disregard the opinion. The reason why the country must be held to its bargain was very well put by Swayne J in the case of *DANIELS v TEARNEY (1880) 102 US 415 AT PAGE 187* in these words:-

**“The principle of estoppel thus applied has its foundations in a wise and salutary policy. It is a means of repose. It promotes fair dealing ... and it often gives triumph to right and justice where nothing else known to our jurisprudence can by its operation, secure those ends. Like the statute of Limitations it is a conservator, and without it society could not well go on.”**

I hold the view that the doctrine of estoppel is recognised by our Constitution because justice is one of the principal objectives of our Constitution. The doctrine of estoppel is also based on public policy which in turn broadly means the requirements of justice, good faith and fairness. I find that even from this standpoint, I should grant interim relief which directly stems from the Constitution. A democratic country is a country that respects fundamental rights and it is implied pursuant to S 1A and s 84 of the Constitution that the courts should under these provisions reject any action or conduct which derogates from the recognised principles of justice, good faith and fairness.

It is the tentative view of the court, that the Attorney General’s written opinion does give rise to estoppel against him in trying to back out of his opinion concerning the Agreement by now purporting to support a PWC contract which contradicts his written opinion. It would be a mockery of justice to allow the Attorney General to do so, just as it would similarly be an affront to the administration of justice in the country to allow the Anti Corruption Commission to tolerate what prima facie appears to be a shameless usurpation of its core business by the Ministry of Finance to conduct investigations under s 13 of the *ACECA*. The Attorney General is estopped from taking any other position except the position expressed in the written opinion reproduced elsewhere in this judgment. The Court is aware that the Attorney General could himself direct that investigations be carried out pursuant to his power under section 26 of the Constitution but his hands are clearly tied to the extent of his Opinion and the estoppel and waiver is limited to what is covered by his opinion. He could have been aware of this hence his endeavour to ride on the wings of the Ministry!

It is now generally accepted that estoppel is part of the general law on grounds of public policy. Estoppel is also founded upon reason and justice and it further constitutes a principle of good morals as well as of the law.

This Court is of the view that not even s 26 of the Constitution can assist the Attorney General in disregarding his opinion given to a party to a contract entered into by *GOK*. Estoppel is a principle of justice and it is the responsibility of the courts under the Constitution to secure justice in the exercise of judicial power vested in the court by the Constitution. The demands of reason and justice demands that he be estopped from backing out.

Again in the English case of *CANADIAN AND DOMINION SUGAR CO LTD v CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD (1947) ACR 46 (PC)* the Council made the following observations concerning estoppel and waiver:-

**...“But in modern times the laws of estoppel and waiver has developed and has become recognised as a beneficial branch of law. That great lawyer Sir Fredrick Pollock has described the doctrine of estoppel as a simple and wholly un-technical conception, perhaps the most powerful and flexible instrument to be found in any system of Court jurisprudence. Estoppel is often described as a rule of evidence as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law.”**

The Attorney General’s opinion clearly evinces an intention to affect the rights of the Contracting Parties to the Agreement. He has clearly waived *GOK’s* right to take a different position from that of his opinion. He is also caught by the sister doctrine of waiver because waiver proceeds on the premise that a man not under legal disability is the best judge of his own interest and if, with knowledge of a right or privilege conferred on him by statute, contract or otherwise, for his benefit, he intentionally gives up the

right or privilege or chooses not to exercise the right or privilege to its full extent he has a right to do so. It matters not that he was exercising his constitutional power to advise **GOK** as both estoppel and waiver are principles recognised by the Constitution as well, and both principles were invented to prevent injustice and unfairness which in turn are matters central to the Constitution itself.

I therefore find and hold that the 1<sup>st</sup> Respondent should not be allowed even on an interim basis to condone an illegality or back out of his opinion. Similarly the Commission has a statutory duty to undertake the work described under the **PWC** contract, subject to the estoppel and waiver incurred by the Attorney General as expressed above.

While accepting that **GOK** is not prevented under this particular contract to deal decisively with any criminal aspects of the Agreement (since public law was not specifically excluded) I hold that **GOK** is estopped to the extent expressed in the Attorney General's Opinion.

On a slightly wider plane both Respondents are in the eyes of all, supposed to be champions of the rule of law and the citadels of law. Thus the second respondent cannot reasonably be expected to contract out its statutory mandate to the Ministry of Finance under the label of a **PWC** contract. The second respondent exists for no other purpose except what is expressed in s 13 of the **ACECA** and that mandate clearly encompasses the terms of reference set out in the **PWC** contract. The second respondent's manifestation of its independence as set out above is to undertake its sole mandate under the Act and not to sit and cheer others usurp its power. It is unthinkable that the Commission would countenance or endorse such a move which goes to the substratum of its very existence. Similarly the Attorney General is the constitutional chief legal advisor to the **GOK** and the Ministry of Finance is one of his clients for the purpose of advice. Granted that the Commission did not have the capacity to undertake the work envisaged in the **PWC** contract, surely the legal position is that it is only the Commission and not the Ministry which had the implied power to perhaps enter into such a contract with a third party, although even this is doubtful in the face of **ACECA's** clear provisions. Again as the Attorney General is one of the principal custodians of the public interest, where does this public interest lie? In my view it lies:

(a) in mounting a strong defence of **GOK's** claims in any arbitral tribunal or a claim in an English Court.

(b) in the event that there is evidence of corruption, bribery or economic crime it is unlikely that such sins were one sided, and any international arbitrator is unlikely to make an award which will please any of the parties. In a situation such as this, where the contract is substantially unperformed by the **GOK**, and the other Contracting Party the greatest public interest is strongly defending the **GOK** in the arbitral tribunal. As held in the **NEDERMAR** case the tribunal has jurisdiction to deal with issues of corruption, bribery and fraud as one of the tribunals did in the **NASSIR** case involving Kenya. A unilateral **GOK** measure, such as the **PWC** contract, does undermine the principle of party autonomy since this is being done by **GOK** after the event and the **PWC** contract encroaches on the preserve of the Arbitral body. Since it is not denied anywhere that the contract was not entered into on behalf of **GOK**, the **PWC** contract is suicidal in that neither this Court, the English Courts nor any Arbitral tribunal would enforce a contract tainted with crime, corruption, or fraud and the loss if any would lie where it fell in the first place, as regards the Contracting parties. By purporting to criminalize the contract as opposed to what was contemplated by the parties namely an International Commercial contract, Attorney General would in my judgment be acting against the public interest or the wider interest of **GOK** in securing its best interest in the circumstances. Recovering the amount due or receiving good value for any services represents a greater public interest than the apparent public sideshows of invoking criminal law strategies. The **GOK** is certainly not approaching the matter with all its cards face upwards. Both this Court and the Arbitral Tribunal would demand this attitude from both parties before thinking of enforcing the contract. Both bodies are obligated to act in accordance with international public policy. All in all the interests of both parties will be better served by invoking the arbitration clause. In view of the apparent dilemma of both parties they could if so advised opt for mediation as the best option.

It is not correct to state that because the Attorney General has not given indications that he intends to prosecute on the strength of the intended report, the Petitioners do not genuinely apprehend that he might

be so inclined. They would be entitled to move the Court as they did to stop any contemplated infringement of their constitutional rights. In this regard what is of great concern to the Court is that the involvement by the Ministry in a matter that falls squarely in the preserve of the Commission and the Attorney General and the outcome could in a big way encroach on the Attorney General's independence as expressed under s 26 of the Constitution.

Turning to the second respondent after carrying out investigations it files a report with the Attorney General with its recommendations to the Attorney General, who in turn exercises his discretion whether or not to prosecute. The two respondents are twin brothers. It follows therefore if the Attorney General is barred, the second respondent must share the same fate. In the circumstances of this case the 1<sup>st</sup> Respondent has taken a stand in the form of a written opinion. It is unlikely that any recommendations from the 2<sup>nd</sup> Respondent touching on the matters covered by the opinion, would be acted on, where the 1<sup>st</sup> Respondent is barred. It cannot therefore be reasonably argued that it was improper for the Petitioners to have joined the respondents in the proceedings. Moreover as stated elsewhere the public interest demands that the second respondent stops ceding its mandate to a third party. The rule of law demands the same of the first Respondent.

A Court of law should never act in vain. For any order pursuant to section 84 of the Constitution to be effective they must bind both respondents and the Court is specifically empowered to issue orders tailored to any situation at hand. Any restraining orders must therefore of necessity bind both respondents.

Granted that both Respondents have the powers to investigate crime, it is quite evident that, they stand on very shaky moral ground due to the involvement of the Ministry for Finance, which was also a signatory to both the Contract and **PWC** contract. Thus, the first payment by **GOK** was made on 29<sup>th</sup> May 2003 the same date that the Contract under investigation was signed and a payment appears to have been made before the ink on the signature had dried up! In other words it is the story of the pot calling the kettle black. It is difficult to delink the **PWC** contract with the obvious suicidal tendency by **GOK** in commissioning it. In the circumstances **GOK** has no right to throw the first stone but it could if so advised either go for arbitration or agree to mediate with the other Contracting Party because both parties appear in the eyes of the law, to share a common moral ground or platform. The international public policy principle hovers over the heads of both Contracting Parties and turns like the Cherubin in the garden of Eden!

### **EFFECT OF THE PRINCIPLE OF SEPARABILITY**

This means that the arbitration clause is regarded as constituting a separate and autonomous contract. It means that the validity of the arbitration clause does not depend on the validity of the contract as a whole. By surviving termination of the main contract, the clause constitutes the necessary agreement by the parties, that any disputes between them should be referred to arbitration.

It is therefore quite evident to the Court, that for example the **PWC** contract task of checking on performance of the parties is a matter for the arbitral tribunal under the English law. Again whether the Agreements are illegal due to corruption bribery or fraud it is for the arbitral tribunal to rule on this because the invalidity of the main contract or the arbitration agreement itself, is a matter within its competence and jurisdiction. Moreover since it is accepted that the governing law is the English law, the main contract may be illegal under the Kenya law but valid under the applicable law. All those points have to be determined by the arbitral tribunal.

On the other hand an arbitral tribunal cannot bind third parties and therefore the arbitral tribunal cannot be expected to rule on the validity of the **PWC** contract since **PWC** is not a party to the arbitration agreement. Seen from the above standpoint the **PWC** contract does undermine the principle of separability whereby parties have agreed in advance to have all their disputes determined by arbitration.

### **ARBITRABILITY**

Arbitrability involves determining which types of dispute may be resolved by arbitration and which

belong exclusively to the domain of the courts. National laws establish the domain of arbitration. And in this case it is the English law which will determine what is arbitrable. Arbitrability is a matter of public policy for each state. In other words whether or not a particular type of dispute is arbitrable under a given law is in essence a matter of public policy for that law to determine. And public policy varies from one state to the next.

Again applying this principle, it becomes necessary for all disputes to be referred to arbitration for the arbitral tribunal to determine what is arbitrable under the relevant law or laws.

### **SUMMARY ON EFFECT OF THE PRINCIPLE OF SEPARABILITY**

*In Law, Applicable Law in International Commercial Arbitration (1978)* at page 554, gives the following opinion concerning the effect of bribery and corruption:

**“It cannot be contested that there exists a general principle of law recognised by civilized nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and they cannot be sanctioned by courts or arbitrators.”**

However, the current international practice based on the principle of separability is that an allegation of illegality does not in itself deprive the arbitral tribunal of jurisdiction. The tribunal is entitled to hear the arguments and receive evidence and to determine for itself the question of illegality. In a Switzerland arbitration involving a consultancy agreement, which was itself an agreement to pay a bribe, it was held that the agreement would survive under the principle of separability. In Kenya, s 17 of the Arbitration Act 1995 provides for this principle of separability. If an agreement is tainted by corruption and this is proved before an arbitral tribunal the agreement would be both illegal and unenforceable. Whereas the arbitral tribunal may not be able to deal with the **PWC** contract for the reasons stated, this court is in a position to do so for several reasons:-

- (i) It is patently illegal as being ultra vires s 13 of the Anti Corruption and Economic Crimes Act (**ACECA**)
- (ii) the Attorney General opinion on the validity of the main contract and consequently the estoppel against **GOK** in interfering with the main contract under the guise of the PWC contract
- (iii) The parties law of choice to govern the contract is English law. In relation to **PWC** contract the Ministry has assumed that it is the Kenya Law to apply. The Ministry has not correctly addressed itself on the law applicable to the contract. Again this is an infringement of the principle of party autonomy and the aggrieved party would be entitled to interim measures of relief pending the appointment of an arbitral tribunal.
- (iv) As indicated elsewhere if the contract has infringed international public policy e.g. by being an illegal contract, its validity, and its performance etc are all issues for the arbitral tribunals determination but this Court is also entitled to enter into this matter because under the conflict of law principles it has a responsibility to enforce international public policy.
- (v) The Commission’s Counsel quite happily submitted that the Commission supports the Ministry of Finance initiated **PWC** contract but unfortunately the court takes a different view for the reasons that:-

a statutory body cannot delegate its functions and powers unless authorized by the Act creating it. The fact that one provision allows the Commission to work with other bodies as partners does not mean or empower it to contract out its core business to those other bodies. The Commission is not a party to the PWC contract. It is incredible that the Commission does not see anything wrong with the **PWC** contract but its blindness baffles the court in that if the roles were to be reversed and the Ministry given the Commission’s work by contract could the situation be different in terms of the validity of such a move? Under this particular contract unlike **NEDERMAR**, public law has not been contractually excluded and the Commission has stated that it has itself carried out investigations concerning the matter. Why it is not

keen to furnish such evidence to a future arbitral tribunal? Why is it necessary to involve a private organization in subcontracting the core business of the Commission, without the Commission at the steering wheel.

As held elsewhere in this judgment both respondents have many battles to fight in Europe in the arbitral tribunals over various contracts and whether or not the best interest of the nation will be served and secured, will depend on what defences or claims are formulated and supported by adequate proof. There is for instance no guarantee that it is the nation that will be successful in each claim. Taking the example, of this particular contract, if there is proof of fraud, bribery or corruption the PWC contract becomes a double edged sword because international public policy, which the arbitral tribunal must uphold demands that the contract becomes unenforceable - and the damage must remain where it fell in the first place as regards the parties to the arbitral process. Thus, the big public show by Respondents of appearing to chase the criminality aspect of an otherwise complicated international commercial agreements might not necessarily secure or serve the greatest public interest which in many cases will be recovery of the unpaid billions or being given full value of the promised services by the other Contracting Parties. Perhaps even mediation could be a viable option. The Court would like to believe that the Commission would want to again occupy the central seat in implementing its mandate. I find that it has no authority or power to delegate its statutory mandate to the Ministry.

### **PRINCIPLE OF PARTY AUTONOMY**

Party autonomy means the arbitral procedure including the constitution of the arbitral tribunal shall be governed by the will of the parties. The only restriction to this principle is that parties may however not confer powers upon an arbitral tribunal that would cause the arbitration to be conducted in a manner contrary to the mandatory rules or public policy of the state in which the arbitration is held.

Since the parties did not provide for the place or seat of arbitration, the arbitral tribunal when appointed may have to deal with this and if Kenya is not chosen the chances of Kenya law applying would be nonexistent, hence the futility of the PWC contract which is predicated on Kenya Laws as the yardstick of whether or not the relevant rules and procedures were followed.

### **JURISDICTION**

It has been contended that the Court has no jurisdiction because the two Petitioners have no physical presence in Kenya being foreign companies. The answer to this in my view is that whereas some Chapter 5 fundamental rights and freedoms only apply to citizens, there are some that apply to all persons. For example section 70 and s 75 rights on property are not restricted to citizens. In addition it has not been denied that some equipment belonging to the Petitioners have been shipped to Mombasa. This invites this Court's jurisdiction because the equipment constitutes "things" within the Court's jurisdiction.

Professor Dicey in his introduction to his treatise on the Conflict of Laws, 5<sup>th</sup> ed, at p 20 says:-

**“A States authority in the eyes of other States and the Courts that represent them is speaking very generally, coincident with, and limited by its power. It is territorial. It may legislate for, and give judgments affecting things and persons within it's territory. It has no authority to legislate for, or adjudicated upon, things or persons (unless there are its subjects) not within its territory.”**

Thus in the *R v ATTORNEY GENERAL & ANOR ex-parte KAMANI Petition No. 199 of 2007* where the same point on jurisdiction arose, the constitutional court held that it had jurisdiction by virtue of almost similar provisions of the Constitution and secondly because the Kamani's were subjects of the Kenyan State although at that time non residents.

The third reason why this Court has jurisdiction is that of public policy, in the context of conflict laws, where the general rule is that all higher courts have an **“inherent jurisdiction”** or **residual discretion”** to apply the public policies of their state to clarify or more properly interpret the letter of their domestic laws and procedural rules.

## **ARBITRATION TRANSCENDS BOUNDARIES**

This Court has given several reasons why it must hold that it has jurisdiction to entertain this Petition but it is important to observe that in the recent past there are few subjects or topics which rival arbitration in terms of uniting nations or breaking the borders or boundaries more than arbitration. In my judgment, domestic courts are required to invariably assume jurisdiction in order to support the arbitral process. Thus in the case of Kenya, a court has a supportive role in giving interim relief under section 7 of the Arbitration Act which is modeled on the **UNICITRAL MODEL LAW**, even before the commencement of the arbitral process (as I have done in this case). It will be recalled that even at this stage the arbitral tribunal has not been appointed nor has the seat of arbitration been set, yet the court is statutorily mandated to intervene.

Similarly Section 6 of the Arbitration Act gives yet another supportive role to the court to give an order of stay where one of the contracting parties goes to court contrary to the provisions of an Arbitration Agreement. The ability of the court to enter into the matter and give interim relief is again not pegged on its competence to determine or rule on the applicable law or the Lex arbitri.

Finally under s 10 of the Arbitration Act which is based on the principle of party autonomy the court is prohibited from accepting arbitral matters where there are valid arbitration clauses. Again the court is required to assume jurisdiction even on a temporary basis in order to rule on the limits of its jurisdiction and play a supportive role. No other body can undertake this important function except the Court. This Court is for the purposes of giving relief under s 7 supposed to apply the Lex Arbitri as defined elsewhere in this judgment and this too does confer on the Court jurisdiction. In addition the Court has inherent power to determine whether under the policy of this country the subject matters is arbitrable. In this regard issues of estoppel and waiver under the constitution fall well within this Court's jurisdiction. This puts the issue of this Court's jurisdiction beyond any shadow of doubt.

## **FORCE MAJEURE**

It has been argued that clause 23.1 on force majeure gives the GOK the power or right to ascertain whether the necessary authorizations, sanctions approvals or procedures including procurement requirements were pursued in the context of the contract (in short compliance with regulations or other governmental rules).

On this the Court's finding is that whereas the clause would apply as regards frustrations allied to weather or acts of God, as regards the other events such as those outlined herein the Attorney General's opinion did take care of them in that he represented to the Petitioners that the necessary domestic procedures had been undertaken prior to the signing of the contract. The second hurdle is that now that the parties accept there is an arbitrable dispute issues of performance, value of the contract etc fall within the jurisdiction of the arbitrator. If the Commission which has the statutory, mandate to undertake inquiries on corruption and economic crimes has done inquiries, there is nothing to prevent their evidence if useful to **GOK's** case being presented to the arbitral tribunal.

The contract states that Force Majeure shall mean any circumstances beyond the control of the contracting party claiming Force Majeure. Such circumstances include but not limited to,

Acts of God,

Strikes,

Lockouts,

Fires,

Riots,

Epidemic,

Adverse weather,

Civil commotion or unrest,

Embargoes,

Interference by civil or military authorities,

Compliance with regulations or other Government rules, and

Acts of war (whether declared or undeclared)

I find and rule that the entering into the PWC contract by the Government cannot constitute force majeure firstly, because the wider issue of who has or has not performed the contract is a matter for the arbitral tribunal and secondly, because the Attorney General's own opinion exhibited as KM 2 in the affidavit of **Kyalo Mbobu** did address inter alia the issue of compliance with the domestic rules as per Clause 5 which states:-

**“In my opinion - therefore:-**

**(a) The buyer has the power to enter into this Agreement and has taken all necessary actions which are required for the execution, delivery and performance of the AGREEMENT.**

**(b) The Buyer has duly obtained all approval consents and authorizations and has duly effected any other declarations filings or registration with any Government authority or agency which are required or appropriate in connection with the execution delivery and performance within the Republic of Kenya.”**

**9 “As at the date of this opinion all the statutory provisions quoted herein are in force and effect as part of the Laws of Kenya.”**

In the light of this, I find that the **GOK** cannot invoke the force majeure clause to justify the PWC contract because the **PWC** contract prima facie goes both against the letter and the spirit of the Attorney General's opinion. And thirdly because the force majeure relied on is duly covered by the representations made in the Attorney General's opinion.

Perhaps it is important for the court to restate what is expressed elsewhere in the judgment that neither this Court nor any competent Arbitral body would uphold the Agreement or Contract herein in the event of proof it is tainted with corruption, fraud or economic crimes because the Agreement would have violated international public policy. But this is not substantively before this Court or the Tribunal at the moment. It is therefore incumbent upon the Respondents to demonstrate and prove the tainting before the Arbitral tribunal or any competent Court including the English Courts (as per the Contract).

By upholding party autonomy the Court should not be viewed as supporting a tainted contract because this is a matter for proof at the proper forum of the resolution of the dispute.

It is not proper for the **GOK** through the Attorney General to now back out of a written opinion concerning compliance given by that high office. This Court cannot allow the Attorney General to violate the principle of public morality which gives authority and weight to his opinion in the eyes of the other Contracting Party. Public morality includes the ideals or general moral beliefs of a society. Every society must have a moral foundation which the courts cannot ignore. In this regard the Court accepts as good law that it cannot look the other way in the face of such a threat from the high office of the Attorney General. Thus Lord Simmonds in the English case of **DIRECTOR OF PUBLIC PROSECUTIONS (1962) AC.220** observed as under:-

**“There remains in the courts of Law a residual power to enforce the supreme and fundamental purpose of Law, to conserve not only the safety and order but also the moral welfare of the State; and that the kings bench was the customs morum of the people and had the superintendence of offences contra-bono mores”**

In the same case Lord Hodson, had this to say

**“I am wholly satisfied that there is a common law misdemeanour of conspiracy to corrupt public morals. The judicial precedents which have been cited show conclusively to my mind that the courts have never abandoned their function as custodies morum by surrendering to the legislature the right and duty to apply established principles to new combinations of circumstance ... one may take an example, the case of negligence where the standard of care of the reasonable man is regarded as fit to be determined by the jury. In the field of Public morals it will thus be the morality of the man in the jury box that will determine that fate of the accused but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law.”**

In the circumstances of this case it is difficult for the Court to understand the position taken by the Attorney General concerning the *PWC* contract, even with his written opinion in view. The *PWC* contract points to the opposite direction and he should have been the first person to point out the contradiction. The court detects here, some standard behaviour which is not been maintained whether one calls it public morality or principles of good faith in discharging public duties, since the effect on the ground is the same - an attempt to wriggle out of clear specific contractual obligations by the *GOK*. The society at large expects a certain moral standard from all constitutional job holders as held in the *SAITOTI CASE* where the Attorney General also tried to disregard a written commitment by this office and the court declined to allow it. While the court accepts that not all moral standards can be enforced by law, when a constitutional job holder takes a position that leaves bad taste in the mouth of a reasonable onlooker walking along River Road in Nairobi, then the court should restrain such a constitutional job holder. I am not oblivious to Professor Hart’s version of morals and the law but in the circumstances of this matter his version has no relevance. This court has great sympathy for Lord Devlin’s powerful argument that in any society there exists a public morality which is an essential part of the bond which keeps the society together and the law cannot afford to ignore such a bond. History has taught us that Empires and Civilizations have in the past collapsed following the decay of the moral fibre. There has not been any exception known to history.

By backing out of his opinion and literally encouraging the client Ministry of Finance to act contrary to a previously given opinion, if the matter came to Court it would present the Court with a situation where findings of abuse of power and oppression would be irresistible. The Court would in such situations have inherent power to stop the abuse and oppression.

### **APPLICABLE LAW AND ITS IMPLICATIONS**

As I observed in the case of *NEDERMAR TECHNOLOGY B.V. LTD v THE ANTI-CORRUPTION COMMISSION AND THE ATTORNEY GENERAL P390/06*, pursuant to the now internationally accepted principle of party autonomy the parties may choose for themselves the law applicable to the dispute. This principle is however subject to the qualifications of bona fides, legality and of no public policy objection.

The choice of law as the English law, does on a prima facie basis defeat the 1<sup>st</sup> Respondent’s argument concerning the *PWC* contract on the basis of the force majeure clause in that Kenya law does not govern the Agreement between the two contracting parties namely the *GOK* and the petitioners. Stated simply the applicable law means the law governing the substance of the Agreement which in this case is the English law. The terms of the Contract therefore require the third party in the *PWC* contract, to ascertain if it has been breached. This cannot be a lawful function of *PWC* contract. As the law governing the contract is the English law the practical effect of this, in law is that the applicable law includes:

(a) interpretation and validity of the contract

- (b) the rights and obligations of the parties
- (c) the performance and
- (d) the consequences of the breach of the contract

### **THE LEX ARBITRI - LAW GOVERNING THE ARBITRATION**

In contrast to the applicable law of the contract, the *lex arbitri* or the governing law of the arbitration is ordinarily the law of the seat of arbitration. It consists of procedural law that supports the arbitral process. In the case before me the parties have not chosen the seat or venue of arbitration. If they choose Kenya, the governing law of the arbitration shall be Kenya. Steyn J in the English case of *SMITH LTD v H & S INTERNATIONAL 1991 2 LLOYDS Rep 127 at 130* defined it as follows:-

**“What then is the law governing the arbitration. It is as the present authors radiantly explain a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the Arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. court orders for the preservation or storage of goods), the rules empowering the exercise by the court of supportive measures to assist an arbitration which has run into difficulties (e.g. filing of vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rule providing for the exercise by the court of its supervisory jurisdiction (e.g. removing an arbitrator for misconduct).”**

In other words the *lex arbitri* extends to inter alia:

- (i) whether a dispute is capable of being referred to arbitration that is to say whether it is arbitrable under the local law of the seat of arbitration.
- (ii) Interim measures of protection.

From the above and on a prima facie basis, it is clear to the Court that the **GOK** in purporting to enter into the **PWC** contract does not appear to have properly addressed itself on the relevant law and the **PWC** contract apart from being illegal, it does in some substantial way encroach on the principle of party autonomy.

In the context of Kenya, section 7 of the Arbitration Act allows the courts to play a supportive role to the arbitral process both before arbitration and after the commencement of arbitration and to give interim measures and this court has practically relied on this section together with s 6, and 10 of the Arbitration Act and the Kenya Constitution for its intervention. Under s 7 of the Arbitration Act 1995 a party can move the court either before the commencement of arbitration or in the course of an arbitration to give interim measures aimed at preserving the subject matter of Arbitration. I find that on the facts as outlined, the **PWC** contract is a serious encroachment of the contractual rights of the contracting parties and under the provisions of section 7 the court is entitled to give any necessary interim relief, pending a ruling on merit by the Arbitral tribunal when appointed. Such relief could take the shape of an injunction, a preservation order, a freezing order or any other suitable order.

### **SECTION 13 OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT (ACECA)**

My finding on this is that even on the clear wording of the section the Commission has no powers whatsoever to delegate its core mandate to both the Ministry, or a private entity. The section does imply that the Commission would have forensic expertise in its establishment or if it does not have it can use suitable means to acquire it without losing control of its mandate. The Ministry has no power to enter into this type of contract.

The section only allows the Commission to cooperate with regional and international bodies. It is not therefore convincing to this Court for the Commission to pretend to be happy with the **PWC** contract.

The Commission has clearly not addressed the correct law on its mandate. The Act does not allow it to be a cheering onlooker or a bystander after ceding its power to the Ministry. The section demands that it takes a firm grip of the steering wheel, in all matters relating to corruption and economic crimes. Any attempt to allow an unlawful or illegal delegation calls for the judicial order of certiorari directed at the offending contract so that the Commission is in turn put in a position to take charge in accordance with the law. It is a breach of the rule of law and an affront to the public interest to delegate or cede power where this is not permitted by law.

The argument that the Court cannot intervene because the second party in the contract has not been joined is unconvincing firstly because the Constitution regulates the affairs of the state and its subjects and as regards claims based on breach or alleged breach of fundamental rights and freedoms, it is the State which is the guarantors of those rights. The state cannot therefore take cover behind the non joinder of a second party, if the contract is perpetrating an illegality or the entering into it, is a threat to deprivation of property rights as held above. Public interest and public policy considerations proceed on the assumption that the State and its organs will adhere to the law binding on it. It cannot be right for the Ministry of Finance to ignore the existence of ACECA and the mandate of the Commission under the law. This is a violation of public policy and public interest. On the facts the PWC contract borders on a possible breach of contract and a clear violation of s 13 of **ACECA** and intervention under s 7 of the Arbitration Act is necessary in order to support the arbitral process and also assert the rule of law.

## **CONCLUSION**

In view of my holdings concerning the role of the arbitral tribunal when appointed, this court has deliberately avoided to make any binding holdings on issues that ought to go to the arbitral tribunal. Thus, the Court has chosen to play only a supportive role to the arbitral process as is the requirement under the Model Law and under the Arbitration Act of Kenya 1995, which is in pari materia with the Model Law. For the same reason, I have avoided granting some of the orders and declarations sought by the Petitioners and I have in the result, granted only three orders. The additional reason for taking this option is, that, this judgment is premised on the realization that without invoking the Constitution and the inherent jurisdiction as stated above, the Petitioners who are foreigners, would otherwise remain unprotected by any other law and they would not be able to seek any effective interim relief or measures.

I therefore invoke the provisions of s 84 of the Constitution and in the face of the threatened violations, arising from s 70 and s 75 of the constitution and also in view of my findings on the illegality of **PWC** contract as per s 13 of **ACECA** and also by virtue of to s 7 of the Arbitration Act hereby forthwith order the removal into this Court the **PWC** contract dated 17<sup>th</sup> January 2007 and same is hereby forthwith quashed by an order of certiorari to the extent it refers to this particular Agreement only. An order of prohibition shall also forthwith issue against both Respondents in terms of prayers (a) and (b). In addition, a prohibition order must forthwith issue against the 1<sup>st</sup> Respondent to prevent him from instituting any proceedings touching on the matters set out in his written opinion. The other reliefs and declarations are refused.

Costs to abide the outcome of the Arbitral proceedings, failing which the parties shall bear their respective costs.

**DATED and delivered at Nairobi this 10<sup>th</sup> day of July, 2008.**

**J.G. NYAMU**

**JUDGE**

**Advocates**

Kyalo Mbobu - Advocate for the Petitioner

Mr Bryant - Advocate for the 1<sup>st</sup> Respondent

Mr Ruto - Advocate for the 2<sup>nd</sup> Respondent.