REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 1638 of 2004

IN THE MATTER OF AN APPLICATION BY TOTAL KENYA LIMITED FOR JDICIAL REVIEW FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE PETROLEUM ACT, CAP 116 LAWS OF KENYA

BETWEEN

TOTAL KENYA LIMITED…….....…..…..
APPLICANT

AND

THE PERMANENT SECRETARY, MINISTRY OF ENERGY ……..
RESPONDENT

AND

CALTEX OIL K. LIMITED

DELBIT PETROLEUM

GALANA OIL KENYA LTD

HASS PETROLEUM K. LTD

INTOIL LIMITED

KOBIL PETROLEUM LTD

METRO PETROLEUM LTD

MOBIL OIL K. LTD

MOIL LIMITED

NATIONAL OIL CORPORATION OF KENYA

PENTOIL PETROLEUM LTD

PETRO OIL KENYA LTD

PETROBULK LIMITED

PETROPLUS OIL COMPANY …….....…….…..…… INTERESTED PARTIES

J U D G M E N T

By an Application made by way of a Chamber Summons dated and filed on 29-11-2004, the Applicant, (Total Kenya Ltd. sought and was granted leave to bring an application for judicial review orders of ***Certiorari, Mandamus and Prohibition.*** The leave so granted was to operate as a stay of the directive issued by the Permanent Secretary (the Respondent) pending the hearing and determination of the Applicant's application for Judicial Review. The leave so granted was also subjected to these conditions-

1. That all the OTS participants shall be at liberty to purchase and accept delivery of the respective quota of Murban crude from the Applicant for the month of November, 2004 at 1st November, 2004 price of Murban i.e applicable purchase price for the month of delivery (November) and not the month of loading October, 2004.

2. That the purchase and acceptance of delivery of Murban crude oil at the said price shall not be in compliance with the Permanent Secretary's decision dated 25th November, 2005 or performance thereof but on the basis of this court order.

3. That the final determination of the appropriate purchase price for the Murban crude oil cargo 22/2004 shall be made in these proceedings in which the OTS participants are made parties and/or through the arbitrations as provided by the Agreement as the case may be;

4. That the acceptance by the Applicant of the sale proceedings at the November rates or billing thereof shall not operate as acceptance of the price or settlement of this dispute.

5. That the applicant be and is hereby at liberty to prosecute this application and in any other proceeding to claim any alleged differential losses or damages not only from the OTS participants but also from the Government of Kenya.

6. That the costs of the Application shall be in the main Application (***not Applicant***)

7. That the Application be filed within 21 days."

The principal application that is to say the Notice of Motion, the subject of this judgement was filed on 17th December, 2004, but is dated 15th December, 2004, and therefore within the 21 days as per the order of leave granted on 30th November, 2004. It seeks three orders in these terms:-

1. That an Order of **CERTIORARI** do issue removing

to the High Court and quashing the decision of the Permanent Secretary, Ministry of Energy, made by way of the letters dated 25th November, 2004 purportedly directing that the interested parties pay for the crude oil for the month of November, 2004 at the rate applicable for November, whilst under the Agreement between the parties the applicable rate is that applicable at the date of loading in this case the rate applicable as at 31st October, 2004.

2. **That** an Order of **MANDAMUS** do issue compelling

the Permanent Secretary to reverse his decision as contained in his letter dated 25th November, and further to compel him to direct that the rate of payment applicable in this instance is that prevailing for the month of October, 2004, in accordance with clause 9 of the Agreement between the Open Tender System Participants which agreement has been in force since January, 2004.

3. **That** an order of **Prohibition** do issue stopping or

prohibiting the Permanent Secretary from deviating from the Terms and Conditions for the Kenya Oil Industry Open Tender System and from dictating at which rate the Interested Parties should pay for the Crude oil supplies for the month of November, 2004.

4. **That** the costs of this application be provided for.

The Notice of Motion was premised upon the Statutory Statement dated 29-11-2004, the Affidavit Verifying the Facts sworn by one Thomas Maganga, the Applicant's Planning and Supply Manager sworn and filed with the application for leave, on 29th November, 2004, and the grounds set out in the Notice of Motion, the most significant of which is in my view sub-paragraph (b) –

(b) The actions of the Permanent Secretary, Ministry of Energy which are the subject of this Application are irregular as the said official has no jurisdiction to overthrow the express provisions of Agreement relating to the Open Tender System, which provisions have been mutually agreed between all the players in the Ministry and which have the sanction of the Ministry of Energy under Rule 1 of the Petroleum (Amendment No. 2) Rules published as Legal Notice No. 197 of 2-12-2003.

The Respondent to this Application is the Permanent Secretary, Ministry of Energy. The parties likely to be affected by the Court's decision, and therefore persons interested in the outcome of the Application were listed :-

(1) Caltex Oil (K) Limited (now Chevron Kenya Ltd).

(2) Dalbit Petroleum

(3) Galana Oil Kenya Ltd.

(4) Hass Petroleum Ltd.

(5) Intoil Limited.

(6) Kobil Petroleum Ltd.

(7) Metro Petroleum Ltd.

(8) Mobil Oil Kenya Ltd.

(9) Moil Limited

(10) National Oil Corporation of Kenya Ltd.

(11) Pentoil Petroleum Ltd.

(12) Petro Oil Kenya Ltd

(13) Petrobulk Ltd.

(14) Petroplus Oil Company.

The following Interested Parties reached accommodation with the Applicant and did not therefore take part in the proceedings the subject of this judgement:-

1. National Oil Corporation of Kenya, by consent letter between their Advocates Iseme, Kamau & Muema dated 6-06-2005 and filed on 10-06-2005.

2. Metro Petroleum Ltd per consent letter dated 23-11-2005 but file on 2-12-2005.

3. Intoil Ltd. per consent letter dated 23-11-2005 but filed on 24-11-2005 all with no order as to costs.

The other interested parties, namely:-

(1) Dalbit Petroleum

(2) Galana Oil Kenya Ltd,

(3) Hass Petroleum Ltd

(4) Moil Ltd.

(5) Pentoil Petroleum Ltd.

(6) Petro Oil Kenya Ltd.

(7) Petrobulk Ltd.

(8) Petroplus Oil Limited

neither entered appearances nor took part in these proceedings.

A Notice of Appointment of Advocates were filed on behalf of Kobil Petroleum Ltd. by Esmail & Esmail on 16-02-2005, and Mr. A. Esmail represented that party in these proceedings. I could not trace any such notice in respect of either Caltex Oil (K) Ltd, Mobil Oil (Kenya) Ltd or the Attorney General on behalf of the Respondent. Since no objection was taken by the Applicant's Counsel, I take it that the firms of Ochieng Onyango, Kibet & Ohaga on behalf of Mobil Oil (K) Ltd), Musyimi & Co. Advocates on behalf of Caltex Oil (K) Ltd, and of course the Hon. Attorney General filed the necessary notices of appointment of Advocates and court copies have yet to find their way into the Court file.

On behalf of the Applicant, there was of course filed the Affidavit Verifying the Facts already referred to above. There was also filed a Further Affidavit by Thomas Maganga, the Applicant's Planning and Supply Manager sworn and filed on 30-06-2005, expressly said to be in response to the Replying Affidavit of Jacob Israel Segman sworn on 9-06-2005. There was also filed on behalf of the Applicant, Skeletal Arguments/submissions dated 1-03-2005, together with a long list of authorities. At the end of the oral submissions there was also filed and served by the Applicant's Counsel a Reply on behalf of the Applicant, to the various arguments made by Counsel for the Respondent and the 1st Interested Party (Caltex Oil Kenya Ltd.), the 6th Interested Party Kobil Petroleum Ltd), the 8th Interested Party (Mobil Oil Kenya Ltd.).

Counsel for these Interested Parties also filed elaborate skeletal submissions and exchanged lists of authorities to which I will in due course make reference.

Those are the preliminaries in relation to the structure of the claims and responses by the applicant, and the Respondent and the Interested Parties. And what are the claims? They are these.

0.2 THE BACKGROUND FACTS

The Applicant together with about twenty five (25) or more oil marketers are together bound by an arrangement called "**Open Tender System**" (in short OTS) under which the importation of Crude Petroleum is centralized and awarded to the winning bidder every quarter of the year. The system was established with effect from 1st January, 2004. Its pillar is the Petroleum Act, (Chapter 116, Laws of Kenya). Its operations limb are the Petroleum (Amendment) (No. 2) Rules 2003 under these rules it is provided:-

"1A ***With effect from 1st January, 2004, no person shall import or cause to be imported-***

(a) such quantities as the minister may prescribe of refined petroleum products other than those specified under paragraph 1 (a) (b) & (c); or

(b) petroleum crude for refining and use in

Kenya. ***Other than through an open tender system centrally coordinated by the Ministry"*** *(underlining mine).*

I shall hereafter refer to these rules as the "***OTS Rules***." These OTS Rules are sketchy in nature. They do not prescribe how they are supposed to operate in practice. The Ministry of Energy has helped in this, probably with a little nudging and help from the marketers themselves, by drawing and causing the said marketers to sign what is referred to as "***the Interim Agreement for January, 2004 Tender Terms and Conditions for Kenya Oil Industry Open Tender System for the Delivery of Crude Oil Into Kenya ("the OTS Agreement").***

Under the OTS Agreement which is coordinated by the Ministry of Energy, but of which the Ministry or the Government is not a party, the oil marketers bid among themselves for the importation of Crude for a particular quarter refined and imported through the Kipevu Oil Storage facility, and crude must be refined through the Kenya Petroleum Refineries Ltd. Only the Minister may make exceptions to these rules.

The ***OTS Agreement provides inter alia for pricing (Clause 9***) and the law applicable to and method of dispute resolution ***(Clause 15).***

In the matter at hand there is no dispute that the Applicant won the tender to import cargo No. 22/2004. The Applicant did secure and imported the said cargo. Once the cargo is delivered to KPRL, and is processed each marketer is entitled to its market share, and the respective importer bills each marketer for its share of product. Some marketers had complained and refused to pay for their share of product imported by the Applicant. According to the letter dated 23-11-2004 from the Respondent Patrick M. Nyoike Permanent Secretary Ministry of Energy–

" ***he had received representation from various companies both large and small) which complained about the alleged high cost burden of the Cargo 22/2004 – Murban Crude Cargo by the Applicant just one hour to midnight of October, 31st 2004.***"

The Respondent therefore invited the Chief Executives of the major oil marketers, Caltex Oil (K) Ltd, Total (K) Ltd ***(the Applicant herein***), Shell/BP, Mobil Oil (Kenya) Ltd and Kenol Kobil Petroleum Ltd. to a meeting in his Conference Room to "***address this problem,"*** asking the addressee's to ensure attendance in person and added a discretionary requirement, attendance by the invitees' Supply Managers. The meeting was scheduled for and it appears it was held from 2.30 pm. on 24-11-2004. I shall later refer to this letter of invitation in relation to the subsequent letter of 25-11-2004 issued by the Respondent Patrick M. Nyoike Permanent Secretary, Ministry of Energy. At this point I need only to note what the Respondent says in the said letter-

"***- there was no agreement between Total Kenya as the importer and other companies (Caltex,***

Kenol/Kobil and Mobil) except with Shell as the buyers-

- there was an impasse, and I could not make a ruling until I had carried out internal consultations on what should be the applicable cost, and directed that Total should bill all OTs participants in the cargo the November price for Murban…"

The Respondent has in essence reiterated the above in his Replying Affidavit sworn on 17-06-2005.

0.3 THE APPLICANT'S CLAIM

Being aggrieved with the above decision of the Respondent the Applicant brought these proceedings for judicial review of that decision. The Applicant says through the Affidavit of Thomas Maganga, the Applicant's Planning and Supply Manager that the decision of the Permanent Secretary is wrong in law and the same was arrived at arbitrarily and ***ultra vires*** of the express provisions of the Agreement obtaining as between the OTS participants "***and which agreement was drafted and is regulated by the Permanent Secretary any way."*** They pray that the court quashes the decision of the Respondent Permanent Secretary. They say that the Permanent Secretary was acting in his official capacity .

His decision is amenable to judicial review and orders sought should be granted.

0.4. THE RESPONDENT'S CLAIM

Not so the Respondent, says on oath, on the advice of his Counsel, at paragraph 47-

"47. ***That I have been informed by the learned State Counsel Mr. Anthony Otengo Ombwayo that the application before court is misconceived because I was called by stakeholders to arbitrate in the dispute hence Total Kenya Limited cannot claim that I acted without jurisdiction, which information I believe to be true."***

0.5 THE 6TH INTERESTED PARTIES RESPONSE

Jacob Israel Segman's Affidavit in Reply sworn and filed on 9-06-2005, is in no less vein than that of Mr. Patrick M. Nyoike, the Permanent Secretary. After describing the operations of the OTS Agreement and the importation of Cargo 22/2004 by the Applicant, in paragraphs 3 -17, concludes at paragraph 18-

"**18**. Clause 15 of the OTS Agreement provides for resolution of any dispute arising therefrom to be finally settled in accordance with the current Arbitration Act of Kenya. A dispute having arisen about the pricing of the November, 2004 cargo on or about 23rd November, 2004 the Participating Petroleum companies (or at least the Applicant and Kobil) referred this dispute for arbitration by Mr. Patrick M. Nyoike in accordance with the terms of the said Clause 15."

19. Mr. Patrick M. Nyoike who is also the

Permanent Secretary in MOE (Ministry of Energy) on 25th November, 2004 made an award regarding this dispute and held that price for the November cargo was the applicable price for that month.

20. If the Applicant was dissatisfied with this

decision it should have pursued (***not perused***) the matter under the provisions of the Arbitration Act. I am advised by Kobil's Advocates and verily believe this application is misconceived and an abuse of the process of this court.

And on the point much hyped upon Mr. Esmail learned Counsel for the 6th Interested Party Mr. Segman had this to say in paragraphs 23 and 24 of his Affidavit.-

23. "I verily believe that the Applicant decided (***at what stage, I do not know***) to buy October, 2004 barrels from its affiliated company for loading on the last day of October, 2004 to suit its affiliated company. The loading of this cargo was allegedly completed only 1 hour and 21 minutes prior to 1st November, 2004 and there would have been an enormous price difference had the loading been completed just a couple of hours later. The applicable price for October "barrerls" was much higher than the November "barrels" with the result that the Applicant's affiliated company received a far higher price for the cargo. Moreover the Applicant was not a purchaser of any portion of the November cargo so it did not stand to lose anything."

24. None of the aforementioned very relevant and material facts were brought to this Honourable Court or were misrepresented when the Applicant obtained exparte orders on 30th November, 2004. I am advised by Kobil's Advocates and verily believe that such orders were obtained by concealment and/or misrepresentation of material facts."

The 6th Interested Party's Counsel filed skeletal Arguments or submissions on 9-02-2005 and dated the same day. They are that:-

1.1 the entire application is misconceived and an abuse of the process of court.

1.2 Prohibitory orders are not available to enforce contractual rights or obligations of the Applicant which are governed by the OTS Agreement. Counsel relied upon the Court of Appeal decision in ***Civil Appeal No. 248 of 2001 Republic –Vs- Municipal Council of Mombasa, Exparte as Employee*** where the court ruled that the procedure for judicial review has no application whatsoever to disputes arising out of contractual relationships. I shall revert to this issue later.

1.3 Clause 15 of the OTS Agreement provided that any dispute arising under the Agreement be finally settled by arbitration under the Arbitration Act 1995, (***Cap 49 was repealed by that Act).***

1.4 A dispute arose between the Applicant and Parties to the OTS Agreement as to the price payable for the crude to be delivered by the Applicant during the month of November. The ***dispute was referred by all*** parties concerned for ***arbitration*** by Patrick M. Nyoike.

1.5 If the Applicant is dissatisfied with the decision of Mr. Nyoike, the ***agreed upon*** arbitrator. its remedy lies under Section 35 of the Arbitration Act.

1.6 This Court has no jurisdiction in this suit to quash or set aside an arbitration award made pursuant to an agreement or order an arbitrator to reverse its decision.

1.7 Alternatively, if as contended by the Applicant the determination of Mr. Nyoike is null and void, then it can pursue the dispute regarding the price in accordance with the OTS Agreement ***inter alia***, with Kobil.

1.8 The Applicant when obtaining ex parte orders for leave to commence proceedings for judicial review and also the stay order concealed material facts from the Court or made misrepresentation of material facts, that is to say, paragraphs 4-21 of the Affidavit of the Segman Affidavit**.**

1.9 The 6th Interested Party's Counsel Mr**.** Esmail relied upon the following cases-

2.1.1 The MV "Lilian S. "Vs. Caltex Oil (K) [1989] K.L.R.I.

2.12 Uhuru Highway Development –Vs. Central Bank of Kenya Ltd & others (Civil Appeal No. 126 of 1995) [1995] LLR 389 (CAK).

2.13 Brinks MAT –Vs E/Combe[1988] 3 ALL E. 188.

2.14 R. Vs. Kensington Income Tax Commissioners [1917] I.K.B. 456.

2.15 Memory Corporation –Vs- Sidhu [2000] I.W.L.R. 1443.

2.16 Judicial Review of Administration Action by …….. 3rd Edition.

2.17 Minister for Foreign Affairs –Vs. Vehicles Supplies Ltd. [1991] 4 ALL ER. 65.

2.18 Kenya Communications Commission –Vs- Econet Wireless (H.C. Misc. Application No. 1621 of 2004).

In time I shall consider some of these cases and texts in light of their application to the matters in issue in this Application, but first the 8th Respondent's case.

0.6 THE 8TH RESPONDENT'S REPLY

The wonderment continues in the Replying Affidavit of ***Robert Duncan Paterson***, the Managing Director of Mobil Oil Kenya Ltd sworn and filed on 30th June, 2005, and at paragraph 3 thereof this deponent avers at the outset that he associates himself fully with the averments in the Affidavit of Jacob Israil Segman (***the Segman Affidavit***), and for himself he states on Oath-

11. I am unable to comprehend the rationale for Total electing to load the cargo which is at the state of the present dispute on 31st October, 2004 except for the purpose of taking advantage of the evident discrepancy in the OTS Agreement which provides a loop-hole for Total to circumvent the industry practice in order to take advantage of the higher prices which prevailed during the month of October, 2004.

14. **It has always been acknowledged that the**

OTS **Agreement is not a model of good and clear drafting. In this respect, I point out that whilst under clause 9***(the price of the crude* **oil constituting the FOB which is identified as the Official Government Selling Price) being the price published by the Government of the country of origin is stipulated as the price of the month of loading whereas under clause 10 and in particular the proviso to clause 10.2 there is reference to the official Government Selling Price as being the price for the month of loading. Accordingly, whilst there is subsequently reference to the month of loading,** I am advised by Mobil's Advocates that the discrepancy raises sufficient ambiguity for the court to apply the trade and usage in the industry, to which the Segman Affidavit already makes reference ***(underlining mine).***

And "***the Paterson Affidavit***" continues at paragraphs 16 and 17 as follows-

"**16. I am advised by Mobil's Advocate that under the terms of Section 10 of the Arbitration Act 1995, no court should intervene in matters governed by the Act and I verily believe that the present proceedings are an abuse of the process of court to the extent that they invite the court to intervene in a matter where the dispute resolution mechanism has been specifically stipulated to be by way of arbitration.**

and

"**17. Further, I share Segman's view that a dispute having arisen as is clear from the Maganga Affidavit, and in particular paragraphs 19 and 20 thereof, the parties invited the Permanent Secretary in the Ministry of Energy to resolve the dispute. The Permanent Secretary duly arrived at a decision which is in the nature of an award.**

The Paterson Affidavit then confirms at paragraph 18 thereof that the Maganga Affidavit in paragraph

22 thereof identifies the Permanent Secretary's letter of 25th November, 2004 as setting out his decision.

And on the advice of his company's Advocates, which advice he accepts, Paterson swore, that the Permanent Secretary's decision accords with ***Section*** 32 of the Arbitration Act, and accordingly Total's recourse is now as set out in Section 35 of the Act.

Paterson's Affidavit concludes at paragraphs 20, that on the advice of Mobil's Advocates, that the matters complained of by Total are not amenable to judicial review especially as it is clear that an alternative remedy already existed under the OTS Agreement and that the Honourable Court has no jurisdiction to intervene in the resolution of the present dispute. Lastly in paragraph 21, the Paterson Affidavit prays on oath that these proceedings be dismissed with costs.

In addition to the Paterson Affidavit, the 8th Interested Party's Advocates, Ochieng Onyango Kibet and Ohaga Advocates, filed skeletal submissions dated 30th June, 2005. In the said submissions the said Counsel set out in synopsis form and with lists of authorities why the orders of mandamus, prohibition and certiorari prayed for by the Applicant in the Notice of Motion the subject of this judgement should not be granted or do not lie. Counsel also cite Section 4 of the Arbitration Act as reason why in their opinion, the court has no jurisdiction to entertain the present application, and finally that the existence of an alternative remedy as another reason why these proceedings should not lie. I shall revert to these contentions later in the course of this judgment.

0.7 - THE 1ST INTERESTED PARTY'S REPLY (CASE)

Lastly, but not least, is the Replying Affidavit of Dorothy Marami-Kiarie supply Manager East Africa of Chevron Kenya Ltd. (***formerly called Caltex Oil Kenya Ltd***) (***the Marami-Kiarie Affidavit")*** sworn and filed on 2-02-2006. This Affidavit describes in paragraphs 5-15 inclusive the operations and trade practice and custom of the oil industry in the importation and pricing of Crude Petroleum Imports, and swears at paragraph 17 on advice of Mrs Anne Mbugua, a partner in the firm of Musyimi & Co. Advocates, who are on record for Caltex – "***that in the absence of a clear term in the OTS Agreement dealing with the pricing of crude oil in relation to the time of loading and the stipulated date range, it affords sufficient grounds for this Honourable Court to determine the same on the basis of accepted industry practice, custom, and usage."***

The Marami-Kiarie Affidavit also states on Oath at paragraph 19 her belief that when a dispute arose between the OTS participants and Total "***that then Permanent Secretary in the Ministry of Energy, Mr. Patrick M. Nyoike was appointed the arbitrator in the said dispute."*** The said Affidavit states on oath that Mr. Nyoike made a ruling/award in the aforesaid dispute on 25th November, 2004 to the effect that the applicable price for cargo 22/2004 was the November, 2004 price as opposed to the October, 2004 price, and concludes on advice from her Company's legal advisers in which advice she verily believes that this matter is wrongly brought into this Court as it is the proper subject of arbitration, and that the application is unfounded in law and is an abuse of the court process, and that the same should be dismissed with costs.

The 1st Interested Party's Counsels' Skeletal Arguments dated 7th February, 2006 were filed on 9.02.2006. They, like those of the 8th Interested Party summarise grounds and authorities why the prayers of prohibition, certiorari and mandamus ought not to be granted. Counsel also argues that judicial review remedy does not concern private rights which have alternative remedies for addressing and redressing violations of such rights.

The foregoing is the review of the written pleadings by the Applicant by the Respondent, the 1st, 6th, and 8th Interested Parties. I shall now consider the oral submissions by their respective Counsel.

0.8 THE ORAL SUBMISSIONS

Mr. Njoroge Regeru, learned Counsel for the Applicant's Pith and thrust of argument and submissions

both Skeletal (dated 1st March, 2005) and consolidated submissions in Reply to the Respondent's submissions and dated 17th May, 2006 and filed on the same date was to the effect that there was no arbitration in terms of the Arbitration Act, 1995 and that consequently the Respondent, the Permanent Secretary to the Ministry of Energy had no mandate to decide on the dispute between the Applicant and the other oil marketers, namely the Interested Parties, and that if he had such power he acted in excess, or that his decision in the dispute was ***ultra vires*** his powers. In the circumstances therefore, the Applicant be granted the orders of certiorari, mandamus and prohibition prayed for in the Notice of Motion of 15-12-2004 and filed on 17-12-2004.

For the Respondent and indeed the Interested parties, namely Caltex Oil Kenya Ltd, Kobil Petroleum Ltd. and Mobil Oil Kenya Ltd. the arguments and submissions were that the application was fatally defective and misconceived and an abuse of the process of court because:-

1.0 **By Mr. Obwayo**

1.1.0 There was no notice to the Registrar of the High Court, contrary to Order LIII, rule 1 (3) under the authority of Republic Vs. Commissioner of Cooperative Development the Ex Parte Simon G. Ithiria & 8 others ((H.C. Misc. Application No. 1349 of 1995) the omission to give Notice or give an explanation was fatal, and the application should therefore be dismissed with costs.

1.1.2 The Applicant failed to attach a copy of the

record, warrant, commitment, conviction, inquisition or record contrary to Order LIII rule 7 (1) of the Civil Procedure Rules. This omission was fatal for an application seeking an order of certiorari to quash such order, warrant, commitment, conviction, inquisition or record, unless at the hearing of the motion a copy thereof has been lodged with the Registrar verified by an affidavit or the applicant accounts for his failure to do so to the satisfaction of the High Court.

2. By Mr. Esmail

2.10 that the applicant argued a case different from its pleadings (Statement of Facts) without first amending its motion contrary to order LIII rule 4 (1) of the Civil Procedure Rules;

2.1.1 that the applicant had obtained the exparte orders, including the order of stay of the Permanent Secretrary's decision ***(compelling the applicant to accept the November price of crude oil in lieu of the loading price of October),*** through concealment and/or misrepresentation of material facts;

3.0 By the Respondent and the Interested Parties' Caltex Oil (K) Ltd, Kobil Petroleum Ltd, and Mobil Oil Kenya Ltd;

3.1.0 that there was an arbitration;

3.1.1 that Permanent Secretary, Patrick M. Nyoike was not acting ***qua*** Permanent Secretary but had cast off that official cloak, that he was acting in his personal capacity;

3.1.2 that more fundamentally this was a private contractual dispute and it was not subject to or amenable to judicial review;

3.1.3 that this being a purely private contractual matter, the applicant's claim lay in private law remedies and not judicial review;

3.1.4 that there being such alternative remedies the Applicant was barred from pursuing public law remedies such as certiorari, mandamus or prohibition;

For all those reasons Counsel for the Respondent and the stated Interested parties submitted that the Court should not only set aside the ex parte orders but should dismiss the Applicant's Notice of Motion.

So before I delve into the consideration whether or not there was an arbitration, and whether or not the applicant is entitled to judicial review remedies it is both essential and necessary to determine the several issues raised by Ombwayo and Esmail, that the proceedings do not lie for the reasons stated above, including non-compliance with the several rules under Order LIII, of the Civil Procedure Rules, and non-disclosure or concealment of material facts as set out in paragraphs 4 to 21 inclusive of the Segman Affidavit.

1.2 OF NOTICE TO THE REGISTRAR OF THE HIGH COURT, ORDER LIII, RULE 1 (3)

Rule 1 (1) of Order LIII of the Civil Procedure Rules provides that no application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.

Rule 1 (3) of the said order requires an Applicant to give notice of the application for leave not later than the preceding day to the Registrar and lodge copies of the statement and affidavits required under rule 1 (2) of the said order. The Court may extend the period for one day, or excuse the failure to file the notice of the application for good cause shown.

The application herein was lodged on 29-11-2004, without first giving the requisite mandatory notice to the Registrar under rule 1 (3) of the said order. In the application however, the Applicant prayed that on account of the urgency of the matter the notice to the Registrar be excused. Under Order No. 2 of the Orders granted on 30-11-2004 and issued under the seal of this court on 1-12-2004 the court excused failure to give the requisite notice to the Registrar. It is thus clear to me that the Applicant did fulfill the requirements as to notice to the Registrar in the application, herein. The cited case of ***REPUBLIC –VS-COMMISSIONER FOR COOPERATIVE DEVELOPMENT*** (Ex Parte Simon G. Ithiria & 8 others (*supra)* has no application to this application and is of no avail to the Respondent.

1.0 ***OF FAILURE TO ATTACH A CERTIFIED COPY OF THE ORDER, WARRANT, COMMITMENT, CONVICTION, INQUISITION OR RECORD, VERIFIED BY AFFIDAVIT BEFORE HEARING OF MOTION CONTRARY TO THE REQUIREMENT OF RULE 7 (1) OF ORDER LIII – CIVIL PROCEDURE RULES***

The said rule requires that in an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, an applicant cannot question the validity of any such order, warrant, commitment, conviction inquisition or record unless the said orders, warrant, commitment, conviction, inquisition or record is lodged to the court duly verified by affidavit.

It was Mr. Ombayo, learned Counsel for the Respondent submission that the decision contained in the Permanent Secretary's letter of 25th November, 2004 is neither an order, a warrant, commitment, conviction, inquisition or record. It is a communication.''

With profound respect to learned Counsel for the Respondent, firstly, every order of court, warrant, commitment, conviction, inquisition or record, is a communication. Secondly, to what proceedings does rule 7 (1) of Order LIII of the Civil Procedure Rules apply. In my view, that rule only applies to formal proceedings of a court of law, or a tribunal by law established for its only those or such bodies which are by law empowered to make such orders, as a conviction, deal the issue of warrants, carry out inquisitions/inquiries or commit persons to prison. An arbitral award becomes an order of court, and therefore subject to such lodgment and verification once it has been formally lodged and confirmed by the Court. Such is the requirement of Section 36 of the Arbitrations Act 1995.

There is therefore no basis for Mr. Ombayo's submission that the "decision by the Permanent Secretary contained in his letter of 25th November, 2005 ought to have been produced by the Applicant. It is not an Order of Court, and rule 7 (1) of Order LIII is of no application to the matter at hand. This submission is overruled.

10.0 OF DEPARTURE FROM CASE FILED CONTRARY TO RULE 4(1) OF ORDER LIII CIVIL

PROCEDURES

Rule 4 (1) of the Order LIII (***Judicial Review***) is the equivalent of Order VI, Rule 6 of the ordinary rules of Civil Procedure Rules made under Section 81 of the Civil Procedure Act that no party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his …… in the same suit – unless first amended or granted leave to amend.

Similarly under Order LIII, an order made under section 8 and 9 of the Law Reform Act, (***Cap. 26, Laws of Kenya***) but is included in the Civil Procedure Rules (***on account of its brevity and convenience of practitioners),*** and Rule 4 (1) of the said Order provides that "no grounds shall,…….. be relied upon or any new relief sought at the hearing of the motion except the grounds and relief set out in the statement," unless first amended under rule 4 (2) of the said Order LIII.

I have searched through my notes, and I have re-read the Statement and the Verifying Affidavit of Thomas Maganga, the Applicant's Planning and Supply Manager, and all I get is Mr. Esmail's Statement that the Applicant's Counsel has argued a case which is not in Applicant's Statement.

The Applicants' case is summarized in paragraph 20 of the Affidavit Verifying the Facts that "***the decision of the Permanent Secretary is wrong in law and the same was arrived at arbitrarily and Ultra Vires the express provisions of the Agreement obtaining as between the OTS participants and which agreement is drafted and regulated by the Permanent Secretary."*** That is the gist of the case argued by Mr. Njoroge Regeru, learned Counsel for the Applicant in support of the reliefs sought namely, Certiorari, Mandamus and Prohibition. There was in my finding no departure from those reliefs, from the grounds or premises upon which Application was found. I reject Mr. Esmail's argument to the contrary.

11.0 OF CONCEALMENT AND/ OR MISREPRESENTATION OF MATERIAL FACTS.

Non-disclosure and/or misrepresentation of material facts at ex parte stage may vitiate any exparte orders, or advantage gained by a party at the ex parte stage. It is the Court, not the party or its Advocate which determines the materiality or otherwise of any fact. So a party which approaches the Court ex parte does so on the basis of utmost good faith ***uberrimae fidei***.

It is however not enough to aver that an Applicant was guilty of non-disclosure of and/or misrepresentation. To deprive a party of an advantage gained at the ex parte stage the party or respondent aggrieved by such exparte order obtained at the leave stage, like the 6th Interested Party herein, ought to have brought or filed a formal application to challenge the grant of those orders.

This is because at the leave stage, the judge seized of the application is not required to examine it in any detail. I need only consider whether the applications raised an arguable or ***prima facie*** case. The judge does not grant leave or ex parte orders as a matter of course for otherwise there would be no need for leave in the first place. Once leave has been granted, the role of the judge granting leave becomes functus. See the Court of Appeal decision in NJUGUNA –VS- MINISTER FOR AGRICULTURE [1996] KLR.

Ex parte orders are by their nature provisional and are liable to be affirmed or vacated. A respondent or an Interested party who is aggrieved with any order made or granted at the leave stage may apply to the judge who granted the orders if that judge is available, if that judge is not available then to any other judge seized of the matter in the relevant administrative Division of the High Court to set aside or vacate the orders. The application is made under the inherent powers of the Court and not under the ordinary's Civil Procedure Rules. That is what happened in the case of ***REPUBLIC –VS- KENYA NATIONAL FEDERATION OF COOPERATIVES LTD. & OTHERS [2004] 2 E.A. 128, (the KNFC CASE).***

In that case the KNFC filed an application seeking leave to apply for judicial review orders to quash the decision of the Communications Commission of Kenya (CCK) which had granted a global service mobile (GSM) licence to a company called ***Econet Wireless Kenya Ltd (EWK)***.

The application for such leave was granted, and was to operate as stay pending the hearing and determination of the application. It was also ordered that EWK be made a party to the proceedings. EWK being aggrieved with the granting of the leave to operate as a stay filed an application to the court to discharge the stay order and to dismiss the main application. The court (Hon. Mr. Justice Ibrahim found as a fact) that there was concealment and suppression by KNFC of evidence or information which was in its possession in the form of detailed blow, for blow response to KNFC'S Case, hence the court proceeded to grant the application by EWK and set aside the ex parte orders made at the threshold or leave stage, and those orders having been set aside there was then no basis for the second stage, the Notice of Motion which was subsequently struck out as well.

There is of course no dispute regarding the principles of ***uberimae fides (utmost good faith***) at the leave stage, and the necessity for full disclosure of facts which materially affect the judge's mind in granting or otherwise refusing the leave at the threshold or leave stage.

In this matter however, ***Kobil Petroleum Limited***, made no application to set aside the orders granted at the leave stage. Submissions from the bar are no substitute for such an application. This court will not therefore blindly follow as Mr. Esmail learned Counsel for the 6th Interested Party earnestly urged in his submissions, a decision whose facts are so different from the case at hand. I do not wish to speculate as to what my finding would be if there was a formal application to set aside the ex parte orders granted to the Applicant at the leave stage. I am however prepared to say that if such an application were premised upon the averments in paragraphs 4 to 21 inclusive of the Segman Affidavit they would not constitute facts concealed and/or misrepresented by the Applicant at the leave or threshold stage. For those reasons the Interested party's argument that leave to bring these proceedings was obtained by concealment and/or misrepresentation or material facts must therefore fail.

12.0 OF THE AVAILABILITY OF AN ALTERNATIVE REMEDY/PROCEDURES

This argument was put forward by the Applicant and may be found in paragraph ix (p.4) of the Applicant's Skeleton Arguments. I think that is another unfortunate way of attacking the Applicant's case. If it were to be taken literally, it would not of course be correct as Mr. Esmail rightly observed that besides, judicial review, the Applicant has a host of other remedies, as it reserved to itself in paragraph 6 of the Ex Parte Orders granted 30th November, 2004 the liberty to "***prosecute….. in any other proceedings to claim differential losses or damages not only from the OTS participants but also from the Government***."

I do not however think that the meaning attributed by Mr. Esmail is what the Applicant's Counsel meant by the submission that the order of certiorari was the only remedy available to the Applicant. My understanding of that submission is that the order of certiorari is the only remedy available to quash the decision of the Permanent Secretary, and not that the Applicant had no other remedy except judicial review orders. Judicial review will be granted where the alternative statutory remedy is nowhere as convenient, beneficial and effective or where the decision in question is liable to be upset as a matter of law. A major factor is what is convenient for both the Applicant and the public interest (see the case of ***Regina –Vs- Hillingdon London*** Borough Council, ex parte ***Royco Homes*** Ltd. [1974] 2 ALL ER.643 at 648.

Under Section 9 (3) of the Law Reform Act; the availability of an alternative remedy by way of an appeal is no bar to judicial review. The Court may however adjourn the application for judicial review for leave until the appeal is determined or the time for appealing has expired. The argument that the availability of an alternative remedy is a bar to judicial review is not correct in law.

13.0 OF THE SCOPE OF JUDICIAL REVIEW

Following the dismissal of the argument on the availability of an alternative is a bar to judicial review, I should also dispel another incorrect notion evident from paragraph 6 (3) of the Orders of 30-11-2004 that "***the final determination of the appropriate purchase price for the Murban crude oil cargo 22/2004…. be made in these proceedings which the OTS participants are made parties."***

These are judicial review proceedings. The scope of judicial review is extensively discussed in many textbooks on the subject and the most commonly cited texts include **Administrative Law** by Sir William Wade, 8th Edition Grahame Aldous and John Alder – ***Application For Judicial Review, Law and Practice of the Crown Officer*** – 2nd Edition, and that constant companion to practitioners in the Commonwealth, **Halsburys Laws of England, Vol. 1 (1), 4th Edition where at paragraph 60, the learned authors say-**

"**60.** The Nature of Judicial Review"

Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public duties……

The duty of the Court is to confine itself to questions of legality- although the court should not be used as a means to obtain a decision on a question of law in advance of hearing ***(R. –Vs Crown Court At Reading, ex p Stutchinson [1988] I ALL ER. 333*** at 340 per LLoyd L5). The concern of judicial review is whether or not a decision making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, a duty to act fairly (per Lord Roskill in ***Council of Civil Service Union*** –Vs- ***Minister for the Civil Service [1985]*** A. C. 374, at page 414), or whether the authority reached a decision which no reasonable tribunal could have reached (***Associated Provincial Picture Houses Ltd. –Vs- Wednesbury Corporation [1948] 2 ALL ER.*** 680 at 683 or abused its powers [***Re: Preston –Vs- Inland Revenue Commissioners. [1985] 2 ALL ER. 237).*** It is so whether or not there is a right of appeal against the decision on the merits. The duty of Court is to confine itself to the question of legality.

Administrative action has been subjected to judicial review on three grounds-

(1) illegality

(2) irrationality

(3) procedural impropriety

13.1.0 OF ILLEGALITY

The decision –making authority must understand correctly the law that regulates his decision – making power and must give effect to it.

13.1.1 OF IRRATIONALITY

The decision maker reached a decision which no reasonable tribunal could have reached, the ***Wednesbury unreasonableness***.

13.1.2 OF PROCEDURAL IMPROPRIETY

This is the description given by Lord Diplock Council in ***Civil Service Union Vs. Minister for the Civil Service*** [***1984] 2 ALL ER.*** 935 at 951, in place of failure to observe rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision ……. "***because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred …….. even where such failure does not involve any denial of natural justice."***

So even where the facts are "***jurisdictional***" the Court's investigation of them is of a supervisory character and not by way of an appeal.

In summary therefore, judicial review is a supervisory jurisdiction by the High Court over decisions of

said bodies. Secondly judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review was made, but the decision-making process itself. It is thus different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which it has been subjected. It is no part of that purpose to substitute the opinion of the Judiciary or that of individual judges for that of the authority constituted by law to decide the matters in question.

The above principles are restated and applied in our cases such as ***COMMISSIONER OF LANDS – Vs. KUNSTE HOTEL LIMITED [1995-1998] E.A. 1 (CALL)*** – Where the Court of Appeal said that judicial review is a procedure which is ***sui generis.*** It is neither civil nor criminal. By the very words of Section 8 of the Law Reform Act (Cap 26, Laws of Kenya) the High Court in exercise of its Criminal or Civil Jurisdiction will not issue any of the Orders of Certiorari, prohibition or mandamus, that is the judicial review court is not concerned with the merits but the decision-making process.

So, I was not a little taken aback by the copious Replying Affidavits by respectively, the Respondent and the Interested parties to these proceedings, and no less by the long arguments by their respective Counsel dealing purely with the merits of their respective cases. Judicial review as over repeatedly stated above is about decision-making process not the merits of either the Respondent's case or that of the Interested Parties.

As I will presently show, those Affidavits and submissions on the merits of the case are probably proper on appeal or a proper arbitration process, as a response to judicial review application I think they are totally misconceived.

14.0 OF JURISDICTION

Having disposed of those major arguments so far as the Respondent, and 6th Interested Party was concerned, I must now turn my attention to the other preferal but important argument (s) by Mr. Ohaga learned Counsel for Mobil Oil Kenya Ltd, the Interested party and to a lesser extent that of Anthony Oteng'o Ombayo learned Counsel for the Respondent. Mr. Ohaga's argument was that this court lacks jurisdiction to entertain these judicial review proceedings because Section 10 of the Arbitration Act expressly precludes any court from intervening in any matter where the parties have specifically stipulated that disputes are to be resolved by way of arbitration. Section 10 of the Arbitration Act 1995 provides:-

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

No piece of legislative drafting could be clearer. That legislation has however to be read in the context it is, or is to be applied. To apply that provision to the proceedings at hand literally would do grant violence to justice and its administration in relation in particular to the Arbitration Act. It would mean, as I will shortly demonstrate, that a group of business persons corporate or otherwise bound by a common agreement like members of the petroleum industry under OTS Agreement, or Grain Millers Association or similar body bound by some agreement subject to arbitration under the Arbitration Act could walk into a coordinator's office, summoned or otherwise, make a complaint about the way a member is procuring grain or other commodity in a manner they do not approve, and the coordinator or regulator after a few hours of discussion issues a directive as to how purchases should be made not only in the future, but also to what has already been purchased by a member. Such members could triumphantly argue the next day that the coordinator's decision is not only valid and binding, but that it was arrived at after an arbitration, and the courts of law cannot look at such an arrangement or conclusion because Section 10 of the Arbitration Act says so. Sorry, I do not accept that proposition, and I will not touch it with even a very long poker pole.

To uphold that proposition, the Court must not only look to the agreement to arbitrate but also find out whether there was an arbitration. This is what the Segman Affidavit says of the arbitration – paragraph 18-

"….**A dispute having risen about the pricing of the November 2004 cargo on or about 23rd November, 2004 the participating petroleum companies** *(or at least the Applicant and Kobil)* **referred this dispute for arbitration by Mr. Patrick M. Nyoike in accordance with the terms of Clause 15."**

The Paterson Affidavit at paragraph 17 says:-

17….. **that a dispute having arisen …. the**

parties invited the Permanent Secretary in the Ministry of Energy to resolve the dispute. The Permanent Secretary duly arrived at a decision which is in the nature of an award."

And the Marami-Kiarie Replying Affidavit at paragraph 19 says "***out of belief***" that…….

19.. …**Because** CALTEX **and other OTS**

participants rejected TOTAL's **purported selling price of cargo 22/2004 a dispute arose over the same and that the then Permanent Secretary in the Ministry of Energy, Mr. Patrick M. Nyoike, was appointed the arbitrator in the said dispute."**

And behold what the Permanent Secretary, Mr. Patrick M. Nyoike depones in his Replying affidavit at paragraph 47 about his appointment to arbitrate-

47. **That I have been informed by the learned State Counsel Mr. Anthony Oteng'o Ombwayo that the application before the court is misconceived because –** I was called by the stakeholders to arbitrate in the dispute **Total Kenya Ltd cannot claim that I acted without jurisdiction –which information I believe to be true."**

Perhaps commencing with the Respondent's paragraph 47 – which information does he believe to be correct, that he was called to arbitrate, or that the application by Total Kenya Limited is misconceived. I think it is the latter, because that he was called to arbitrate by stakeholders is a matter within the Permanent Secretary's personal knowledge and he would say and lay out evidence in his Affidavit how he was called by the stakeholders to arbitrate.

Similarly, the Marami-Kiarie, the Paterson, and the Segman Affidavits claiming that Mr. Patrick M. Nyoike the Permanent Secretary Ministry of Energy was appointed by them and the Applicant to arbitrate in the pricing of cargo 22/2004 must show, how and when the appointment was made. Each and all of them singularly fail to do so, and yet their Counsel strenuously opposed Mr. Regeru's submissions that there was no arbitration. The argument was entirely based in my view upon the unfortunate and careless statement not to be found either in the statutory statement or the Affidavit Verifying the Facts sworn by Thomas Maganga, but in paragraph (VIII) of the Applicants Counsel's Skeletal Submissions – "**that the P/S when called upon to arbitrate the dispute has given a ruling against the Applicant in favour of those who have failed to pay."**

Mr. Regeru learned Counsel for the Applicant tried to explain away this submission by appealing to the totality of the material put before the court by the Applicant is such that no arbitral proceedings even took place and no arbitral award was ever rendered.

In view of what I have said in reference to the Respondent's Replying Affidavit, the Paterson Affidavit and the Marani-Kiarie Affidavit, I am prepared to say and do say that there was no material placed before the Court, of the appointment of the Permanent Secretary Mr. Patrick M. Nyoike to be arbitrator under the Arbitration Act to determine the dispute regarding the pricing of cargo 22/2004, between the Applicant and the Interested Parties under the OTS Agreement.

To discover the nature of the proceedings which took place in November, 2004, recourse has to be made to only two recorded sources namely, the letters of the Respondent, the Permanent Secretary, Patrick M. Nyoike, and which letters I beg to set out in full in order to appreciate their full import into the alleged

arbitration under the Arbitration Act – pursuant to Clause 15 of the OTS Agreement.

Both letters are attached to the Affidavit Verifying the Facts of Mr. Maganga, the Applicant's Planning and Supply Manager sworn on 29th November, 2004. The letter of 23-11-2004, as I have already stated above, is addressed to the major stakeholders Chief Executive Officers of Caltex Oil Kenya Ltd, Total Kenya Ltd, Shell/BP, Mobil Oil (k) Ltd and Kenol/Kobil Petroleum Ltd. It says that "***I have received representations from various companies, both large and small on the alleged high cost burden of Murban Crude Cargo 22/2004 load by Total one hour to midnight of October 31-2004, and to address the problem……"*** arrange to attend a meeting in our Conference Room on 24th November, 2004 at 2.30 p.m.

The Permanent Secretary is careful not to say he has been appointed arbitrator by any of the various companies who made representations to him about the alleged high cost of the Crude imported by the Applicant.

The Permanent Secretary's letter of 25th November, 2004 does not also shed any light about his appointment as an arbitrator. The letter damned an "***arbitral award"*** by the Interested Parties to these proceedings, is addressed to the Applicant's Chief Executive and copied to CEO's Oil Marketing Companies is as follows:-

Mr. Lamine Kane

Managing DirectorTotal (Kenya) Ltd

Koinange Street

NAIROBI.

Dear Lamine

Applicable Cost for Murban Crude Oil Cargo No. 22/2004 imported by Total Kenya

As you may recall, at yesterday's meeting on the above captioned subject, there was no agreement between Total Kenya as the importer and other companies (Caltex, Keno/Kobil and Mobil**) except with Shell as the buyers on your demand that the October, 2004 import cost for the subject Murban Crude be used for billing all OTS participants in the Cargo.**

In view of this impasse I made it clear that I was not in position to make a ruling on what should be the applicable billing cost and that I needed to undertake further in house consultation. After internal consultations based on the outcome of the meeting and on OTS Crude imports for specific months and the attendant billing costs, it has been decided that since Cargo 22/2004 was meant for the month of November, 2004, the applicable purchase price should be for the same month (November).

In view of the foregoing, Total Kenya should bill OTS participants in the cargo the November 2004 price for Murban. It has also been decided that in order to avoid any further confusion in the future leading to price disputes, cargoes nominated to be imported for particular months shall have such months, applicable prices for billing."

Yours sincerely,

PATRICK M. NYOIKE

PERMANENT SECRETARY"

The letter bears the coat of arms of the Republic of Kenya and is headed – "Office of the Permanent Secretary Nyayo House, P.O. Box 30582 Nairobi and is dated 25th November, 2004.

Mr. Anthony Oteng'o Ombwayo Counsel for the Respondent, and Counsel for the Interested Parties, Caltex Oil Kenya Ltd, Kobil Petroleum Ltd and Mobil Oil (Kenya) Ltd all as per the various Affidavits termed this letter an award "***or that the decision was in the "****nature of award*" and that it was made after an arbitration perhaps lasting a record three hours or less from the meeting of 24-11-2004 having been scheduled to commence at 2.30 p.m. and assuming it ended at usual working hours of government at 5.00 pm it would have lasted no more than 2 ½ hours. The time taken is not of critical importance. What is of critical importance is whether the letter communicating the decision of the Permanent Secretary was a result of an arbitration.

Mr. Ombwayo learned Senior Principal State Counsel, submitted that the decision was a result of an arbitration. Why so? Because there are several varieties of arbitration.

According to ***Black's Law Dictionary*** "***arbitration is a method of dispute resolution involving one or more neutral parties by the disputing parties and whose decision is binding."***

In this dispute Mr. Ombwayo submitted the Permanent Secretary was a neutral third party and was agreed upon by all the parties in the dispute to resolve the dispute and this decision was binding. In terms of the definition by Black's Law Dictionary, the Permanent Secretary was the arbitrator.

Said Counsel also referred to the Concise Oxford English Dictionary 10th Edition which defines "***arbitration"*** as the "***use of an arbitrator to settle disputes."***

And yet in terms of the Approved Learners Dictionary, 5th Edition "***Arbitration"*** is defined "as a process of having a dispute settled by a person or a group not involved in a dispute."

The issue whether or not there was an arbitration is basically answered by Mr. Ombwayo himself in advice to the Respondent, the Permanent Secretary, that he believed to have been called to arbitrate by the stakeholders. This belief is however shattered by the Permanent Secretary's letter of 23rd November, 2004 which was a summons by the Permanent Secretary to the Applicant's Managing Director primarily to attend the Permanent Secretary's Conference Room from 2.30 pm. on 24-11-2004. Why? Because the Permanent Secretary had received complaints from various companies both large and small on the alleged high cost of crude.

The Permanent Secretary did not say, as he would have done, that he had received complaints from these various companies, large and small, and that they had appointed him as "a ***neutral party***" per Black's Law Dictionary definition of an arbitrator, and would the applicant accept the appointment, or not. The Permanent Secretary does not do such thing. He has determined to resolve the pricing dispute in his own way. In the interest of the petrol pump end users so that the petroleum prices remain manageable for the consumers of oil products.

There is an impasse after the meeting with the invited Chief Executive Officers of the major Petroleum Companies. He would consult before making his ruling. He does not say that Total Kenya Ltd and Caltex Oil Kenya Ltd, Keno/Kobil and Kobil) mandated him to make a ruling either way. He would nevertheless do in house consultations, not as one arbitrator, but as Permanent Secretary, Ministry of Energy, and make his decision not so much to suit the Interested Parties, but rather end-user Consumers of Petroleum Prices, as if there has ever been a day when Crude Petroleum prices have been low, and the benefit was passed to consumers. That is hardly a decision of a neutral or disinterested party. That is also hardly a decision of an arbitrator.

For the Permanent Secretary to claim that he was acting as an arbitrator he needed firstly to invoke that

he was acting in terms of clause 15 of the OTS Agreement. He needed to show his letter of appointment as arbitrator signed by or with the consent of the Applicant and the complainants or Interested Parties all appointing him as arbitrator.

In addition, the Arbitration Act 1995, the law applicable to any arbitration under the OTS Agreement was required to be followed. The Act lays down the procedure for appointment and composition of the arbitrators if more than one and the conduct of arbitral proceedings in Sections 11, 12, 19, and 20 thereof. Those provisions echo the principles set out in such leading texts as ***Russel an Arbitration***, 21st Edition which detail contents of an award etc. There is no semblance of an arbitration by the Permanent Secretary, no notice of appointment to the effect that he would be sole arbitrator, there is no indication as to how parties presented their cases or procedure for conducting the arbitration or when the arbitration commenced or what statement of claim and defence were made. It is neither fair nor proper for the Permanent Secretary to say on oath that he believed he was acting as arbitrator. If every Permanent Secretary who is called upon to resolve disputes were to say; he believed he was arbitrating under the provisions of the Arbitration Act, when he in fact was acting in his administrative capacity, it would make the arbitration process and law completely farcical.

For those reasons I reject any pretence that that the decision of the Permanent Secretary, Mr. Patrick M. Nyoike conveyed by his letter dated 25th November, 2004 was a result of an arbitral process by him in dispute resolution in respect of the pricing of Cargo No. 22/2004. Instead I accept Mr. Ombwayo's submission that when the Permanent Secretary intervened in the dispute he was exercising his powers under rule 14 (a) (d) of the Petroleum (Amendment) N(No. 2) Rules 2003 (the OTS Rules). These rules as we have observed permit the importation of the petroleum products whether Crude or refined through the open tender system centrally coordinated by the Ministry. It is clear from the words of the rules themselves that the Coordination related to importation of petroleum products. The issue of price is governed by Clause 9.1 of the OTS Agreement.

9.1 FOB. Component – The official Government Selling Price (OSP) for the applicable crude as published by the relevant Government/Government Body/Government Agent for the country of origin for the applicable crude oil, for the month of loading."

It is thus clear that the price of any cargo can only be fixed by the Government of the country of origin of the petroleum cargo. The Permanent Secretary has nowhere power to fix such prices. The value of his Replying Affidavit would lie as evidence to an independent arbitrator appointed under clause 15 of the OTS Agreement. The Permanent Secretary in deciding the crude price for the benefit of the end consumers of petroleum products would be acting on his own cause, against the rules of natural justice ***nemo judex*** in ***causa sua*** no man may be judge in his own cause.

In my judgement therefore the Permanent Secretary, Patrick M. Nyoike, not only did not arbitrate over the dispute but he also acted wide outside and offside the OTS Rules. In the common expression he acted ***ultra vires*** outside his jurisdiction and in excess of those powers as coordinator under the OTS Rules.

Mr. Ohaga, learned Counsel for the 8th Interested party, and indeed Mr. Esmail with the agreement of Mrs Ann Mbugua learned Counsel for the 1st Interested Party urged that the judicial review court has no jurisdiction in matters of contract and where aggrieved parties have alternative remedies in damages.

To these submissions I give a qualified approval, and say it depends. Qualified because, it depends upon the basis or the nature of the contractual relationship. For instance where a contractual relationship is underpinned by statute, an aggrieved party has access both to the judicial review court which will inquire into whether the authority or body charged with the administration of the law in issue has in relation to the aggrieved party acted in accordance with the law. In addition, the aggrieved party has a legitimate right to pursue his remedy in contract.

For instance in termination of employment under the public service which is underpinned by the Services Commissions Act, (***Cap. 185, Laws of Kenya***), the authorized officer must, in dealing with public officers act in accordance with the respective regulations. On the principle of mutuality of interest termination of

employment even in the public service may be sanctioned even by the Courts. The Courts will still quash decisions made by authorized officers otherwise than in accordance with the respective service regulations. The principle of mutuality of interest in matters of master and servant, employer and employee is that no specific performance will be ordered by the Court against the will of either party. If an employee wished to relinquish his current employment, he will not be retained by his employer against his will. Similarly an employer will not be compelled to retain an employee in whom it has lost confidence.

However in matters purely of a commercial nature, judicial review remedies do not by their very nature apply, and not by virtue of the contract. That is why for instance in ***PRESON –VS- INLAND REVENUE COMMISSIONERS*** [1985] 2 ***ALL ER. 327***, held that judicial review is available against the Inland Revenue Commissioners at the instance of a tax payer if the Commissioners failed to discharge their statutory duty to the tax payer or if they abused or exceeded their powers. In that case the Commissioners had agreed with the taxpayer not to reopen its investigations into his past tax affairs if he fulfilled his current tax obligations to the Inland Tax Commissioners. The court added that for the purposes of judicial review abuse of power included unfair exercise of a statutory power if the Commissioners' decision or action was equivalent to a breach of contract or a breach of representation giving rise to an estoppel.

In the recent English case ***of R.*** (on the application of West) Vs ***LLOYD'S OF LONDON [2004] 3 ALL ER. 251***, the Court of Appeal held that duties performed by ***LLOYD'S*** even though of a public nature, related solely to the commercial relationship between the applicant (Dr. West) and the relevant managing agents governed by the contracts into which he had chosen to enter. The decisions impugned were of a private and not a public nature, that the Business Conduct Committee (BCC) did not exercise governmental functions in the operation of the MST- By-Law but was itself subject to external governmental control….. further the fact that ***LLOYD'S*** corporate arrangements were underpinned by a Private Act of Parliament made it in no way unique and was not dispositive of the matter.

The Court further observed that the fact Lloyds regulated its members activities in the way it did through a desire to avoid a more intrusive governmental regulatory regime would not possibly convert it into a body exercising public functions itself. ***LLOYD'***s was not therefore amenable to judicial review and the application for judicial review would therefore be dismissed.

I am unable to disagree with that decision in its context. It has however no application in this case. Indeed Brooke LJ who gave the major speech in that case cited with approval, the seven tests at pages 262-263 which Lord Woolf C.J. proposed in the case of ***POPLAR HOUSING and REGENERATION COMMUNITY ASSOCIATION LTD –VS- DONOGHUE*** [***2001] 4 ALL ER. E.R. 604***, in determining whether or not a particular authority or body is subject or amenable to judicial review. In that case Lord Woolf was construing the provisions of Section 6 of the Human Rights Act 1998 of the United Kingdom. Section 6 (1) provided-

(1) ***It is unlawful for a public authority to act in a way which is incompatible with a Convention……..***

(2) In this Section "***Public authority***" includes ….

(b) any person certain of whose functions are functions of a public nature……

(c) In relation to a particular act, a person is not a public authority by virtue of only of subsection 3 (a) if the nature of the act is private –

Lord Wolf C.J. said-

(i) While Section 6 of the 1998 Act requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review.

(ii) the emphasis on public functions reflects the approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal (the judgement of Lloyd LJ. in Ex Parte Datafin (RV. Panel on Take-overs and merges [1987] I ALL ER. 564.

(iii) What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act;

(iv) statutory authority for what is done can at least help to mark the act as being public. So can the extent of control over the function exercised by another body which is a public authority;

(v) the more closely the acts that could be private in nature are enmeshed in the activities of a public body, the more likely they are to be public;

(vi) the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogues to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorized private.

(vi) after identifying the most important facts in any given case, it is desirable to step back and look at the situation as a whole.

(vii) as is the position on applications for judicial review, there is no clear demarcation line which can be shown between public and private functions. In a borderline case the decision is very much of fact and degree."

In the subsequent case cited by Brooke L.J – In R. (on the Application Heather) Vs. ***Leonard Cheshire Foundation [2002] 2 ALL ER. 936 and Aston Cantlaw and Wilmote and Bidesley Parochial Church Council*** Vs. Wallbank [2003] ***3 ALL ER. ALL ER. 1213*** the courts found that although the works of the Children's Foundation and the Church Council were public in character, they were not governmental and were therefore not subject to judicial review. In Kenya, Dr. Barnados Children's Home (***Christian Homes***) and **Mama Fatuma** Home for abused children – no doubt perform great public charitable work, but they are not governmental, and their decisions would not be subject for judicial review.

Mr. Ohaga, learned Counsel for the 8th Interested Party Mobil Oil Kenya Ltd. urged me to accept the proposition that if I stepped back and looked at the situation as a whole I should find that the decision of the Permanent Secretary is not amenable to judicial review.

I have stepped back and looked at the circumstances of this case through the pages, I have written, I have looked at and read all the authorities cited to me, I have read over my notes, the skeleton arguments by Counsel on both sides of the divide and what do I see?

I see here a clear case of a "**public officer**" to borrow the phrase used in the ***Donoghue Case***, and "**authorized officer**" under Service Commissions Act, and an ***Accounting Officer*** under the Exchequer and Audit Act, (**Cap 412, Laws of Kenya)** a Permanent Secretary under ***the Constitution of Kenya*** who acted under the guise of a purported arbitration which lacked every ingredient of an arbitration process under the Arbitration Act, 1995 or the rules thereunder and yet the Respondent and the Interested parties through their representatives and sometimes on the advice of their Counsel state on oath that an arbitration took place, that the matter is purely commercial in nature and has nothing to do with the orders sought under judicial review or that the applicant has an alternative remedy.

I am indebted to Mr. Ohaga for bringing to my attention the LLOYDS' case. If I were however to accede to any of the arguments, or to the situation described in the Lloyds's case, I would truly open myself to the accusation of both intellectual and legal/cum- judicial ineptitude. The public officer, the authorized officer, the Accounting Officer, the Permanent Secretary's acts which would otherwise be private were so enmeshed in his activities as a public officer that there is no doubt in my mind that he was performing a governmental function under Item (VI) of the tests by Woolf C.J. (supra). His foundation

was the OTS Rules based upon the Petroleum Act. The OTS Rules allow him to coordinate the importation of the precious and expensive commodity.

The coordination role under the OTS Rules do not allow him to arbitrarily assume the office of arbitrator and to make decisions purportedly under the Arbitration Act without as much as affording the Applicant any opportunity of putting its case. By common agreement of all the oil industry players or to use that hackneyed word, stakeholders in the petroleum industry, led by the Permanent Secretary the stated author of the OTS Agreement, had reached under that Agreement, that any disputes arising under the Agreement would be resolved by arbitration. By going back on that arrangement, a more classic arbitrary exercise of power I am unable to define. Under the Woolf C.J. tests (supra) the government hand is so enmeshed in the matter that this becomes yet a classic case for judicial review in a matter which fell under commercial arbitration if only the Respondent had adhered to the OTS Agreement. I do not therefore accept Mr. Ohaga's submission to the contrary.

The Applicant has sought these orders by its Motion on Notice, namely Certiorari, Mandamus and Prohibition. The prayers for both mandamus and prohibition are incompetent on the authority of ***KENYA NATIONAL EXAMINATIONS COUNCIL V. REPUBLIC***, Ex parte Geoffrey Gathenji and 8 others.

An order of Mandamus is a mandate to a public authority or person or body of persons to carry out what it is by law required to do. My favourite example is that of the Licensing Court under the Licensing Act **(Cap 121, laws of Kenya)** which is required to ***consider*** and ***determine*** applications for liquor licences. If it refused or neglected to sit, consider and determine an application, then this court would issue a mandate , a command to that body to consider and determine an application for a liquor licence. My other favourite example is that of the Trade Licence, under the Trade Licensing Act (**Cap 497, Laws of Kenya.)**. If the Trade Officer refused or neglected to consider and determine an application whether for an initial licence or renewal, again an order of mandamus would issue.

An order of ***mandamus*** will therefore not issue to reverse a decision of an authority or person or body of persons irrespective of whether that decision is right or wrong. The Application for this prayer is therefore not only incompetent but is entirely misconceived. It fails.

OF THE ORDER OF PROHIBITION

An order for Prohibition lies in the future to prohibit an authority, body or body of persons, an authorized officer, etc. from doing or committing an unlawful act. It will not issue to prohibit such authority from exercising its power in any specific way or manner. The prayer for this order of prohibition is equally incompetent and misconceived. It fails also.

OF THE ORDER OF CERTIORARI

An order of Certiorari lies to quash a decision of an authority or body which has been made either without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

In the matter at hand and in light of my extensive discussion of the OTS Rules, under which the OTS Agreement was made, it is quite clear that the Respondent, the Permanent Secretary of the Ministry of Energy in purporting to arbitrate a pricing dispute between the Applicant and the Interested Parties was performing a public and governmental function. He neither had the arbitrator's cloak, nor the mandate under the OTS Rules made under the Petroleum Act, to decide on the dispute. He clearly acted without jurisdiction, and in blatant abuse of the rules of natural justice. For those reasons, an order of certiorari shall issue to quash the proceedings and the decision cont``````````````````````````ained in the Respondent's letter dated 25th November, 2004 shall be removed into this court and quashed forthwith.

I also direct that the costs occasioned by these proceedings shall be borne equally by the Respondent, the 1st, 6th and 8th Interested Parties, and if not agreed upon to be taxed by the Taxing Officer of this Court.

Dated and delivered at Nairobi this 28th day of September, 2006.

ANYARA EMUKULE

JUDGE.