REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 388 OF 2000

GLENCORE GRAIN LTD.....APPLICANT

VERS

TSS GRAIN MILLERS LTD.....RESPONDENT

RULING

Glencore Grain Limited originally filed in this court an application by Chamber Summons dated 9.8.2000 seeking for leave to enforce an international Arbitral Award as if it is a decree of the court under Section 36 of the Kenya Arbitration Act, 1995 and under Rules 4(1) and 9 of the Arbitration Rules, 1997.

TSS Millers Limited who are the Respondents in the above application also on 29.9.2000 filed another application, also by Chamber Summons dated the 22.9.2000 seeking, effectively, for orders of this court refusing enforcement of the said Arbitral Award filed by Glencore Grain Ltd and seeking to set the award aside. The actual prayers sought by either party will be set out later in this ruling.

For ease of reference, this court will in this ruling, refer to Glencore Grain Ltd as "Glencore Ltd" and TSS Grain Millers as "TSS Millers Ltd". TSS Millers Ltd argued their application on 15.11.2001 and the court reserved its ruling. In the meantime it had been impressed upon the court during the prosecution of the TSS Millers Ltd's application aforementioned that the issues raised therein were going to directly affect and/or influence the result in the Glencore Ltd's application dated 9.8.02 for the enforcement of the arbitral award which application was still unprosecuted. I accordingly decided that if the latter application would also be argued, the court would be now placed in a better position to examine the issue raised in both applications and determine them once and for all, especially since most of them were similar and of common interest to both parties. It was under these circumstances that the applications were mentioned before me on 9.4.2002 when I sought the counsel's views over the matter. The result was that both counsel agreed to argue the Glencore Ltd's application for enforcement dated 9.8.2000 before the court's final determination of TSS Millers Ltd's already argued application aforesaid. The counsel also expressed no objection to the court's view that the court should thereafter consider and determine the two applications simultaneously and then deliver a joint ruling. In the meantime TSS Millers Ltd sought and were granted leave to file and serve a replying affidavit to Glencore Ltd's enforcement application aforementioned and Glencore Ltd were also granted leave to file and serve a supplementary affidavit, if need be. On 30.04.02 Glencore Ltd's application aforesaid was finally argued. It brought on the record substantial materials arguments and issues as to whether or not the arbitral award under consideration should be enforced by this court. It is to the said arguments and materials from both parties that I now turn.

The facts behind the applications, as I understand them, are as follows: By a sale agreement dated 18th June, 1998 Glencore Ltd agreed to sell and deliver to TSS Millers Ltd 10,000 (+/- 10%) metric tons in sellers option of US No 2 White corn. Delivery was to commence immediately upon Glencore Ltd's

release order but latest on 31st July, 1998, in 50/90 kg polypropylene bags. The price was agreed at USD 180 per metric ton ex sellers warehouse, Mombasa. Payment was by means of an irrevocable sight Letter of Credit to be opened in favour of Glencore Ltd within full workable 7 days from the date of signing the contract. If TSS Millers Ltd failed to open the Letter of Credit, Glencore had two options:

a) To terminate the contract or
b) To extend the delivery period within the number of days of the delay in opening the Letter of Credit with TSS Millers Ltd bearing the consequences of delay.

There are other terms which need not be stressed at this point except special term 4 which states:

"Arbitration as per Gafta 125 in London, English Law to govern"

and term 5 which states:-

"All other terms and conditions as per Gafta 200"

On 1st July and on 24th July, 1998 Glencore Ltd wrote to TSS Millers Ltd reminding them that they had failed to open up the Letter of Credit within the 7 days agreed, but the latter did not respond. Glencore Ltd were according to the said contract supposed to either terminate or expressly extend the delivery period. They did neither as the records confirm.

Then Glencore Ltd did something apparently outside the above terms of contract. They decided to 'amend' the contract, unilaterally. Instead of supplying US No 2 White Corn of the quality described in the first signed contract, they decided to supply White Maize of South African origin. They fixed their own price at USD 175 per metric ton instead of USD 180 per metric ton. Under the purported amended contract they required TSS Millers Ltd to open a Letter of Credit within the workable days before 15th August 1998. An amended invoice was sent to TSS Millers Ltd. It would appear that TSS Millers Ltd failed or refused to respond to the new situation whereupon Glencore Ltd employed a broker by the name of Export Trading Co Ltd to contact TSS Millers Ltd in respect to the amended contract but it would appear from the records before the court that Export Trading Co Ltd were unable to elicit a response from TSS Millers Ltd sooner. They informed their principals of their failure in writing on 28.8.1998 stating that TSS Millers Ltd were not contactable. Material on the record show Glencore Ltd at this time claiming that TSS Millers Ltd has approved the amended contract. No signed amended contract was included in the material before the Arbitral Tribunal nor this court. On the other hand, the said TSS Millers deny having been party to the amended contract and consistently denied that they in any manner approved or signed it.

In the meantime on 30.9.98 TSS Millers Ltd had also received some sample of the white maize of South African origin, apparently already in Mombasa. It sent the sample to an internationally known company called SGS Kenya Ltd for the purpose of having the maize tested to establish its moisture content and its quality. SGS Kenya Ltd found and put it in their report to TSS Millers Ltd, that the maize was not of the standard of KS 01:42 or grade 4, the latter being the lowest grade acceptable in Kenya for human consumption. The Report is marked Exhibit TSS 2. Upon the contents of the report, TSS Millers Ltd declined to accept and sign the proposed amended contract and also declined to comply with the request to open up a Letter of Credit. This remained the position until the 12th November, 1998 when Glencore Ltd proceeded to treat TSS Millers Ltd to be in breach of the contract and to refer the breach to Gafta for arbitration whose result is the Arbitral Award dated 22nd March, 2000 and which is the subject of the two applications before the court.

When Glencore Ltd filed their application dated 9.8.2000 through their Advocate Mr Khanna, they annexed the following documents:

1) A Certificate of Attestation by one Richard Graham Rosser, Notary Public of the City of London, to the effect that the signature set and subscribed at the foot of the document (ie. Certificate) by one Pamela Maureen Kirby Johnson, The Director-General of Gafta, was genuine.
2) A Certificate by Pamela Maureen Kirby Johnson confirming that the Arbitral Award dated

22.3.2000 filed with the certificate in (1) above, was a true and correct copy of the said Arbitral Award.
3) A Certificate of the true copy (so certified by one Richard Butler) of the Contract Agreement dated 18.6.98 between Glencore Ltd and TSS Millers Ltd.
4) Copy of Award of Arbitration No 12-618 dated 22.3.2000 signed by R.J. Short, H Hintermann and AM Kneen.

The reliefs sought by Glencore Ltd in their application are:

1) That this Honourable Court be pleased to grant leave to enforce the arbitral award as decree;
2) That the said arbitral award be and is hereby filed herein and be given its own serial number in the Civil Registry Register.
3) Costs

The reliefs sought by TSS Millers Ltd in their application are that:

1) The Applicant be granted leave to bring this application out of time.
2) The enforcement of the award of arbitration dated 23.3.2000 by J Short, H Hintermann and AM Kneen in favour of Glencore Ltd be refused and the award be set aside.
3) Costs.

Glencore Ltd did not show to be basing its application upon any grounds as required under Order 50 rule 7 of the Civil Procedure Rules. However, TSS Millers Ltd, in respect to their application gave various grounds. They stated that they received the award only on 13.9.2000 upon request through their Advocate by a letter dated 11.9.2000; that the arbitrators had based the said Arbitral Award on an amended contract never agreed upon or executed by them, which amounted to an error of law apparent on the face of the arbitration award that the enforcement of the award will occasion gross miscarriage of justice and prejudice, to them contrary, to public policy of Kenya; that the arbitrators approach was so astoundingly irregular and partial that the resultant conclusions therefrom amounted to a misconduct on their part; that there is an error on the face of the record of the award as the arbitrators failed to make a finding as to whether Glencore Ltd had in fact duly performed its part of the contract as to entitle it to damages against TSS Millers Ltd; that Arbitral Award dealt with matters and issues not provided in or contemplated by the contract executed by the parties, thus dealing with matters beyond the scope of the reference and enforcement of the contract against Kenya's public policy; that the award is not supported by law and enforcement thereof will be against public policy since the effect thereof is unjust. Most of these grounds were not brought to the fore by Mr Adera Advocate who had filed the application but to this I will revert later.

In supporting Glencore Ltd's application Mr Khanna argued several issues which would be better highlighted at this stage. He stated that:

a) His clients' application dated 9.8.2000 did not require an affidavit in its support because the Arbitration Rules of 1997 rule 9 does not provide for or seek for a supporting affidavit, nor therefore a replying affidavit.
b) That the granting of leave to enforce an arbitral award or to reject it must be confined to S.37 of the Act only and to no other legal provision.
c) That the enforcement of the award is not against public policy of Kenya.
d) That the validity of the award itself has not been challenged since TSS Millers Ltd voluntarily chose not to attend and defend the prosecution of the reference. e) That the application by TSS Millers Ltd for the rejection of the enforcement of the award was out of time by three months having been served on 28.3.2000.

Mr Taib for TSS Millers Ltd raised several grounds in opposition. He was holding a brief for Mr Adera who had earlier appeared for TSS Millers Ltd. He included the followings grounds:

1) That enforcement of the award would be against Kenya's public policy in that the maize which

Glencore Ltd purported to sell to TSS Millers Ltd for human consumption in Kenya was found to be totally unfit for human consumption.
2) That the application dated 9.8.2000 for enforcement did not conform with Order 50 Rule 7 and was fatally incurable.
3) That relevant application was fatally bad in law in not being supported by an affidavit of support contrary to Order 50 Rule 3 or 7.
4) That the award cannot be enforced by the court because no duly authenticated or duly certified award or true copy of the original copy itself was filed for enforcement or if certified, was not certified by a qualified person according to law.
5) That the Arbitration Agreement upon which the award is based was not annexed to this award under consideration contrary to S.3(1) of the Arbitration Act 1995 as read with A.36(2) and S.3(6).
6) That Glencore Ltd's position being that the original contract between the parties was amended and that the amended contact was the one relied upon, the latter was not in writing as the original and was therefore not also annexed as required as per S.4(2) of the Act.
7) That both parties were corporations and that any contracts signed by them must be under corporation seal unless exempted by their individual Memorandum & Articles of Association.
8) That the Arbitration Award was not stamped under Kenya's Stamp Duty Act (S.19&23) and was therefore not only incapable of being filed and registered in the Court Registry, but also was not admissible as evidence or enforceable by any court of law.
9) That TSS Millers Ltd was not given an opportunity to put up its case in that the Arbitration body failed to effectively communicate with them as per S.9 of the Act.
10) That the number of arbitrators, contravened S.11 of the Act and S 12 also. 11) That the place of the award contravened S.32(4) & (5) of the Act.

Before this court begins to consider the merits of the above mentioned grounds in both applications, I find it necessary at this stage to make two rulings. The first is as to why the court refused Mr Khanna's application for adjournment during the prosecution of his main application and the second is also as to why the court refused to allow Mr Khanna to withdraw the whole application aforementioned dated 9.8.2000 which is the basis of all these proceedings.

Mr Khanna having fully argued Glencore Ltd's application under consideration, gave way as per the provisions of Order XVII rule 1 and 2, to Mr Taib to state TSS Millers Ltd's defence. It was when Mr Taib was very advanced in his submission also that Khanna decided to seek an adjournment after Mr Taib raised certain crucial legal issues that might negatively affect Glencore Ltd's case. Adjournment was strongly opposed by Mr Taib mainly on the ground that it was being sought too late in the day and that the application arose from Mr Khanna's probable need to gain time to regroup and then re-attack. I considered the application and refused it then reserving this court's right to give the reasons for such refusal later.

These are the grounds of my refusal orders. It is my view that the application for adjournment at that stage was unsustainable, especially when Mr Khanna did not, for reasons not revealed to the court, give the grounds for suddenly seeking for such adjournment. Furthermore, the application came after Mr Khanna had completed his main submission and had let Mr Taib argue and almost complete his case in response. It is no wonder, therefore, that Mr Taib argued that Mr Khanna was trying to have the adjournment because he realized that his client's case was at that time facing serious difficulties and that he wanted an opportunity to regroup before a fresh attack. Whether this was so or not, this court thought it was indeed too late in the day and that an adjournment at that stage would most probably prejudice Mr Taib's client. The court would also appear to be assisting one side to the matter before the court. And finally, and more important, Mr Khanna's failure to give reasons as to why he wanted the adjournment denied the court the material upon which to exercise the court's discretion in his client's favour, a discretion which can only rightly be exercised in a party's favour judicially and not at the mere whim of the judge.

It is on the record that when Mr Khanna's application for adjournment was refused, he then proceeded to apply for leave to withdraw his application dated 9.8.2000 altogether. This court refused the application

similarly and reserved a ruling until later. I now wish to state that my reasons for refusal to grant leave to withdraw the application are the same as those for refusing adjournment which I have stated above and which I adopt fully and do not need to repeat. I will now revert to the two main applications under consideration.

The first issue to decide is whether or not TSS Millers Ltd's application dated 29.9.2000 opposing Glencore Ltd's application dated 9.8.2000 was out of time. Mr Khanna argued that it was out time because the Arbitral Award was served on TSS Millers Ltd on 22nd March, 2000. The latter was supposed to file any challenging application within 3 months. That they filed their application under consideration on 22nd September 2000, 3 months out of time. That they knew they were out of time and that is why they found a need to include in their above mentioned application a prayer for leave to file the application out of time. But Mr Adera who argued that application did not stress this prayer although he did not abandon it either. TSS Millers Ltd's answer to the question was that they were not served with the Arbitral Award on 29.3.2000 but on 13.9.2000. They further argued that this service came about when TSS Millers Ltd were for the first time served with the Glencore Ltd's enforcement application to which the copy of the Arbitral Award was annexed.

Glencore Ltd depended upon Mr Amrapali Chaudthury's letter dated 22.3.2000 stating that Gafta sent to both parties copies of the award. This turned out to mean that Gafta had sent the copies of the award by courier service. A copy of the delivery book record was annexed and identified to this court as Exhibit'"SJH.2" being a Gafta POD Report. The 14th item thereon shows the following entry:

"84014455722 22-Mar 00 – KENYA OTHERS 28 Mar 00 915 – SIGNATURE".

This entry is underlined and was relied by Glencore Ltd as the evidence of service of the Arbitral Award under consideration on 22.3.2000.

I have considered this piece of evidence. It does not, in the form it was presented before this court, mean much. It is too sketchy. It does not clearly show that it was a service of any particular document to TSS Millers Ltd. It only shows a number "84014455722" and another number "22"– and a word spelt "Mar" with two zeroes in front followed by words "Kenya others" and again "No. 28" and a word spelt "Mar" with "00" in front, before the figure "0915 – signature". These words and figures cannot and did not, before this court, establish the service disputed. It possibly could have made sense if the courier company could have deponed an explaining affidavit to decipher the above figures and incomplete words. This omission may have been carelessly or inadvertently done. However, the omission did not help the court, nor did it help the party who relied on the vague entry. This court has no hesitation therefore in finding that TSS Millers Ltd was not served with a copy of the arbitral award under consideration on March 22, 2000 as claimed by Gafta or Glencore Ltd. I accordingly accept TSS Millers Ltd's contention that they were served with the award for the first time on 13.9.2000 and that they were therefore not out of time when they filed their application challenging the award on 22nd September, 2000.

The Glencore Ltd's application dated 9.8.2000 was not supported by any affidavit. Mr Khanna said that that was an application to enforce an Arbitral Award under the rules made under Arbitration Act, 1995 specifically rule 9, and that such application did not need a supporting affidavit since the rules did not specifically state that such an application should need a supporting affidavit. I find this quite interesting, coming from a senior counsel. However, S.36 of the Arbitration Act states that an arbitral award …. upon application in writing to the High Court, shall be enforced subject to this section and section 37. Rule 9 of the Arbitration Rules states that an application under S.36 of the Act shall be made by Summons in Chambers. Would such an application be any different from those applications generally provided for under Order 50 rule 7? I think not. This means that the application for leave to enforce an award such as the one under consideration like any other must generally state the grounds of the application and be supported by an affidavit bearing the facts or evidence upon which it is based. Glencore Ltd's application was accordingly not based on any facts or evidence as it should under Order 50 rule 7. The application was skeletal. There was no separate oral evidence coming from the applicant upon which the application would be based. In cases where the Applicant's supporting affidavit is found to be valueless or where it is struck out or expunged from the record for good reasons, the application, like in the case of *Wahinya v*

Wahinya KLR, 96, at page 97 was dismissed. It is my view and I so hold, therefore, that the Glencore Ltd's application before this court seeking to enforce the arbitral award under consideration, does not only stand unsupported by any valid affidavit but is also not grounded on any ground as required under Order 50 rule 7 of the Civil Procedure Rules. It is my further finding that Order 50 rule 7 is a mandatory requirement. Indeed the correct legal position is that even where the supporting affidavit were found present and proper, the omission to ground the application would be fatal and incurable. In this case there is no supporting affidavit and also there are no grounds of the application. On either reason I would and do hereby dismiss Glencore Ltd's application for enforcement of the arbitral award before the court.

Mr Khanna further submitted that the granting of leave to enforce the arbitral award must be confined to S.36 and 37 of the Arbitration Act, 1995 and that it cannot be considered as affected by any other law. He said this to stress the view that Order 50 and other legal provisions of general application should not be seen to affect arbitral awards. This court does not share his above views which in my opinion are erroneous. The application of any law in my opinion will depend on the express provision of the same as interpreted by the courts of law and not otherwise. A good example is Order 50 itself. Rule one of the Order provides:

> "All applications to the court, save where otherwise expressly provided for under these rules, shall be by motion…."

This rule read together with rule 9 of the Arbitration Rules which provides that an application under Section 36 of the Act shall be made by summons in chambers, thus taking it off Order 50 rule 3 and placing it under Order 50 rule 7, would, in my view, mean that the Chamber Summons therein mentioned shall be a Chamber Summons in accordance with Order 50. I do not perceive any other clearer way rule 9 aforementioned can be interpreted. This means, as I have held above, that the application had to observe the mandatory requirements of Order 50 and not otherwise as Mr Khanna canvassed. I have already held that Glencore Ltd failed to do so and that the failure was incurable. What I find interesting about the failure is the fact that both Mr Khanna and Mr Taib were in April 2002, allowed by this court to file any relevant affidavits as they may deem fit. Mr Taib proceeded to file a lengthy Replying Affidavit in opposition of the application which had not been filed earlier. But Mr Khanna filed an affidavit in response to Mr Taib's Replying Affidavit not really in support of the application of 9.8.2000 or in response to Mr Taib's affidavit contents but in reply to TSS Miller Ltd's Chamber application dated 22.9.2000. See paragraph 5 of his affidavit dated 24th April, 2002. In paragraph 8 and 9 of the same he asserted the position that Glencore Ltd's application of 9.8.2000 for enforcement of the arbitral award, did not need a supporting affidavit nor did it, according to him, need grounds to support it as would be required under Order 50 rule 7 which have been referred to above. Indeed he went further to submit that even Mr Taib's replying affidavit was unnecessary and needed to be expunged from the record. I find Mr Khanna's position a very innovative one but one not supported by any law familiar to this court. Nor did he cite any precedent in support of his novel argument.

I now turn to the form and manner which the arbitral award under consideration was filed. Mr Taib submitted that the award was not filed in its original form nor was it authenticated or certified as a true copy of the original. I have earlier on shown that a copy of the arbitral award No 12618 dated 22.3.2000 was filed with the application dated 9.8.2000. It was court stamped on the 21.3.2000. Examination of the same confirms that the copy filed is a photocopy. Covering the photocopy in its original form, is a certificate by the Director-General of Gafta, Pamela M Kirby Johnson to the effect that the under-covered copy is a true and correct copy of the Award of Arbitration No.12618 aforesaid. Further covering the two documents above is another certificate and an attestation by one Richard Graham Rosser, a Notary Public of London, England to the effect that the signature subscribed at the foot of the covered certificate was that of the said Director-General of the Gafta whose identity he attested. The said Richard Graham Rosser also attests that the document his certificate covers, ie the certificate of Pamela Maureen Kirby Johnson, is genuine. The question here is whether Mr Richard Graham Rosser's certificate and attestation can be taken to be an attestation and certificate of authentication of the arbitral award itself when it only refers to the document annexed to it which is the certificate of Pamela Maureen Kirby Johnson and not the award of arbitration itself. It is my view and I so hold, that whether or not a copy of a document is certified as a true copy of the original is a matter of fact, of course with legal implications. If it is so certified, it will

carry or bear the stamp or seal of a legally qualified person on it. It will likely carry the date of such certification or authentication. In this application the arbitration award did not itself carry the seal or stamp of Richard Graham Rosser, the person shown as qualified to do the certification. It instead carried a certificate of Pamela Maureen Kirby Johnson who is not shown thereon to have been qualified to do the certification or authentication thereof as she did not show that she was herself a Notary Public or a Commissioner for Oaths. The end result accordingly is that the copy of arbitral award filed by Glencore Ltd through Mr Khanna was not either certified or authenticated as mandatorily required under S.36(2)(a) of the Arbitration Act.

Along with the arbitration award is the mandatory requirement to file with it an original copy of the arbitral agreement or certified or authenticated copy thereof under Section 36(2)(b) of the Arbitration Act. There is no doubt or dispute that the arbitral agreement or contract filed by Glencore Ltd herein was a photocopy. It was certified as true copy of the original by one Richard Butler. The qualification of Richard Butler is not shown on the seal or stamp affixed on the document. It cannot therefore be said or found that Richard Butler was qualified to carry out the certification. He is not shown to be a Notary Public or Commissioner for Oaths. I therefore have not hesitation in holding that the certification was improper according to the law and that Glencore Ltd failed to file a certified copy of the arbitration agreement as required under Section 36(2)(b) of the Act. Since the court was not approached to nor did it otherwise make any other orders before the filing of or in relation thereto, it is my ruling that failure to comply with the said Section 36(1) and (2) of the Arbitration Act by Glencore Ltd was fatal. This in my view, and I so hold, renders the arbitral award and the arbitral agreement jointly and severally inadmissible in evidence in accordance with S.2(1), 64, 66, 67 and 68(1)(e) and (f) of the evidence Act. The court in the case of *Ngigi Ngugi v Njenga Waweru,* [1979] KLR at 254, had opportunity to consider closely the said sections governing the admissibility or otherwise of secondary evidence. It held that the provisions of the Evidence Act cannot be ignored or slighted. It held further that a document being a mere copy of another and thus amounting to secondary evidence, which is not satisfied in accordance with the law is indeed inadmissible. This being a Court of Appeal decision, this court is bound by it. It is my opinion and I so hold therefore that the Arbitral Award and Arbitral Agreement are not admissible for the purpose of recognition and/or enforcement sought under Clencore Ltd's application dated 9.8.2000.

The next issue for consideration is whether Glencore Ltd filed the Rules called GAFTA 125 and 200 and if not, with what result. Mr Taib for TSS Millers Ltd submitted that original or certified copies thereof were not filed with the arbitral contract or agreement. Perusal of the Arbitral Award on page 5 and 6 clearly confirms that the Arbitral Tribunal purportedly appointed under the arbitral contract, heavily relied on the GAFTA Rules 125 and 200 to conduct the arbitral proceedings. In particular the appointment of arbitrators, communication of documents between it and the parties, rules governing same etc were all probably done in accordance with GAFTA Rules. It is also in the Arbitral Agreement signed by the parties herein on 18.6.1998 that GAFTA Rules would govern any dispute arising between the parties although it did not specify whether it would be some or all disputes arising that would be so referred. To this situation Section 3(6) of the Act states:

> "Where a provision of this Act refers to the fact that the parties have agreed or that they may agree or in any other way refer to an agreement of the parties, <u>such agreement includes any arbitration rules referred to in that agreement"</u> (stress is mine).

This read together with Section 36(2)(b) which provides:

> "(2) Unless the High Court otherwise orders, the party …. Applying for enforcement shall furnish ….. (b) the original arbitration agreement or duly certified copy thereof"

means that the arbitration agreement to be filed shall include the arbitration rules to that agreement, in this respect, the""GAFTA" rules. I have perused the Arbitration Agreement or even the Arbitration Award in this case, but find no copies of GAFTA rules 125 or 200 or even any. This means the Arbitral Agreement filed under Section 36(2)(b) is incomplete either by carelessness or inadvertence. Whichever is the case, it is my view that the arbitral agreement filed herein considered as it is, is fatally defective. Glencore Ltd did not at any stage of the conduct of these applications specifically seek to rectify the deficiencies. The

result is that the said agreement cannot for this purpose be held to be an arbitral Agreement as provided under S.36(2)(b) which was accordingly, also, not complied with. This therefore in my view makes the arbitral award unenforceable.

Mr Taib for TSS Millers Ltd also submitted that the arbitral Agreement clause that purported to refer any disputes arising for arbitration by GAFTA was so vague or uncertain that it should not have been relied upon for any purpose. He was referring to the arbitration clauses on page 2 of the arbitral contract that states thus:

> "Arbitration as per GAFTA 125 in London, English Law to govern".

Mr Taib referred to the provisions of Section 3(1) of the Act, which states:

> ".. arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship whether contractual or not".

Mr Taib then argued that since the arbitral agreement did not specify whether it was all or certain disputes that could be referred, it should be held to mean that it was too vague to form a contract. I have considered this submission but find that it is not sustainable. In my view, if the parties wanted to exclude any specific or certain disputes from the arbitration they would have said so. The statement:

> "Arbitration as per GAFTA 125 London, English Law to govern"

to this court means that all disputes were left to GAFTA 125. To read it any other way would be to twist the meaning. I accordingly reject Mr Taib's view.

The next issue that Mr Taib raised was whether the arbitral agreement filed herein was a written agreement within S.4(2) of the Act which makes such mandatory. He submitted that while the original agreement signed by both parties was written and signed, the amended agreement, so amended by Glencore Ltd, was not signed by TSS Millers Ltd. He then asserted that since the amended agreement was not signed by TSS Millers Ltd, it failed to amount to a written agreement within S.4(2) of the Act. He asserted that filing an agreement which never amounted to an agreement within the section was a futile exercise as there was no agreement to go for arbitration. I have considered this argument and while it is difficult to understand why the Arbitral Tribunal implied reached the conclusion that there was a proper arbitral agreement to arbitrate upon, nevertheless, this was an issue in respect of which the Tribunal had jurisdiction to decide and which it indeed decided. I hold that it is not open to this court to determine upon an issue which was properly before the Tribunal and in respect of which this court has no jurisdiction.

The issue of the arbitral agreement not being sealed with the company seal of either TSS Millers Ltd and Glencore Ltd was also argued. It may be correct to state that the arbitral contract should have been sealed with the company seals to validate the same unless the Articles of Association of the same authorized them otherwise. It is my holding however that this would be also an issue to be validly raised before the arbitrators and not here.

TSS Millers also contended that the Arbitral Award was not validly filed and registered and cannot be countenanced by this court for having been so filed unstamped contrary to Sections 19 and 23 of Stamp Duty Act Cap 480, Laws of Kenya. There is no dispute between the parties that the Arbitral Award was completed in England although there was a suggestion also that it may have been written in South Africa. In either case it was arrived at outside Kenya and only brought to Kenya for enforcement. Section 23 of the Stamp Duty Act reads:

> "Every instrument executed out of Kenya by any persons … shall before being used, brought into force, or registered within Kenya, be stamped ….".

Clearly, the Arbitral Award herein is an instrument which was required to be stamped under Section 23

aforesaid, before it could be used, brought into force or be registered in this court. So was the contract agreement filed at the same time as the Arbitral Award so long as the same can be considered to be an instrument that was to be registered in the arbitral process completed in England or South Africa, as the case may be. The fact that either document was not stamped in accordance with the mandatory Section 23 of the Stamp Duty Act, is also in my view not in dispute between the two parties herein. The immediate logical legal result of non registration is provided by the section itself. It is that such instrument cannot be used in any way for any purpose; it secondly cannot be brought into force; and finally, it cannot be registered. Further results of nonstamping are provided in Section 19 of the said Stamp Duty Act which I also reproduce for clarity:

> "1) Subject to the provisions of subsection (3) of this section and to the provisions of Section 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except:
> a) In criminal proceedings; and
> b) In civil proceedings by a collector to recover stamp duty unless it is duly stamped
>
> 2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped".

Under the above section therefore non-stamping leads to the instrument being not:

> 1) received in evidence in any proceedings whatsoever except those exempted therein none of which is relevant in this case
> 2) incapable of being filed, registered or acted upon.

The joint effect of the two sections above is to mandate and require this court:

> a) Not to use the Arbitral Award and probably the contract filed together with the Arbitral Award for any purpose b) Not to enforce the Arbitral Award
> c) Not to allow the filing and/or the registration of the said documents in this court's registry
> d) Not whatsoever to receive in evidence in this civil proceedings, the said Arbitral Award.
> e) Not to act upon the said documents in any way.

The courts conclusion arising from the effect of Section 23 and 19 of Stamp Duty Act is that their joint effect is not only to authorise and mandate the court to refuse the arbitral award recognition and enforcement but also not to use them for any purpose, not to allow it to be filed or registered, not to receive it in evidence in civil proceedings and not to act upon them in any way. This view is still right in law in my opinion despite Mr Khanna's submission that no other law provisions should be applicable in relation to the recognition and enforcement of an international arbitral award such as this except S.36 and 37 of the Arbitration Act. In my view Section 19 and 23 of the Stamp Duty Act are provisions of general application except where they are expressly excluded and they are not so excluded by the Arbitration Act.

Another issue raised by Mr Taib for TSS Millers Ltd was that there was no dispute from the signed arbitral contract which was due or capable of being referred to arbitration in view of the fact that the contract provided that if TSS Millers Ltd failed to open a Letter of Credit as provided therein, there were only two options open to Glencore Ltd. Those were either to terminate the contract, or extend the delivery period within the number of days of the delay in opening the Letter of Credit. Glencore Ltd did not exercise either of the two options when TSS Millers Ltd failed to open the said Letter of Credit. And so Mr Taib argued, Glencore Ltd chartered a totally new course not provided for in the contract when they proceeded to unilaterally amend the contract and proceeded to purport to enforce it. It is the opinion of this court once again that this court has ordinarily no jurisdiction to consider and determine a matter which was properly before the arbitral Tribunal such as this, however unhappy it may feel about it. It may be that Glencore Ltd acted outrageously in this matter. It may also be that Gafta Arbitration tribunal should have proceeded differently but I have already said, this is a matter properly within the jurisdiction of the Tribunal and this court has ordinarily no jurisdiction over it under the Act.

The issue of the service of arbitration documents from the whole start of the arbitral proceedings inclusive of the notices required to be served upon the parties and the service of the final arbitral award, was submitted by Mr Taib, to have been defective and non-effective under the provisions of Section 9(1) and (2) of the Arbitration Act. Mr Taib argued that TSS Millers were not served with the notice as to where and when the arbitration would take place by Gafta. TSS Millers Ltd was therefore not exactly aware of the actual conduct of the arbitration, he argued. I have examined the correspondences purportedly sent by Gafta to TSS Millers Ltd in light of Section 9(1)(2) aforesaid. It is common knowledge that when a fax is sent, a certificate is automatically produced by the fax machine certifying the successful communication sent. Also when a letter is sent by registered post a certificate of posting is issued. None of these were produced or proved to this court to confirm that all the documents purportedly communicated to TSS Millers as claimed by GAFTA or Glencore Ltd in these applications were indeed so communicated and/or delivered as required under Section 9(1)(2) aforesaid. For easy reference S9(1) & (2) provides as follows:

> "1. Unless otherwise agreed by the parties –
> a) any written communication is deemed to have been received if it is delivered to the addressee personally or if delivered at his place of business, habitual resident or mailing address; and
> b) the communication is deemed to have been received on the day it is so delivered.
> 2. If none of the places referred to in sub-section (1)(a) can be found after making a reasonable inquiry a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered mail or by any other means which provides a record of the attempt to deliver it". (stress mine).

No evidence was deponed by Glencore Ltd to allege or prove that the said GAFTA, relied on other similar or different provision to or from those of Section 9 aforementioned to fulfil the purpose of the same. Nor did GAFTA refer or quote the exact rule they used in this respect. If GAFTA used the relevant Gafta rules, the same can never be ascertained as no GAFTA rules were quoted in the award and none was annexed or filed by Glencore Ltd at the time of filing the award. It is under these circumstances that Section 9 of the Arbitration Act became relevant and applicable as it cannot be said to have been excluded by non-existence GAFTA rules. Having found as above, it is my opinion and I so find that Mr Taib's assertion that his client was not effectively served and that he could not therefore be held to have known the actual time and manner of the arbitration proceedings, has substance and it is held hereby, to have been established on the balance of probability. It means therefore that communication from Gafta about the selection of an arbitrator or arbitrators was not known to TSS Millers Ltd. How can they then be held to have failed to select their own arbitrator to entitle Gafta to do selection for them? Under these circumstances, Gafta had no power nor authority to select an arbitrator or two arbitrators on behalf of TSS Millers Millers Ltd and doing so as Gafta did, was contrary to the mandatory provisions of Section 37 (1) (a) (iii). This omission in my opinion and I so hold, *inter alia*, renders this arbitral award once again, not recognizable and not enforceable within the said section. Upon the same grounds I do hold that TSS miller Ltd was otherwise unable to present its case before the arbitral Tribunal which as well, on its own, is a ground upon which also I hold that the arbitral award is not to be recognized nor be enforced under the same section as aforesaid.

The final issue argued by TSS Miller Ltd was that the arbitral award should not be recognized nor enforced because it is one against Kenya's public policy. Mr Taib submitted that the white maize of South African origin which was to be supplied under the amended arbitral agreement was certified to be unfit for human consumption under a certificate supplied by SGS (Kenya) Ltd. The latter as earlier shown is an international company recognized for establishing quality standards of goods usually sold or purchased between countries. Mr Taib further argued that the maize ordered under the original arbitral agreement dated 18.6.1998 was for human consumption. The original contract, as established in evidence before this court was replaced by the amended one under which the maize of South African origin was to be eventually supplied for human consumption as originally intended. Glencore Ltd did not controvert this fact with an alternative quality report. So this court accepted the fact that the maize to be supplied under the contract was the maize certified as unfit for human consumption. Indeed Glencore Ltd, even before this court confirmed to have later sold the maize to a third party, Mombasa Maize Millers Ltd.

The question that must be considered and determined is whether or not such a contract or an arbitral

award should be held to be against the public policy of Kenya. If this court comes to that conclusion it will refuse to recognize or enforce the arbitral award and vice versa.

A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/ or moral principles or values in the Kenyan society. It has been held that the word "illegal" here would hold a wider meaning that just "against the law". It would include contracts or acts that are void. "Against public policy" would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.

In this case before the court, the amount of the maize involved which could have been released under the relevant contract, to the Kenyan public for its human consumption is shown to be 10,000 metric tons. The health risk to the Kenyan people who would consume it if this happened, is unknown but could not be underestimated. The fact that the final arbitral award converts the said amount of maize into a monetary value payable by TSS Millers Ltd, does not alter the illegality of the contract from which the arbitral award results. As stated by a court of law two centuries ago and I reiterate the words:-

> "……it is not competent to any subject to enter into any contract to do anything which is detrimental to the interest of his own country, and that such a contract is in as much prohibited as if it had been expressly forbidden by an Act of Parliament"—*Furtado vs Rovers* [1802], 3 Bos & P 191 at 198.

In my view, and I so do hold, the contract will be detrimental to a country because it is illegal by express provision of a country's legislation. It will also be so illegal in the loose meaning because it is either void or morally wrong or is contrary to the principles expressed hereinabove in relation to a country's public policy. It is within those meanings that Lindley, Lord, Justice, in reference to such acts, contracts or arbitral awards, which he believed were against the public policy of England, stated in *Scott vs Brown* [1892] 2 K.B, 724 at 728.

> "No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality."

This court cannot have a better choice of words than those just quoted to categorically state that it cannot allow to be used to enforce the arbitral award the subject of these applications, which as hereinabove shown have been, in my view, shown to be illegal or void or immoral and therefore against the public policy of Kenya. It is under those circumstances therefore, also, that TSS Millers Ltd is, in my view, relieved of its possible obligations under the arbitral contract or any other contract that may have replaced it, not because this court wishes to do so *per se*, but because it is fully accepted by this court, that the transaction in question is objectionable under the public policy of Kenya.

To emphasise the seriousness of a country's public policy of holding paramount its people's welfare, Mr Taib pointed to this court the recent policy of European countries move to destroy several millions of sheep and cattle and imposing strict restrictions to animal movement even against existing individual and corporate contracts with a view of protecting their people from exposure to health risks due to the suspected disease. I do not agree more with Mr Taib's sentiments. I hold that position despite the fact that I am conscious of the fact that it is also in Kenya's public policy to enforce international Arbitral treaties and agreements such as the one under consideration with a view of sustaining such treaties and agreements as Kenya may be a signatory to. It is my holding, however, that this is a balancing process of two competing rights and this court in its discretion has to carefully balance the two i.e public policy in protection of matters more favourable to Kenyan people's welfare and public policy in protection of matters more in favour of international arbitral awards, contracts or judgments. In this case the court is persuaded to protect a public policy in favour of Kenyan citizen who would be exposed to a health risk as discussed hereinabove. Indeed in my opinion, a contract or an award whose effect would be to release to the public maize unfit for human consumption would itself be tortuous as well as illegal within the legal

meaning used hereinabove and accordingly the transaction or contract would be against Kenya's public policy.

This court however, is in addition, conscious of the fact that the Arbitral Tribunal and not this court is ordinarily seized with the full jurisdiction to consider and determine the contractual issues arising therefrom. The money award that the Tribunal made was accordingly within its jurisdiction. Under ordinary circumstances therefore this court may not have the legal authority to question the Arbitral Award made by the Tribunal. But in issues concerning public policy of Kenya, this court will in addition to what has been held hereinabove, examine the award even at the stage of enforcement to determine whether or not the Arbitral Tribunal had jurisdiction in respect of the disputes relating to the underlying contract. As stated in the case of *Westcre Investments - vs - Jugoimport*, [1998] 4 All E.R 570 at page 593, by Colman, J:-

> "When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was undisputedly illegal at common law, an award in favour of the claimant would not be enforced, for it would be contrary to public policy that arbitrators should be entitled to ignore palpable and indisputable illegality".

In relation to the arbitral award before the court, it is in evidence that the arbitrators tribunal was informed by a fax letter written by TSS Millers Ltd dated 23.10.1999 to them, Exhibit "TSS 3B" that the maize intended to be sold to them under the amended contract were white maize of South African origin which were of a quality unacceptable for human consumption. It was established before this court that the maize was indeed not fit for human consumption and SGS report had been sent to Glencore's agents. But this issue, from the arbitral award record, was not considered and determined by the Tribunal. Instead the Tribunal used the communication to assert the purchasers submission to the Tribunal process. Had the Tribunal considered this matter of refusal by TSS Miller Ltd to open the Letter of Credit , it would have established the cause to be that the maize to be supplied were not fit for human consumption of the Kenyan public, which would be against the public policy of Kenya. The Tribunal would then have not enforced it. That is the task that has now been taken up by this court at this stage of enforcement of the award as underscored by the Westacre Investment case above. The upshot of that is that this court cannot enforce the award arising from what this court has found to be an award in respect of an illegal or tortuous or immoral contract within the meaning of the words as used in respect to such contracts relating to or against public policy.

The application under consideration by Glencore Ltd dated 9.8.2000 was for the recognition and the enforcement of the arbitral award numbered 12618 and dated 22nd March, 2000. The application by TSS Miller Ltd dated 22.9.2000 had the prayers that this court refuses and sets aside the said award of arbitration. This court considered both applications simultaneously as the issues raised and argued were directly related and a joint ruling was recommended by court and accepted by the parties. I have in this ruling considered the issues raised by the parties and made a finding in relation to each point raised. My finding in respect of every point or issue raised is independent and final in relation to the specific issue. I have accordingly indicated that each such a finding independently disposes of the two applications. The several findings therefore should be read as alternative and independent of one to another.

The upshot of all the canvassing hereinabove is that Glencore Grain Limited's application to this court for recognition and for enforcement of the Award of Arbitration dated 22nd March, 2000 is hereby refused and dismissed. The filing and registration of the said award in the Courts Registry is hereby rejected and cancelled. The application to the court to accept the arbitration award as a decree of the court is hereby refused. TSS Grain Millers Limited's application to reject the arbitral award and set it aside is accordingly allowed. Costs of the two applications are to TSS Grain Millers Limited.

It is so ordered.

Dated and delivered at Mombasa this 5th day of July, 2002

D.A ONYANCHA

JUDGE