REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC CIVIL APPLICATION NO. E852 OF 2020

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD

BETWEEN

ELIGE COMMUNICATIONS LIMITED.......APPLICANT

VERSUS

SAFARICOM PLC.....................................RESPONDENT

RULING

Applicant's case

1. The application for consideration is the Applicant's Notice of Motion dated 15th June, 2020 brought under **Sections 35(2) (a)(iv)** and **35(2) (b)(ii)** of the **Arbitration Act** 1995, Laws of Kenya, **Rule 7** of the **Arbitration Rules, 1997, Order 51 Rule 1** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the Law. The unspent sprayers in the application are:

> ***a) THAT upon hearing of this Application, the Honourable Court be pleased to set aside the holding, in the arbitral award published on 26th March, 2020 and issued on the 5th May, 2020 by Dr. Kibaya Imaana Laibuta, to the effect that the Applicant herein was engaged in suspicious or fraudulent activities and the Respondent was not wrong in blocking or limiting calls from the Applicant's network.***
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> ***b) THAT the dispute between the parties herein be and is hereby referred back to the aforesaid Arbitrator for assessment of damages.***
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> ***c) THAT in the alternative to prayer 3 above, the Honourable Court be pleased to remit the Final Award back to Dr. Kibaya Imaana Laibuta for review.***
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> ***d) THAT the Honourable Court be pleased to make such further or other order(s) as it may deem appropriate.***
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> ***e) THAT the costs of this Application be provided for.***

2. The application is based on the grounds on the face of it and supported by the Affidavit of the Applicant's head of technology, **GEORGE MUKENYA**, sworn on even date. He deposed that the Applicant herein commenced arbitration proceedings against the Respondent before Dr. Kibaya Imaana Laibuta, the Arbitrator, seeking, *inter,alia,* special and general damages for breach of an Interconnection Agreement dated the 25th September, 2017 (hereinafter **"the Interconnect Agreement"**) between itself and the Respondent. The Arbitrator heard the dispute and published his award on the 26th March, 2020 dismissing the Applicant's claim with costs.

3. He averred that in paragraph 4.3.27 of the Award, the Arbitrator held that the Applicant herein was engaged in fraudulent activities, which holding is beyond the scope of the reference to arbitration as it is a matter that is currently pending before the Communications Authority of Kenya. He stated that the Arbitrator had acknowledged that fact in his ruling of 7th August, 2019 where he held that the reference was limited to a claim for financial compensation for breach of contract as the other issues were being handled by the Authority in exercise of its

administrative powers.

4. He contended that the holding that the Applicant was engaged in fraudulent activities is also in conflict with the public policy of Kenya as fraud is a serious offence that requires proper investigation and evidence before a finding of guilty can be reached, but the Arbitrator reached the said decision based on the Respondent's allegation without evidence.

5. Further, he averred that the Arbitrator's finding that the Applicant was in breach of the Interconnect Agreement hence the Respondent was justified in using its fraud detection tools to block the Applicant's calls, is in conflict with the public policy of Kenya for the following reasons:-

> **i.** It is inconsistent with the express provisions of clause 3.7 of the Interconnect Agreement between the parties which provides that in case of breach of the Agreement by the Applicant, the Respondent was to suspend or terminate the said Agreement but only with the express consent of the Communications Authority of Kenya as provided under **Regulation 16** of the **Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010.**
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> **ii.** The holding is inconsistent with the express provisions of Clause 8 of Schedule 13 of the Interconnection Agreement between the parties which provides that in the event that a network fraud or fraudulent practice is noted or implied from date derived by either party, then the Party concerned shall initiate action with the other Party to set up a joint technical team to investigate and identify the nature of fraud and/or fraudulent practice for joint corrective action. No joint technical team was set up, and the Respondent's decision to block the Applicant's calls was done unilaterally.
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> **iii.** The holding is inconsistent with express provisions of **Regulation 13(6)** of the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010 which provides that where a party to an Interconnection Agreement alleges that the other party has breached the Agreement, the Communications Authority of Kenya shall investigate and make a decision thereon.
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> **iv.** It ignores the Respondent's express admission on several occasions that it interfered with the Applicant's service operations by blocking the Applicant's calls.
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> **v.** It ignores the express confirmation of the Communications Authority of Kenya that the Respondent's act of using its fraud detection tools to block the Applicant's calls without approval from the Authority is illegal as a result of which the Authority even penalized the Respondent an amount of **Kshs. 449,070,000**/= for the said act.
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> **vi.** It ignores the directive of the Communications Authority of Kenya in *Complaint Number 1 of 2018* that whenever parties detect fraud, which was not the case herein, they should notify the Authority for appropriate apprehension and prosecution of those involved.
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> **vii.** In any event, the Respondent has never ever reported the Applicant for any act of fraud to the Communications Authority of Kenya and no evidence of the same was provided to the Arbitrator during hearing. In fact, the Authority in penalizing the Respondent confirmed that the Applicant had not provided any satisfactory evidence of suspicious or fraudulent activities.
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> **viii.** It is injurious to the economic interest of the Republic of Kenya as it discourages a creation of a conducive environment for investment by telecommunication service operators in Kenya since it places power in the hands of one interconnect licensee to interfere with the services of another interconnect licensee.
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> **ix.** It is against the principles of natural justice as it empowers a party to an Agreement with another to accuse the other party of breaching the Agreement without giving that other party an opportunity to be heard and to go ahead and enforce sanctions which is akin to making the Respondent a "judge" in its own case.
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> **x.** The holding failed to take into consideration the Applicant's evidence during hearing as well as its submissions which violated its constitutional right to fair administrative justice and judicial action.
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> **xi.** It is a gross miscarriage of justice.

6. Further, it was averred that in paragraphs 4.3.18 to 4.3.23 of the Award, the Arbitrator upheld the Respondent's witness's testimony during hearing as against the Applicant's witness's testimony without any evidence in support of the said testimony, which is in conflict with the public policy of Kenya as it is a violation of the Applicant's right to fair hearing. He argued that the award has only taken into consideration the Respondent's Statement of Claim and Defence and ignored the Applicant's Reply to the Statement of Defence which countered the contents of the former. This, in his view, also conflicts with Kenya's public policy as it violates the Applicant's right to fair hearing.

7. It was thus his contention that it is in the interest of justice and fairness that the orders sought be granted since the Applicant has satisfied the conditions set out in law for setting aside an arbitration award.

Respondent's case

8. In response, the Respondent filed a Replying Affidavit sworn on 9th October, 2019 by **DANIEL MWENJA NDABA**, its Senior Manager-Litigation Department as well as Grounds of Opposition dated 19th November, 2020. In the Affidavit, it was deposed that the Application is fatally defective, bad in law and inconsistent with various legal provisions which I set out as under;

a) **Failure to lodge the Award**

9. The deponent averred that the application herein is a non-starter as the Award violates **Section 36 (3)** of the **Arbitration Act** and **Rules 4** and **5** of **the Arbitration Rules, 1997** for not having been lodged in court by either party thus far. He stated that the Rules enjoin either party to an Arbitration to lodge an Award with notice to their counterparts so that the same may be registered and given a serial number. He stated that the proceedings for either setting aside or recognition can only be filed in the cause in which the Award was lodged. He noted that annexation of an Award in Affidavits is not synonymous with lodging and registration of Award as contemplated in the Rules. He asserted that lodging and registration of an Award is a jurisdictional issue and is not a mere technicality hence the Court cannot take cognizance such an Award.

b) Referral to an Arbitrator

10. He averred that the Application has been filed out of time as it seeks prayers whose effect is referral to the Arbitrator to make an additional award or vary the effect of the same, which recourse can only be sought within thirty (30) Days of the receipt of the Arbitral Award. He noted that since the Award was received by the parties on 5th May, 2020, the Applicant had until 5th June, 2020 to seek the said prayers.

11. It was further his contention that even where referral to an Arbitrator is timeously sought, the same can only happen in the following strict scenarios which the said Application is bereft of; to correct a typographical error on the Award; to correct a clerical error on the award; to make an additional award where there has been an omission. Further, that such referral is sought in writing to the Arbitrator with a copy of such letter to the other party and not by way of litigation as herein.

12. He argued that in any event, assessment of damages was not omitted but was indeed considered, based on evidence, pleadings and testimonies and was denied. He noted that at paragraphs 4.3.27, 4.4 and 5.1 of the Award, the Arbitrator found as a fact that it was the Applicant that had breached the Agreement and was consequently not entitled to the reliefs sought. That the Arbitrator having found a breach on the part of the Applicant, he was not expected to give an award of damages as the law cannot countenance a breach of contract.

c) Matters referred to the Arbitrator

13. He denied the Applicant’s contention that the Arbitrator travelled outside the scope of Arbitration. He deposed that the Applicant’s fraudulent conduct was strongly brought out in the Respondent's defence and in rejoinder, the Applicant filed a Reply to Defence in which it denied the particulars of fraud set out in the said Defence and invited the Respondent to strict proof.

14. He noted that Respondent also raised the issue of breach of Clause 3.7 of the Interconnection Agreement where the parties were not to terminate international traffic on the local interconnect in its defence as well as in the Witness Statement of Mr. Elly Odera. In the Reply to the Defence, the Applicant referred to the operations of the said Clause 3.7. Further, that at paragraphs 7, 18 and 19 of Mr. George Mukenya's witness statement filed before the Arbitrator, the Appellant testified on the allegations of fraudulent SIM Boxing. Clause 3.7 was supplemented by Paragraph 8 of Schedule 13 of the Interconnection Agreement which was titled "NETWORK FRAUD AND FRAUDULENT PRACTICES”.

15. It was further his assertion that in the Respondent's List of Proposed Issues dated 9th October, 2020, fraud was submitted as a material issue relevant to the determination of the dispute. Also, among the list of Issues was whether the Applicant had breached the Interconnection Agreement. Further, that in the Applicant's List of issues dated 16th October, 2020, the Applicant submitted a number of issues, *inter alia*, whether either party had breached the Interconnection Agreement. Ancillary to the question of breach, the Applicant posed the question of whether the Applicant had suffered loss as a result of said breach.

16. In addition, he averred that the issues of fraud and breach of contract were extensively referenced during the hearing of the dispute, and the Arbitrator has aptly referred to the testimonies of each witness in addressing the said issues. The issue of breach of the Interconnection Agreement and fraud as per Clauses 3.7 and Paragraph 8 of Schedule 13 of the Interconnection Agreement was also extensively canvassed by both parties in their respective written submissions before the Arbitrator. As such, fraud and breach of the Interconnection Agreement were material questions referred to the Arbitrator for consideration.

17. Moreover, he averred that even though the Applicant claims that the dispute was for assessment of damages, there could not have been an award of damages without ascertainment of liability for breach of the Interconnection Agreement as per the pleadings and evidence. He contended that the arbitrator made a finding on the issue of liability for breach of the Interconnection Agreement and his finding can only be impugned by way of appeal. Further and in any event, that an appeal can only be resorted to where parties clearly intended that such an avenue would be available to them and this was not the case in the Interconnection Agreement between the parties herein.

18. He also argued that the Arbitrator is a master of facts and the Court while dealing with the Award proceeds from a point of unqualified acceptance of the Arbitrator's finding of facts. As such, the Court cannot set aside an award simply because it would have reached a different conclusion on questions of fact or mixed fact and law.

d) Public Policy

19. On this, the Respondent averred that an error of fact or law does not justify setting aside an Award and does not constitute a violation of public policy as the same requires proof that the Arbitrator either violated the Constitution or acted illegally. It was noted that in any case, public policy of Kenya leans towards finality of Arbitration. He contended that the Arbitrator, at Paragraphs 4.3.12 to 4.3.27 of the Award, gave an extensive analysis of the evidence presented before him as well as reasons for finding credibility in the Respondent's witness and evidence. That the Arbitrator was correct in finding that the Respondent did not violate the Agreement as it merely took precautionary steps to prevent fraud. He asserted that the Arbitrator's act of being persuaded by the evidence and testimony of the Respondent's witness over that

of the Applicant does not amount to a breach of public policy or an affront to the Applicant's right to a fair hearing.

20. In totality, it was averred that the Application as presented goes to the merits of the Award by contesting the findings of law and fact by the Arbitrator thus making the Application an appeal veiled as an application for setting aside. That in the premises, the present Application is an abuse of the Court process, unmeritorious, misconceived and incompetent and should be dismissed.

21. In the Grounds of Opposition, the Respondent stated that the failure to lodge the award as per **Rules 4** and **5** of the **Arbitration Rules, 1997** divests the Court of jurisdiction to either recognize or set aside the Award. It reiterated that annexation of the Award in an Affidavit is not sufficient nor is it synonymous with lodging and registering the Award under the aforesaid provisions.

22. The Application is fatally defective since it seeks inconsistent prayers without regard to various mandatory statutory provisions.

Reply by the Applicant

23. The Applicant responded to the responses filed by the Respondent through a Supplementary Affidavit sworn by **GEORGE MUKENYA** on 4th December, 2020. It basically restated the averments in the Supporting Affidavit filed emphasizing that the Application herein is competent and properly filed in accordance with the provisions of the law.

a) **Failure to lodge the Award**

24. On this, the Applicant averred that even though the Rules provide that any party to an arbitration may file an award in the High Court, the said provision is discretionary and as such the failure by the Applicant to file the award before filing the instant Application seeking to set aside the award does not divest this Honourable Court of jurisdiction to hear and determine the said Application to set aside the award. He noted that the failure to lodge an award before filing of the instant Application is not prejudicial to the Respondent since both parties were served with the final award after the conclusion of the Arbitration Proceedings, a fact that the Respondent has not contested.

25. Further, he asserted that a certified copy of the award has been annexed as Annexure "GM 5" to his Supporting Affidavit and as such the legal requirement that a party who wishes to rely on an Arbitral award should provide either the original or certified copy of the award has been met. He noted that the Respondent has not disputed that arbitration proceedings took place between the parties herein and that indeed a final award was issued to both parties and neither has it questioned the authenticity of the Award annexed to his Supporting Affidavit.

26. It was thus his contention that to hold the instant Application as incompetent on the basis that the same was not filed before lodging of the award would be unfair and unjust as the same would amount to sacrificing the substantial justice of this case for a procedural requirement.

27. Further, he asserted that the Application herein was made without delay and as such the same is competent and the Court has jurisdiction to hear and determine it.

b) Referral to an Arbitrator

28. On this, the Applicant responded that this Court has inherent power, if it deems necessary, to refer this matter back to the Arbitrator for reconsideration or to refer parties back to Arbitration before a different Arbitrator. The deponent reiterated that the Application herein seeks competent prayers which cannot be deemed to be fatally defective as alleged by the Respondent.

c) Matters referred to the Arbitrator

29. On this, he reiterated that the issue before the Arbitrator was strictly on breach of the Interconnection Agreement between the parties and not whether the Applicant was engaged in fraud as the issue of fraud is a matter that is currently pending determination before the Communications Authority of Kenya.

30. Further, he reiterated that fraud being a serious criminal offence in Kenya that needs proper and extensive investigation before a finding of guilt can be established, the Arbitrator has no capacity to investigate the alleged fraud in the telecommunication sector in Kenya. It is for this reason that the Applicant avers that the Arbitrator's holding that the Applicant was engaged in fraudulent activities is beyond the scope of the reference.

31. The Applicant also denied the Respondent's assertion that the instant application is a disguised appeal.

d) Public Policy

32. On this, the deponent reiterated his earlier averments and added that whereas public policy leans towards the finality of arbitration between parties, the arbitration process should not violate the Constitution.

SUBMISSIONS

33. The Application was canvassed by way of written submissions.

Applicant's submissions

34. In its written submissions dated 15th January 2021, the Applicant formulated two issues for determination which it submitted on as follows:

i. Whether the Application herein is a competent one properly filed in accordance with the provisions of the Arbitration Act and the Arbitration Rules, 1997

35. The Applicant submitted that it duly complied with **Section 36 (3)** of the **Arbitration Act** which requires in mandatory terms that any party relying on an Arbitral Award should furnish the Court with either the original award or a duly certified copy of the same. It reiterated that in compliance with the aforesaid legal provision, it furnished the Court with a certified copy of the award annexed as annexure "**GM5**" in the Supporting Affidavit sworn by George Mukenya on the 15th June, 2020.

36. Further, it submitted that **Rule 4** of the **Arbitration Rules, 1997,** on the other hand, is couched in a discretionary manner as it uses the word "may" hence, it goes without say that the filing of an Arbitration Award before filing an Application for setting aside the Award is not mandatory. It argued that in the circumstances, it is clear that its failure to file the Award before filing the instant Application does not divest this Court of jurisdiction to hear and determine the Application. It relied on the case of **Summit Cove Lines Co Ltd v UAP Insurance Co Ltd [2020] eKLR** where the Court held as follows when faced with a similar issue:-

> ***"…The challenge on the competence of the application is grounded on the failure to exhibit on the application, the original award and the arbitration agreement. It is not in doubt that the statute mandates that the two be exhibited. What has not been canvassed by the respondent is the rational for the law and the mischief it was aimed against. By nature, arbitration is consensual and the court ought to be satisfied that indeed the two contestants were at an ad idem that their dispute be resolved by arbitration. That is the rationale for demanding that the agreement be exhibited to court. On the other hand the need to exhibit the original or certified copy of the award is purely for authentication that there is a genuine award made in terms of the agreement by the parties. In my view, the need for those documents in the original or certified form is made unnecessary if the two parties agree that they agreed to go to arbitration, arbitration proceeding took place and a final award was made in terms of a copy, even if not certified, exhibited to court and agreed by both to be the award…"***

37. In its view therefore, the intention of the provisions of **Section 36 (3**) of the **Arbitration Act** and **Rules 4** and **5** of the **Arbitration Rules, 1997** have been fully met.

38. Further, the Applicant submitted that contrary to the Respondent's assertion that the Application seeks inconsistent prayers, the same is brought under the provisions of **Sections 35(2) (a) (iv)** and **Section 35(2) (b) (ii)** of the **Arbitration Act.** It stated that prayers 3 and 4 in the Application seek orders for the Court to invoke its inherent powers and refer the matter back to Arbitration for the second time. It relied on the case of **Evangelical Mission for Africa & Another v Kimani Gachuhi & Another [2015] eKLR** where the Court made orders such as the one sought in the said prayers.

39. The Applicant submitted that without prejudice to the foregoing, even if prayer 3 and 4 in the instant application are incompetent as alleged by the Respondent, the same does not make the entire Application fatally defective since the Court still has the power to allow prayers 1, 2, 5 and 6 of the Application and dismiss prayers 3 and 4**.**

ii. Whether the Arbitral award should be set aside

40. On this issue, the Applicant submitted on the two grounds under which it seeks to set aside the subject Arbitral Award as follows:

a. Whether the Arbitral award is contrary to the public policy of Kenya

41. The Applicant reiterated that the Arbitral award herein is in conflict with the public policy of Kenya and cited several cases in which courts have attempted to define what constitutes public policy. It relied on the case of **Christ For All Nations v Apollo Insurance Company Limited, NRB HCC No. 477 of 1999** where the court stated as follows:

> ***"… I take the view that although public policy is a most broad concept incapable of precise definition…an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality…"***

42. Reliance was also placed on the case of **Rwama Farmers Co-operative Society Limited v Thika Coffee Mills Limited [2012] eKLR** where the Court cited with approval the case of **Enusagar Power Company Ltd v General Electric Company (1994) AIR 860** in which the Supreme Court of India defined public policy as follows:-

> ***"Public Policy is some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time"***

43. Further, it noted that the Court in the same case also cited with approval the cases of **National Oil Company (1987) 2 All ER 769** and **Glencore Grain Ltd v TSS Grain Millers Ltd [2002] 1 KLR 606** and observed as follows as regards the definition of public policy: -

> ***"Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J remarked in Richardson –vs- Mellish 'it is never argued at all but when other points fail, it has to be shown that***

there is an element of illegality or that the enforcement of the award would be clearly injurious to the public good or possibly that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."

"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 than 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."

From the foregoing, it is quite clear that that term "conflict with the Public Policy" used in Section 35 (2) (b) of the Arbitration Act, is akin to "contrary to Public Policy", "against Public Policy" "opposed to Public Policy." These terms do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."

44. Relying on the above judicial definitions of public policy, the Applicant restated it averments on how the Award conflicts with the public policy of Kenya. The Appellant was emphatic that the said Award is in violation of statutory provisions and as such cannot be said to be in the public interest. It placed reliance on the case of **Evangelical Mission for Africa & Another v Kimani Gachuhi & Another (Supra)** where the court cited with approval the case of **Murlidhar Agarwal and Another v State of U.P. and Others [1974] 2 SCC 473** in which the Supreme Court of India held that an award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice.

45. Further, the Applicant urged that if parties were to be allowed to take the law into their own hands, then why would we have judicial systems in place to resolve disputes among parties? It relied on the **Evangelical Mission for Africa Case (supra)** where the Court stated inter alia that:

"While accepting the Court of Appeal on the issues of finality of decisions as an overriding objective on public policy, I am satisfied that public policy concept will keep on changing, and as it does, we shall be guided by the values contained in our legal instruments being the Constitution and our laws, and also various policy documents emanating from various ministries in the country. Our Constitution at Article 10 thereof sets out national values which all decision makers in the country are obligated to observe while performing a public duty. Those values, when it comes to judicial officers and arbitrators must necessarily import the duty to do justice in deciding disputes. A decision which, on the face of the record, is so devoid of justice, and cannot be explained in any rational manner, can only be set aside on account of failure to satisfy public policy consideration"

46. It was the Applicant's further submission that Kenya's public policy leans towards ensuring fidelity and strict adherence to the law and the same has risen to a new height in line with the national values and principles in the constitution. Further, the Applicant stated that the Arbitrator's holding is against the legal principle that a party to a contract should never be allowed to take advantage of his wrongs/omissions at the expense of the other party as was held in the case of **Hassan Zubeidi v Patrick Mwangangi Kibaiya & Another [2014] eKLR.**

b. Whether the arbitral award herein contains decisions and matters beyond the scope of reference to the arbitration

47. On this, the Applicant reiterated the averments in its Affidavits filed herein. In addition, it contended that it is clear from the wording of the **Arbitration Clause 32.2** in the parties' Interconnection Agreement that the Communications Authority of Kenya has jurisdiction, in exercise of its regulatory functions, to resolve disputes between the parties. It argued that it is for that reason that it filed *Complaint No. 1 of 2018* before the Authority. It was also emphatic that the Arbitrator's jurisdiction was limited to the rights and obligations of the Parties under the interconnection Agreement and the question of fraud was not within his jurisdiction to determine.

48. In totality, the Applicant submitted that it has established sufficient grounds for setting aside the Arbitration award issued herein and the Court to allow the instant Application with costs.

Respondent's Submissions

49. On the other hand, the Respondent filed written submissions dated 26th April 2021. The Respondent begun by setting out the facts of the dispute that was before the Arbitrator to enable the court to appreciate the backdrop against which the Award being challenged herein was issued. It submitted that the Applicant's motion proceeds from the premise that no evidence was tabled before the Arbitrator to support the allegations of fraudulent conduct by the Applicant. The Respondent then identified three issues that begs the court's determination and submitted on the same as follows:

a) Whether the Application is properly before the Court, seeing that the Award has never been lodged?

50. On this, the Respondent reiterated that the Award was not lodged, contrary to mandatory provisions of the law. It faulted the Applicant for clinging to the word **'may'** as used in **Rule 4** of the **Arbitration Rules, 1997** as an excuse for the failure to lodge the award, which admittedly, was not filed as contemplated in the rules. It argued that a purposive reading of the **Rule 4(1)** and putting the use of the word **'may'** in context, shows that the Rule is only permissive as to who may file an award and not on whether an ward may be filed or not.

51. Further, the Respondent submitted that **Rule 4(2**) of the Rules provides that the Application is to be filed in the course where the Award was filed which was not the case herein. It was emphatic that the Award was not filed but was merely annexed and this could be deduced from the filing fees paid by the Applicant during the lodging of the Application herein. It stated that the present Application herein was filed on 16th July 2020 and the Applicant only paid **Kshs. 1155** for filing of the same. It urged the Court to take judicial notice that the fees for

lodging an award as per the **Rule 10(1)** of **the Arbitration Rules, 1997** are cast in stone at **Kshs. 10,000/=.** In its view therefore, where the Court fees have not been paid, there cannot be deemed to have been proper filing.

52. The Respondent relied on the case of **Laly Sukhdev Singh v Onesmus Mwangi Muraguri [2020] eKLR** where Kasango J. had this to say about the failure to pay Court fees;

> ***"It is clear from that section that the court cannot consider the Notice of Motion because the correct fee has not been paid. The Court of Appeal in the case South Nyanza Sugar Company Limited vs. Samwel Osewe Ochillo P/A Ochillo & Co. Advocates Civil Appeal No. 127 of 2003 stated that a plaint was invalid if the fee was not paid for it. The court stated as follows: -***
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> ***"The Deputy Registrar, however, had no power to exempt the respondent from paying the requisite fee with the result that the plaint was not properly filed and that being so, there was no valid plaint upon which the learned Judge of the superior court could proceed to deliver his judgment. The judgment was based on no valid plaint.***
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> ***Dealing with a similar situation in the Ugandan case of Unta Exports Ltd Vs Customs [1971] EA 648, Goudie, J. stated as follows at page 649 letters E to F:-***
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> ***"I have no doubt whatsoever that both as a matter of practice and also as a matter of law documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit from the filing advocate form which authority has been given to deduct court fees…"***
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> ***With respect, we agree and would adopt that principle as being aptly applicable to the issue we are dealing with."***
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> ***The correct court fees were not paid in this case by the Applicant…The failure to pay the correct court fees contravenes a statutory requirement as set out in the above case. The sum effect of not paying the correct court fee is that there is no valid claim before me. (Emphasis added)***

53. Further, the Respondent restated that annexation of the Award in the Application as the Applicant has purported cannot be deemed as proper filing as envisioned under Rule 4 of the Arbitration Rules. In support of the said submission, it relied on the case of **Primka Debucon Construction Ltd v Manyota Limited & Another [2017] eKLR** where the Court stated as follows:

> ***"…Further provisions of Rule 4 and 5 of the Arbitration Rules 1997 too must be adhered to, that the party filing the award shall give notice to all other parties of the filing of the award giving the date and the cause number and registry in which it has been filed and thereupon file an affidavit of service." This threshold has not been complied with at all.***
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> ***Without the procedure stated in Section 36 and 37 of the Act and Rule 4 and 5 of the Arbitration Rules stated above, there can be no valid award for the court to either recognise or adopt as a judgment of the court.…See Iris Properties Ltd & Another v Nairobi City Council [2002] eKLR where Justice Githinji (as he then was) struck out an application for recognition and adoption of an award when it was not filed, but only appended to the applicants affidavit. (Emphasis ours)***
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> ***Section 35(2) of the Act sets grounds upon which an award may be set aside… I shall not go into the merits or otherwise of the grounds set out for the reasons that since no valid arbitration award has been filed, there is nothing for the court to interrogate and set aside as doing so, in view, would be jumping the gun. unless the arbitration award is filed in the strict sense, there is no award worth looking at. (Emphasis added)***

54. Reliance was also placed on the case of **Kenya Tea Development Agency Ltd (KTDA) v Builecon Associates [2008] eKLR,** where the Court noted that an application touching on the Arbitral Award can only be filed in the cause where the Award was filed. The Respondent posited that from the authorities, it would mean that the Award would have to be filed first for the Court to take cognizance of the same and then the attendant application would be anchored thereon.

55. Further reliance was put on the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** where the Court of Appeal (Kiage J.A) had this to say about circumventing rules of procedure:

> ***"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."(*** Emphasis added)

56. In the Respondent's view therefore, the application herein is incompetent and must fail.

b) Whether the Applicant has proved any grounds for setting aside the Arbitral Award?

57. The Respondent stated that even if the Court will be inclined to indulge the blatant disregard of statutory texts by the Applicant, the Application is bereft of grounds for setting aside an Arbitral Award. It was emphatic that the Arbitrator considered all the facts and issues that were properly before him and rendered an award within the confines of the Dispute. It reiterated that the issue before the Arbitrator was whether breach of the Agreement and/or fraud were within the scope of the dispute before the Arbitrator.

58. Relying on various definitions of the term dispute, the Respondent submitted that under **Clause 32.2** of the Agreement, parties agreed on a wide scope of disputes to be arbitrated. It contended that the said **Clause 32.2** is outrightly clear that parties intended that **any dispute or difference** between them relating to their rights and/or obligations under the agreement be finally determined through Arbitration. It was stated that consequently, to determine what dispute or difference parties had between them, the Court would only have to look at the pleadings, the testimonies of witnesses, submissions by counsel and the Arbitrator's rendition of what was before him and what took center stage of controversy. The Respondent relied on the case of **Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR**, where the Court of Appeal (M'inoti, Sichale & J. Mohammed-Justices of Appeal) was emphatic thus;

> ***"…It is clear, in our view, that the appellant pleaded in its statement of claim that agreements were vitiated by duress and unconscionable and fraudulent conduct on the part of the respondent, which the respondent denied in its statement of defence. Both parties led evidence on those issues and among the issues for determination that the arbitral tribunal identified were whether the respondent was guilty of unconscionable conduct or fraud. We do not in the circumstances see how the arbitral tribunal can be said to have acted outside its powers.***
>
> ***As for the argument about admission of evidence and equality of arms, we take note that the arbitral tribunal is the master of procedure and that by dint of section 20 (3) of the Act, it has power to determine the admissibility, relevance materiality and weight of any evidence…***
>
> ***Ultimately we find merit in this appeal. The learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration or had decided matters beyond the scope of the reference. The appellant will have the costs of the appeal. It is so ordered."***

59. The Respondent also cited the case of **Devjibhai Bhimji Sanghani & Another V National Bank of Kenya Ltd [1981] eKLR**, where Hon J.F Shields held thus;

> ***"…Issues are formulated and stated on the basis of the cumulative effect of all the pleadings as they presently stand, and if further proceedings have occurred, then on the basis of the pleadings plus any arguments and testimony which may reveal the real points of controversy. Those points of dispute are the ones that will form the issues."***

60. It was contended that the Applicant approached the Arbitral Tribunal with the allegation that the Respondent was unlawfully and illegally dropping its calls. The Respondent asserted that when allegations of unlawfulness or illegality in a certain action are imputed, the person accused of such unlawfulness or illegality is called upon to disprove the allegations by showing why their action was either legal or lawful. It argued that the Arbitrator was not bound to take the Applicants allegations as gospel truth without considering what defence the Respondent had in response to what it was being accused of. The Respondent reiterated the averments in its responses filed herein and argued that insisted that the issues of fraud and breach of contract were co-joined and extensively referenced during the hearing of the dispute.

61. Further, it was submitted that when the issue of fraud was put to the Respondent, the Applicant in fact invited it to strict proof thereof. That having been so invited, the Respondent tabled evidence in the form of Call Data Records (CDRs) contained in the Compact Disk aforementioned which analyzed mobile numbers using available data records, call diversity, location activity and other parameters which indicated activity by certain numbers belonging to the Claimant to be emanating from outside the country. The CDRs provided in the compact Disks disclosed the real Calling Line Identity (CLI) and the CLI that was displayed on the called party line (point of call termination.).

62. It submitted that international calls with international CLIs at the point of call origination however terminated as calls with locally assigned CLIs on the called network is evidence that the traffic was re-originated, re-assigned new CLIs, and masked to bypass detection. The Respondent noted that parties had at Paragraph 8 of Schedule 13 of the Agreement reached the consensus that fraud can be inferred from data. According to the Respondent, the summary of the Call Data Records evidence that it submitted was aptly captured by the Arbitrator at '**Table III-Summary of Test Calls generation'.**

The Arbitrator's finding of fact or law cannot be challenged even when the same is allegedly manifestly wrong.

63. On this, the Respondent urged that if indeed the Arbitrator found breach on the part of the Applicant without evidence, what about the Call Data Records that were submitted by the Respondent and not controverted by the Applicant? It wondered whether the Applicant is appealing against the Arbitrator's finding on facts or questioning the Arbitrator's assessment of admissibility, relevance, and weight to be attached to evidentiary material. The Respondent reiterated that there is no avenue for the Applicant to raise such questions under the Arbitration Act. It submitted that this Court is by dint of **Section 10** of the **Arbitration Act** only permitted to interfere on the narrow grounds stated at **Section 35** of the **Arbitration Act**. The Respondent asserted that an Arbitrator is a master of facts, and any finding of fact by him is binding, and the Court cannot interfere with the same, even where the Court would have reached a different finding.

64. The Respondent relied on the case of **Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited [2018] eKLR** where the High Court stated thus:

> ***"In any event, matters to do with the propriety or otherwise of the Arbitrator awarding a specific sum, or interest or costs are***

matters over which only the Arbitrator had jurisdiction to deal; and which this Court would have no mandate to interfere. I would therefore concur with the decision in <u>D. Manji Construction Limited vs. C & R Holdings Limited [2014] eKLR</u> in which the Court observed that:

"The applicant has cited some alleged erroneous decisions by the arbitrator on matters to do with completion date, double gauge windows, rate of interest awarded, final accounts, disregard of evidence, extension of time, only to mention but a few...those arguments did not really show that the law was violated as they are matters which fall within the fallibility of every person who is exercising judicial or quasi-judicial authority. They also relate to the merits and factual appreciation of the case by the arbitrator; which again falls squarely on the competence of the arbitrator as the master of facts..." (Emphasis added)

[42] I also find persuasive the English case of <u>Geogas S.A vs. Trammo Gas Ltd (The "Baleares")</u> which was cited with approval by the Court of Appeal in <u>Kenya Oil Company Limited & Another vs. Kenya Pipeline Co. [2014] eKLR</u>. In that case, the question arose as to whether it was permissible to review, as an error of law, a finding of fact by arbitrators, which was challenged on the ground that there was no evidence to support it. The English Court (per Lord Justice Steyn) took the position that:

"The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

[43] Similarly, in <u>Mahican Investments Limited and 3 others vs Giovanni Gaida & Others [2005] eKLR</u>, Ransley J. was of a like view when he held that: "A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

[44] Consequently, in respect of the first issue herein, I am not satisfied that the Applicant has shown, to the requisite standard, that the Arbitrator travelled out of the confines of the reference or that he dealt with any issue that was not contemplated by or falling within the terms of the Reference; or even that the Arbitrator granted a relief that was not envisaged by the Agreement and therefore not specifically pleaded before him."

65. Further, the Respondent submitted that even assuming that the Arbitrator reached wrong conclusions of fact, or analysis of evidence, or interpretation of the contract, the same was still within the fallibility of the Arbitrator. It argued that errors of law, or fact, or mixed fact and law, are not grounds for challenging an Arbitral Award. It relied on the case of **<u>Christ for All Nations v Apollo Insurance Company Ltd [2002] 2 EA366</u>** as was quoted in **<u>Kenya National Highways Authority v Pride Enterprises Limited & Another [2020] eKLR</u>** that:

"In my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy in Kenya."

66. Reliance was further placed in **<u>Mahan Limited v Villa Care ML HC Misc. Civil App. No. 216 of 2018 [2019] eKLR</u>**, where Tuiyott J. had this to say:

"It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that the decision of the Arbitrator would be final and binding on them .It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they happy to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act."

67. In addition, the Respondent urged that when parties submit to Arbitration, they are cognizant that the reference could either be in their favour or against them, and that is alright, seeing that cases are decided on a balance of probabilities. It submitted that if the Courts were to entertain any disgruntled party to Arbitration, there would never be the much-desired finality, yet the intention of parties to submit to Arbitration was to avoid litigation in the first place.

68. The Respondent further submitted that for damages to suffice as was sought by the Applicant, a Claimant has to show that their loss has anything to do with breach by the opposite party. It noted that cognizant of this fact, the Arbitrator aptly held in his preliminary Ruling of 7th August 2019 that much as there were issues pending before the Communications Authority, there was nothing preventing him from determining liability. It was further noted that the Applicant's assertion that there was a penalty from the Communications Authority, perhaps in an attempt to show that the Arbitrator was bound to find breach on the part of the Respondent, is pointless because the said penalty was consequently withdrawn in the Communications Authority letter of 21st December 2018. Consequently, the Respondent went into the Arbitration clear of any blemish.

Public policy desires finality.

69. On this, the Respondent noted that the Applicant extrapolates the meaning of public policy to include errors of law, and fact whereas the same are not, by any stretch of imagination, public policy grounds to set aside an award. It relied on the case of **<u>Matrix Business</u>**

Consultants Limited & 4 Others v Safaricom Limited [2020] eKLR where Majanja J. in rejecting the argument to set aside an award on public policy noted that:

> ***"Public policy, as defined above, is a broad, infinite and malleable concept and when considering it, the salutary warning of Burrough J., in Richardson v. Mellish [1824] 2 Bing 228 that, "Public policy is a very unruly horse, and when you get astride, you never know where it will carry you" must be kept in mind. It must be considered alongside the principle that parties who enter into an arbitration agreement expect a level of finality. Ringera J., in the Christ for All Nations Case (Supra) further stated that:***
>
> ***[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act."***

c) Whether the Court can refer the dispute back to the Arbitrator for assessment of damages?

70. On this issue, it was the Respondent's submission that when the Arbitrator published his Award on 26th March 2021, he became *functus officio* and cannot relook at the Award save as per the narrow confines of **Section 34** of the **Arbitration Act.** It reiterated that the Orders sought in **Prayer 3** and **4** are incompetent since as per **Section 34** of the Arbitration Act, resort to an Arbitrator to either vary, correct, or make an additional award can only be made where there is a clerical, typographical error, or where the Arbitrator omitted certain reliefs from the Award that were sought. In this regard, it relied on the finding in **Albatross Aviation Limited & Another v Phoenix of East Africa Assurance Company Limited [2015] eKLR.**

71. It was emphatic that the Applicant has not shown any clerical or typographical errors to be corrected in the award so as to warrant referral to the Arbitrator. Further, it noted that the Arbitrator did not omit to assess damages, but indeed considered the prayer for the same and the Arbitration dispute in its entirety and dismissed the said prayer.

72. Moreover, the Respondent submitted that under **Section 34** of the Act, referral of a dispute to the Arbitrator to make an additional award or correct any errors can only be done in writing to the Arbitrator copied to the other party and not by an application to this Court. Further, that such referral can only be done within Thirty (30) Days of receipt of the Award as per **Section 34** of the Arbitration Act hence prayers 3 and 4 of the Application are being sought out of time.

73. In totality, the Respondent submitted that the Applicant is merely a disgruntled litigant attempting a second bite at the cherry in this Court. It thus urged that the Application herein must fail, with costs to the Respondent.

Analysis and Determination

74. I have carefully analysed the Application herein, the Respondent's responses thereto, the Applicant's Supplementary Affidavit and the parties' respective submissions. I find that the following are the issues for determination: whether the Applicant failed to comply with **Section 36 (3)** of the **Arbitration Act, 1995** and **Rules 4 & 5** of the **Arbitration Rules, 1997**; *whether the Applicant has made out a case for setting aside the Arbitral Award under **Sections 35(2) (a) (iv)** and **Section 35(2) (b) (ii)** of the **Arbitration Act**; and whether the Court can refer the dispute back to the Arbitrator for assessment of damages and/or remit the Final Award back for review.*

(i) Whether the Applicant failed to comply with Section 36 (3) of the Arbitration Act, 1995 and Rule 4 & 5 of the Arbitration Rules, 1997.

75. The Respondent contended that the Application is a non-starter since the Applicant failed to comply with the above provisions as regards the filing of the Award in court. **Section 36 (3)** of the **Arbitration Act** provides as follows:-

> ***"Unless the High Court otherwise orders the party relying on an arbitral award or applying for its enforcement must furnish***
>
> ***(a) The original arbitral award or duly certified copies of its.***
>
> ***(b)The original arbitration agreement or a duly certified copy if it"***

76. Rule 4 and **5** of the **Arbitration Rules, 1997** stipulate as follows:

> ***"4. (1) Any party may file an award in the High Court.***
>
> ***(2) All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date.***
>
> ***(3) If an application in respect of the arbitration has been made under rule 3(1) the award shall be filed in the same cause; otherwise the award shall be given its own serial number in the civil register.***
>
> ***5. The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause***

number and the registry in which it has been filed and shall file an affidavit of service."

77. Whereas Applicant's emphasis is that it complied with the above provisions as it annexed a certified copy of the Award to the Application which was duly served on the Respondent, I find that these provisions relate to recognition and enforcement of an Arbitral Award. There is no such requirement under **Section 35** of the **Arbitration Act** which provides for the setting aside of an Arbitral Award. (See **Victoria Furnitures Limited v Zadock Furniture Systems Limited [2017] eKLR**). Indeed, even the case law relied on by the Respondent to buttress its argument relate to applications for recognition and enforcement of Arbitral Awards.

78. Suffice it to note, the only other provision which relates to an Application for setting aside is **Rule 7** of the **Arbitration Rules, 1997** which provides as follows**:-**

> ***"An application under Section 35 of the Act shall be supported by an affidavit specifying grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator."***

79. Since the Respondent has not questioned the Applicant's compliance with Rule 7, it is safe to assume that the same was duly complied with. Further and in any event, the Respondent has not provided any other authority, whether case law or otherwise, that may sway the court to find otherwise. I cannot therefore fault the Applicant for failing to file the Award before making the present Application.

ii. *Whether the Applicant has made out a case for setting aside the Arbitral Award under Sections 35(2) (a) (iv) and Section 35(2) (b) (ii) of the Arbitration Act.*

80. It is trite law that recourse to the High Court against an arbitral award may only be made through an application for setting aside the award upon proof of any the grounds stipulated under **Section 35 (2)** of the **Arbitration Act** which stipulates as follows:-

> ***"(2) An arbitral award may be set aside by the High Court only if—***
>
> ***(a) the party making the application furnishes proof—***
>
> ***(i) that a party to the arbitration agreement was under some incapacity; or***
>
> ***(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or***
>
> ***(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or***
>
> ***(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or***
>
> ***(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or***
>
> ***(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;***
>
> ***(b) the High Court finds that—***
>
> ***(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or***
>
> ***(ii) the award is in conflict with the public policy of Kenya.***

81. In the present case, the Applicant seeks the setting aside of the subject Arbitral Award under **Sections 35(2) (a) (iv)** and **35(2) (b) (ii)** above which shall be determined separately as hereunder:

Whether the arbitrator dealt with matters beyond the terms and scope of the reference to arbitration

82. The Applicant complained that the Arbitrator holding that the Applicant was engaged in fraudulent activities is beyond the scope of the reference to arbitration as it is a matter that is currently pending before the Communications Authority of Kenya.

83. In considering whether or not an arbitral award deals with matters beyond the terms and scope of the reference to arbitration, the Court of Appeal in the case of **Synergy Credit Limited v Cape Holdings Limited [2020] eKLR,** stated as follows:

> ***"In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause***

or agreement is critical. Other relevant considerations without in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc. (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings."

84. It is therefore important to examine the arbitration **Clause 32.3** of the Interconnection Agreement pursuant to which the dispute between the parties herein was referred to arbitration. The said Clause 32.3 stipulates as follows:

"This Agreement is without prejudice to any statutory rights which the Authority may have in the proper exercise of its functions to resolve disputes between the parties. Subject to this any dispute or difference between the parties relating to the rights or obligations of the parties under this Agreement shall save as herein specifically otherwise provided (Clause 6.3) be referred to and finally determined by Arbitration in Nairobi. Following the service of notice of a dispute in the manner referred to in clause 32.3 by one Party on another, that a matter be referred to arbitration, the Parties shall agree on an arbitrator. If the Parties cannot agree on an arbitrator within 21 (twenty one) days of such notice being served, either Party may apply in writing (with a copy to the other party) to the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch to appoint an arbitrator. Both Parties shall be given the opportunity to make representations to the arbitrator. In all cases the arbitrator shall be instructed to respond with his/her written decision sent to both Parties at the same time, as soon as reasonably practicable and in any event, within 30 (thirty) days of the referral. The arbitration shall be conducted in the English language. No arbitrator shall be related or employed by or have any material business relationship with either Party. This clause 32.2 shall not preclude the making of any application to court for injunctive relief or for the enforcement of an award of the arbitrator. "

85. Under Clause 6.3 of the Interconnection Agreement referred to in the above clause, the Parties agreed to resolve disputes regarding billing statements or billing information generally through a jointly selected auditor of international standing in case they are unable to resolve such disputes by themselves.

86. I note that by virtue of Clause 32.2 of the Interconnection Agreement, the Parties herein gave the Arbitrator wide powers to determine **ANY** dispute or difference between them relating to the rights or obligations of the parties thereunder except those relating to billing statements and billing information generally.

87. The reference to arbitration by the Applicant concerned the breach of the Interconnection Agreement. In response to the Applicant's allegation of breach, the Respondent in its Statement of Defence averred that it was actually the Applicant who breached the Agreement herein through its fraudulent activities and in fact set out particulars of the same. Indeed, and as submitted by the Respondent, the Applicant denied the particulars of fraud set out in the said Defence through its Reply to Defence and invited the Respondent to strict proof of the same. The Respondent further listed fraud as a material issue relevant to the determination of the dispute and fraud was in fact extensively referenced and canvassed by both parties during the hearing of the dispute before the Arbitrator.

88. A perusal of the Arbitral Award reveals that the Arbitrator tackled and determined all the issues that were listed by the parties for determination and indeed confined himself to the same. In **Mahican Investment Limited & 3 Others v Giovani Gaid & 80 Others [2005] eKLR,** Ransley J, while noting that it had not satisfactorily been shown that the matters objected to were outside the scope of the reference to arbitration, held:

"In order to succeed the applicant must show beyond doubt that the arbitrator has gone on a frolic of his or her own to deal with matters not related to the subject matter of the dispute. This the applicant has failed to show."

89. In the instant case, I find that the issue of fraud was well within the terms of the reference and purview of the Arbitrator hence he cannot be said to have gone into a frolic of his own. Finding otherwise would require the court to scrutinize the Arbitrator's analysis of issues of fact and law which would be tantamount to sitting on appeal of the arbitral award yet it is clear from the provisions of **Sections 10** and **39** of the **Arbitration Act** that this court has no powers to do so.

Whether the award was in conflict with public policy

90. The concept of public policy as a ground or setting aside an Award was considered by Ringera J. (as he then was) in **Christ for all Nations v Apollo Insurance Co. Ltd. (2002) EA 366,** in the following terms:

"… An award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals".

91. I have considered the arguments made by the Applicant regarding its claim that the award is contrary to public policy. From the outset, it is clear to me that the Applicant is inviting this court to consider the merits of the Award under this ground. As noted hereinabove, the Arbitrator determined all the issues that were listed by the parties for determination and this was done on the basis of the evidence presented before him by both Parties herein through their respective witnesses. The Arbitrator also considered the submissions rendered by the parties' respective Counsel. In the premises, I am unable to see how the Award was against the public policy of Kenya or contrary to law.

92. What I see is a party who is discontented with an Arbitrator's interpretation of the terms of the Agreement between the parties and the

evidence placed before him. I reiterate that this Court cannot interfere with the manner in which the Arbitrator dealt with the evidence before him because that was well within his jurisdiction. I add that it matters not whether the findings of fact by the Arbitrator were right or wrong. They are matters this court cannot reconsider. The rationale being that parties opted to go the arbitration way to resolve their disputes. As noted earlier, to interfere would place this court in the position of a Court of Appeal, which is against the principle of finality that informs the preference of arbitration to litigation by disputants in commercial contracts.

93. I find guidance in the **Christ For All Case (supra)** where Ringera J. concluded as follows:

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

94. In view of the foregoing, I find that the Applicant has failed to demonstrate how the Arbitral Award was in conflict with the public policy of Kenya. This therefore takes us to the final issue for determination which combines both prayers 3 and 4 of the Application.

> ***iii. Whether the Court can refer the dispute back to the Arbitrator for assessment of damages and/or remit the Final Award back for review.***

95. On this issue, it was the Respondent's submission that when the Arbitrator published his Award on 26th March, 2021, he became *functus officio* and cannot relook at the Award save as per the narrow confines of **Section 34** of the **Arbitration Act.**

96. I beg to differ with the Respondent's position because **Section 35(4)** of the Act also provides an exception to the "functus officio" principle which binds a tribunal upon delivery of the final award. The said provision stipulates that:

> ***"(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."***

97. In **Nyutu Agrovet Limited v Airtel Networks Limited, [2015] eKLR**, the Court of Appeal (M'Inoti JA) while echoing the said provision noted that:

> ***"The provision Section 35 empowers the High Court to suspend proceedings before it, which seek to set aside an arbitral award, so as to give the arbitrator an opportunity to rectify any faults, which would have otherwise justified intervention by the court. In this provision, one sees the court being required, as much as possible, to exercise restraint in intervening in arbitral awards and proceedings and to give the arbitration process opportunity to resolve the dispute. In other words, the courts are being requested, as much as possible, to defer to arbitration."***

98. In light of the above, I have no doubt that the Applicant was well with its right to seek prayers 3 and 4 in the Application. However, having found that the Applicant has not established either of the grounds that it had raised in seeking to set aside the Award, I find that there were no faults in the Award which would have necessitated this Court to remit Award to the Arbitrator for rectification. In the premises, Prayers 3 and 4 of the Application also fails.

Disposition

99. In the upshot, I find that the Applicant's Notice of Motion dated 15th July, 2020 lacks merit. The same is hereby dismissed in entirety with costs to the Respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH JUNE, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Miss Nyaseme h/b for Mr. Wasonga for the Respondent.*

2. *Miss Kimaru h/b for Kiptinesse for the Respondent.*