IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

MISC. APPLICATION NO. E742 OF 2020

CONSOLIDATED WITH

MISC. APPLICATION NO. E812 OF 2020

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE

AND ADOPTION OF AN ARBITRAL AWARD

BETWEEN

HOME AFRIKA COMMUNITIES LIMITED.....APPLICANT

AND

JOSPHAT NJOROGE MWANGI.....RESPONDENT

RULING

Introduction

1. There are two applications before the court for determination. The first is a Notice of Motion dated 26th May 2020 brought by Home Afrika Communities Limited ("Home Afrika") made, inter alia, under **section 35 (2)(a) (iv)** and **(b) (ii)** and **3** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking an order that:

> *[c] THAT this Honourable Court be pleased to set aside the whole of the Arbitral Award published by the Honourable Arbitrator Justus M. Muthithya on 27th February 2020 awarding the Respondent among others, the sum of Ksh.20,980,000.00/- being the loss of income.*

2. The grounds in support of the application are set out in the face of the application as well as the supporting affidavit sworn on 26th May 2020 by Dickson Wanjohi, its General Manager. It is opposed by the Respondent's replying affidavit sworn on 26th June 2020.

3. The second application is the Respondent's Chamber Summons dated 24th June 2020 that is brought by invoking **section 36** of the ***Act*** seeking orders that:

> *(i) That the Arbitral Award published on 27.2.2019 between the Claimant and the Respondent, be recognized, adopted and enforced as a decree of the court.*
>
> *(ii) That Leave be granted to the Applicant to enforce the Arbitral Award published on 27.2.2019 as a decree of this court.*
>
> *(iii) That cost of this application be provided for.*

4. The application is supported by the Respondent's affidavit sworn on 24th June 2020. It was opposed by the replying affidavit sworn by Dickson Wanjohi on 23rd July 2020.

5. It is common practice that applications for setting aside and adoption of an arbitral award are heard together as the two applications are like two sides of the same coin (see ***Rentworks East Africa Limited v Kenya Airways Limited*** **HC COMM Misc. E363 of 2019 [2020] eKLR**). In any case, the parties did not object to the court adopting this course.

Background

6. Home Afrika and the Respondent are owners of parcels of land in Kiambu County; L.R. 2959 known as Migaa Golf Estate, measuring about 774 acres and L.R. No. 98/7 known as Ngurunga Farm measuring about 220 acres respectively. The parties share a common boundary. Home Afrika developed a golf course and a controlled housing park while the Respondent is primarily a coffee farmer.

7. On 26th January 2012, the parties entered into an Agreement for an Easement in which the Respondent granted Home Afrika a right of way and access over his land. The agreement provided for arbitration as the mode of dispute resolution. Later, a Deed of Easement was registered against the Respondent's title at the land registry on 17th July 2012.

8. When Home Afrika started construction, a dispute arose between the parties regarding damage done to the Respondent's property including his trees and crops. The parties entered into negotiations which culminated in the execution of a Deed of Settlement on 1st November 2012.

9. The Respondent contended that during construction on the easement, the contractor damaged his irrigation system causing him substantial loss. The Respondent declared a dispute and issued a notice to Home Afrika notifying it of the existence of the dispute. The parties could not agree on an arbitrator. The Respondent wrote to the Chairman of the Chartered Institute of Arbitrators who appointed Justus Munyithya as the arbitrator ("the Arbitrator"). Home Afrika consented to his appointment and arbitration proceedings commenced on 23rd August 2016.

10. The substance of the Respondent's claim was that when Home Afrika's contractor commenced work on the easement in 2012, it damaged and destroyed the water piping system on Ngurunga farm, spilling water thus occasioning him substantial damage as he was unable to irrigate his coffee for a period of 4 years. He also alleged that the contractor destroyed more coffee bushes during the construction after re-routing the easement without his consent. The parties managed to iron out some differences and the understanding was confirmed by Home Afrika in a letter dated 15th March 2016. He therefore made a claim for loss of income.

11. In its defence, Home Afrika conceded the damage caused by the construction works but added that the emergency work was done on site by the contractor who stopped the water leakage within 30 minutes. Further, the Respondent was duly informed whereupon his site manager closed the water valve on the same day. Home Africa further averred that substantial repairs of the water piping were done within a period of 3 months after discovery of the damage. It therefore argued that the Respondent's claim was unwarranted.

12. The issue then before the Arbitrator was whether Home Afrika damaged the Respondent's piping system and whether the Respondent suffered loss and damage. The Respondent testified and called, Sylvester Kyedi, an agronomist by profession as a witness. Home Afrika called Dickson Wanjohi and Stephen Kamau, a Land Economist as witnesses.

13. On 20th October 2018, the Arbitrator informed the parties that the Award was ready for collection upon payment of his fees. The Respondent paid his portion of the arbitrator's fees while Home Afrika paid its portion on 14th February 2020. On 27th February 2020 the arbitrator published his award after giving the parties notice vide letter dated 25th February 2020. The award was in the Respondent's favour and was on the following terms;

> *(i) Kshs.20,980,000.00/- being loss of income.*
>
> *(ii) Kshs.4,615,000/- negotiated and agreed upon by the parties prior to the Arbitral Proceedings.*
>
> *(iii) Interests in (a) and (b) above at the court's rate of 12% until payment in full.*
>
> *(iv) Costs Kshs. 678,925/-;*
>
> *(v) Simple Interest on (d) above at 12% per annum should the costs remain unpaid thirty days after collection of the award.*

Application to set aside

14. The thrust of the application by Home Afrika was that the arbitral tribunal acted without jurisdiction leading to misconduct on its part and a manifest disregard of its authority by acting in apparent disregard of the Easement Agreement as well as the Settlement Deed contrary to **section 29(5)** of the ***Act***.

15. In response to that application, the Respondent raised an objection that goes to the heart of the jurisdiction of this court to entertain the application. He contended that the application to set aside the Award was filed three months from the date of issue of the Award contrary to **section 35 (3)** of the ***Act***. Although this objection was expressly raised, Home Afrika did not answer or respond to it. However, since the objection is in the nature of a preliminary objection and goes to this court's jurisdiction to set aside the Award, I propose to deal with it.

16. **Section 35(3)** of the ***Act*** provides as follows:

> *35 (3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the*

party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

17. The Court of Appeal in ***Ann Mumbi Hinga v Victoria Njoki Gathara*** **NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR** was categorical in that, "*Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award."* In the more recent case of ***Ezra Odondi Opar v Insurance Company of East Africa Limited*** **KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR**, the Court of Appeal reiterated that:

[22] The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in ***Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2015*** *"the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes" "in a manner that is expeditious, efficient…" while also observing that Section 35 of the Act, "also provides the time limit within which the application for setting aside should be made.*

18. The Respondent contended that the application for setting aside was not filed within 3 months after Home Afrika received the Award as contemplated by the ***Act***. The Award was issued on 27th February 2020 therefore Home Afrika should have filed the application for setting aside by 26th May 2020. Home Afrika did not address this issue either in its application or submissions.

19. In ***Transworld Safaris Ltd v Eagle Aviation Ltd & 3 others*****. H.C Misc. Application No. 238 of 2003 (UR)** and ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **[2020] eKLR,** it was held that under **section 35(3)** of the ***Act***, once the award is received, the time for filing the application to set aside starts running once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses. In this case, the Arbitrator notified the parties that the Award was ready for collection on 29th October 2019. The notification was in fact received by the Applicant's advocates on 1st November 2019. The application ought to have been filed latest, 31st January 2020.

20. Even assuming that that time starts running from the day the Award was actually received, the application would still be out of time. According to the online platform, Home Afrika filed its application to set aside dated 26th May 2020 on 28th May 2020, two days outside the period prescribed by **section 35(3)** of the ***Act***. The application is therefore incompetent and is accordingly struck out.

Application to enforce the Award

21. **Section 37** of the ***Act*** provides the grounds upon which the High Court may decline to recognize and/or enforce an arbitral award at the request of the party against whom it is to be enforced. It provides as follows;

37. The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes the High Court proof that;

(i) a party to the arbitration agreement was under some in capacity; 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, under the law of the state where the arbitral award was made;

(iii) The party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or

(vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;

(b) If 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya. [Emphasis mine]

22. It is not in dispute that the Award was issued by the Arbitrator. Home Afrika assailed it on the ground that the Arbitrator acted in excess of his jurisdiction by disregarding the provisions of the Deed of Easement and the Deed of Settlement contrary to established principles that the court ought not to re-write the parties agreements as was held in by the Court of Appeal in ***National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Another*** **NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR**. Home Afrika also relied on the provisions on **section 29(5)** of the ***Act*** which stipulates that:

> 29(5) *In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction.*

23. As I understand, Home Afrika contended that the Deed of Settlement addressed the issue of compensation of loss of income by inter alia providing for compensation for loss of coffee bushes and mature trees, pumps, plumbing and tanks, spilled water and professional fees. Home Afrika complained that the Respondent was now raising new issues of income which were never raised and deliberated upon when the Deed of Settlement was executed.

24. In his deposition, Mr Wanjohi, referred to the finding by the Arbitrator that the repair of the Respondent's water pipes was never completed yet the Respondent, in his own, pleading and letters, admitted that the pipes had been repaired and restored. Counsel for Home Afrika submitted that parties are bound by their pleadings and relied on the decision in Independent ***Electoral and Boundaries Commission & Another Vs. Stephen Mutinda Mule & 3 Others*** **NRB CA Civil Appeal No. 219 of 2013 [2014] eKLR**.

25. Home Afrika complained that the Arbitrator heavily relied on the Respondent's expert witness report and testimony which was primarily based on mere assumptions, hypothesis which were not subjected to sufficient scrutiny and was further produced without any supporting documentation contrary to **section 48** as read with **section 107** and **109** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. Counsel cited the cases of ***Samson Tela Akute v Republic*** **NRB HCCRA No. 844 of 2004 [2006] eKLR** where the court emphasized that the evidence of an expert is an opinion and the trier of fact ought to make its own independent evaluation of the evidence. It therefore submitted that the Arbitrator acted in excess of jurisdiction when he relied on expert testimony abdicating his duty of making his own independent finding on the issue of undertaking by his own examination of the documents.

26. Home Afrika concluded that it had proven on a balance of probabilities that the Arbitrator acted in excess of its jurisdiction by purporting to re-write a contract that had voluntarily been agreed upon and executed by the respective parties.

27. The Respondent submitted that the Award was regular and issued with the proper participation of all parties. He contended that Home Afrika had not set out with precision how the Arbitrator acted without jurisdiction leading to misconduct on his part or how he disregarded the Easement Agreement as well as the Deed of Settlement.

28. Counsel for the Respondent submitted that Home Afrika has not established the threshold for interfering with the award. He cited the decisions of the Supreme Court in ***Synergy Industrial Credit Limited v Cape Holdings Limited*** **SCK Petition No. 2 of 2017 [2019] eKLR** and ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*** **SCK Petition No. 12 of 2016 [2019] eKLR** where it was held that the court should not ordinarily interfere in an award unless there are exceptional circumstances.

29. In response to the argument that the Arbitrator acted in excess of jurisdiction, Counsel for the Respondent submitted that Home Afrika failed to raise the issue of jurisdiction at the earliest opportunity contrary to **section 17** of the ***Act***. In any case, he pointed out that the issues raised by the parties fell within the arbitration clause in the Easement Agreement as read with the Deed of Settlement. Counsel submitted that the arbitration clause anticipated that damage of property could occur during construction and the Deed of Settlement addressed part of the damage that occurred during construction. He contended that Home Afrika conceded that the Respondent's water pipes were ruptured during construction work on the easement road, therefore the dispute on the loss suffered by the Applicant as a result of that damage was within the arbitration clause.

30. Counsel cited the case of ***Asheville Investments Ltd v Elmer Contractors Ltd*** **[1988] 2 All ER 577** which was cited with approval in ***Heritage Consultants Ltd v Permanent Secretary, Ministry Of Regional Development*** **HC COMM Misc. No. 636 of 2012 [2013] eKLR** where the court held that in interpreting the words of the arbitration agreement, the Court has to interpret them in their normal, literal meaning in the first instance and in this case the words would cover the dispute between the parties.

31. As regards the expert evidence, the Respondent submitted that Home Afrika merely attacked one aspect of the evidence yet the Arbitrator explained why he preferred one expert over the other. He maintained that in any case evidentiary findings of the Arbitrator could not be challenged in this forum. He pointed out that under **section 27** of the ***Act***, the arbitral tribunal is entitled to rely on expert evidence to reach a decision and the mere fact that the Arbitrator relied on one expert is not of itself a sufficient ground to argue that the tribunal abdicated its role to the expert. In this case, counsel argued, that the court considered the evidence of both experts and gave reasons why he preferred one witness over the other after each of them were extensively examined by the parties.

Determination

32. The extent of an arbitrator's jurisdiction is governed by the arbitration clause. Clause 5 of the Easement Agreement dated 26th January 2012 provided as follows:-

> *Any dispute which shall arise between the parties hereto touching on the Agreement or the construction or application thereof of any clause or thing herein contained or to the rights and liabilities of any party under this Agreement shall be referred to the decision of a single arbitrator which must be agreed by both parties and in default of such agreement within Fourteen (14) days of notification of a dispute by one party to the chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators.* [Emphasis mine]

33. The Deed of Settlement dated 1st November 2012 provided at Clause E as follows;

> *The Grantor has further negotiated to be compensated by the Grantee for the coffee stumps and trees to be uprooted within the Easement area.*

Clause 7 thereof further provided;

> *Except as and to the extent varied hereby, the Easement Agreement shall remain as binding to the Parties in all other aspects.*

34. As correctly submitted by the parties, it is a well settled principle of law that the court cannot rewrite contracts for parties and that parties are bound by their agreements. It is evident from the phrasing of the arbitration clause aforesaid as well as the clauses in the Deed of Settlement, the parties confined themselves to settling issues of compensation for the crops and coffee bushes growing on the easement in the Deed of Settlement. The Deed of Settlement did not compromise or affect the Easement Agreement, which was executed earlier, as seen from Clause 7 thereof nor was it a full and final settlement of all that was disputed. Although the agreements did not expressly deal with the loss occasioned by the damage to the irrigation system pipes, the loss that the Respondent claimed occurred as a result of and was connected to the construction of the road on the easement and therefore fell squarely within purview of dispute as contemplated in the arbitration clause.

35. Whether the arbitral tribunal could entertain the Respondent's claim is to be determined, as I have stated, by the scope of the arbitration agreement. In ***Kenya Tea Development Agency Limited and 7 Others v Savings Tea Brokers Limited*** **ML HC Misc. Appl. No. 129 of 2014 [2015] eKLR**, Gikonyo J., while considering the scope of an arbitration agreement, observed as follows:

> *Accordingly, the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law. The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether a claim based on tort was contemplated by the agreement or falls within the terms or scope of the reference to arbitration. Even where general, broad, generous and elastic words are used in arbitration agreement or reference to arbitration, courts will still interpret them by reference to the subject matter of the contract.*

36. The court cited, with approval, the following passage from **Mustill and Boyd**, ***Law and Practice of Commercial Arbitration in England, 2nd Ed, Butterworths (1989)***, p. 118 – 119 and came to the conclusion that the claim did not fall within the subject matter of the dispute contemplated by the parties.

> *General words such as these confer the widest possible jurisdiction. They must, however, be construed by reference to the subject matter of the contract in which they are included. Thus, the inclusion in a mercantile contract of an arbitration clause in general terms would not endow the arbitrator with jurisdiction over disputes between parties concerning, say, personal injuries caused by one to the other, or over allegations of libel.*

37. The question for resolution then is whether the issue concerning damage of the irrigation pipes and consequent loss was covered by the agreement. The clause referred to *"any dispute which shall arise"* and *"touching on the Agreement or the construction or application thereof of any clause or thing herein contained or to the rights and liabilities of any party under this Agreement"* all confer wide jurisdiction on the arbitral tribunal to determine any matter arising out of the easement agreement. This is the approach that is now accepted and was elucidated by Lord Hoffman in ***Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others*** **[2007] UKHL 40** where he stated that:

> *[13] In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with the presumption unless the language makes clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para. 17: "If any businessman did not want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."*

38. If indeed the claim fell outside the Easement Agreement and Deed of Settlement, then Home Afrika should have raised the issue of jurisdiction at the earliest opportunity as provided for in **section 17(2)** and **(3)** of the ***Act*** which provides as follows:

> *17(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.*
>
> *(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter is alleged to be beyond the scope of authority is raised during the arbitral proceedings.*

39. Home Afrika did not raise the issue of the Arbitrator exceeding the scope of his authority. In fact, the perusal of the Statement of Claim and Statement of Defence shows that the issues raised by the Respondent were answered, the parties called experts who were extensively examined, the Arbitrator visited the locus in quo and after hearing and considering the submissions on the issues framed as set out in the proceedings, he issued the Award. The issues now raised, whether and to what extent the irrigation pipes were damaged and whether they were repaired and the nature and extent of loss were the matters placed before the Arbitrator for resolution.

40. Having found that the Arbitrator dealt with the issues before him, I would do no better than quote Kariuki J., in ***Cape Holdings Limited v Synergy Industrial Credit Limited*** **HC COMM Misc. 114 of 2015 [2016] eKLR** where he observed that:

[73] The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend limits imposed by law; parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be heard. See the case of ***Kenya Oil Company Limited & another v Kenya Pipeline Company [2014] e KLR***.

[74] The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.

[75] Further, the court cannot interfere with the findings of fact by an arbitrator. See the case of ***DB Shapriya and Co. Ltd VsBish International BV [2003] 2EA 404***. [Emphasis mine]

41. The other issue raised by Home Afrika is related to the appreciation of expert evidence. It is also a matter of fact and evidence. In this respect the Arbitrator made the following findings;

[73] In examining the weight to be attached by the said two witnesses, it is my view and I hold that this Tribunal shall place more reliance on the evidence tendered by the Claimant's expert witnesses. I find so because the Claimant's witness has on a prima facie and on a balance of probabilities demonstrated that he is qualified and has the necessary background and qualifications in regard to matters pertaining to coffee farming and agriculture in general. The witness has demonstrated a rich background in this field as compared to the Defendant's expert witness who has not adduced before this Tribunal sufficient evidence to demonstrate his expertise in the field of coffee farming or anything on crop production, as required of an agronomist or as would have been expected of him, especially for the purpose of this proceedings.

[74] In holding so, this Tribunal is alive to the role played by such expert witnesses as has been admitted by the Courts in this and other jurisdictions ….…

….

[77] It is therefore clear that the role of an expert witness is to assist the Court in arriving at a just and fair decision and more importantly to appraise the Court and/or Tribunal as in the present case with information which is likely to be outside the experience and knowledge of the Tribunal."

42. The Arbitrator considered the two experts and their area of expertise and its relevance to the present case and gave his reasons for rejecting Home Afrika's evidence. The Arbitrator went further into the experts reports and held as follows;

[80] Based on the expert Reports submitted by both parties, I am perturbed that the Respondent's expert witness made two reports based on the same facts and reached two different conclusions. It is however important to note that no explanation was given as to why the expert changed his conclusions midway in the court of proceedings and the fact that the second Report was filed after the close of the Claimant's case after withdrawing the first Report. In the absence of answers to the foregoing this Tribunal is further constrained to place much reliance on the Claimant's (sic) expert witness report. The Respondent's Expert witness was not truthful and was merely evasive and during cross-examination he could not explain why he came up with two different conclusions. I therefore find that the Report filed thereafter by him was a mere afterthought and no weight can be attached to it.

43. The aforesaid excerpts clearly show that the Arbitrator considered the expert evidence placed before him and explained why he preferred the testimony of one expert over the other. At the end of the day, the issues raised by Home Afrika go to the appreciation of the evidence by the Arbitrator which this court must avoid delving into. The Court of Appeal in ***Kenya Oil Company Limited & another Vs Kenya Pipeline Company*** **NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR** accepted the position that the arbitrator is the master of facts and cited with approval the decision in ***Geogas S. A. v Trammo Gas Ltd ("the Baleares")*** **[1993] 1 Lloyds LR 215** as follows;

[40] The court in that case was dealing with an appeal under section 1 of the English Arbitration Act, 1979. It is necessary to quote at length the words of Lord Justice Steyn, who, while addressing the limits of the jurisdiction of the court hearing an appeal under that Act, had this to say:

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.....

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[41] ---------- Lord Justice Steyn went on to emphasize the need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator's finding of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged.

44. I am satisfied that the Arbitrator did not act in excess of his jurisdiction. He dealt with the issues that were placed before him for consideration based on the pleadings and evidence. Home Afrika has failed to meet the requirements of **section 37 (1)(a)(iv)** of the ***Act***. On the other hand, the Respondent has complied with the condition of **section 36(3)** of the ***Act***.

45. I therefore make the following orders:

(a) The Notice of Motion dated 26th May 2020 is dismissed with costs to the Respondent.

(b) The Chamber Summons dated 24th June 2020 is allowed on the following terms:

(i) That the Arbitral Award issued by Justus M. Munyithya and published on 27th February 2019 be and is hereby recognized and adopted as a judgment of this court.

(ii) That Leave be granted to the Applicant to enforce the Arbitral Award issued by Justus Munyithya and published on 27th February 2019 as a decree of this court.

(iii) That the Applicant shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 2nd day of NOVEMBER 2020

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Macharia instructed by Robson Harris and Company Advocates for the Applicant.

Mr Kivuva instructed by Kivuva Omuga and Company Advocates for the Respondent.