REPUBLIC OF KENYA

IN THE HIGH COUR TOF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. CIVIL CASE NO 65 OF 2018

IN THE MATTER OF ARBITRATION ACT, 1995 &

THE ARBITRATION RULES,1997

AND

IN THE MATTER OF: RECOGNITION AND ENFORCEMENT OF AN INTERNATIONAL ARBITRAL AWARD

BETWEEN

SGS KENYA LIMITED.....APPLICANT

-VERSUS-

TRACER LIMITED.....RESPONDENT

RULING

By a Chamber Summons Application filed on 20th February, 2018 with Supporting Affidavit dated 8th February 2018, pursuant to **section 36 of the Arbitration Act, 1995 and Rules 4(2), 8 & 9 of the Arbitration Rules 1997**; the Applicant sought orders**:**

a) That this Court recognizes the Arbitral Award dated 20th April 2015 by Mrs Olufunke Adekoya and annexed herewith as a judgment of this court and binding on the parties.

b) That this Court grants leave to the Applicant for the enforcement of the Arbitral Award dated 20th April 2015 and annexed herein as a decree of this Court.

c) That the costs of this application be borne by the Respondent.

The application was based on grounds that;

a) The parties herein entered into a reseller agreement (hereinafter referred to as **"Reseller Agreement")** on 15th February 2011 where the Applicant appointed the Respondent as a non-exclusive reseller of Electronic Cargo Tracking Systems Equipment Services in Kenya [to 3rd Party end users]as set out in the Agreement.

b) The parties had also entered into a Teaming Agreement (hereafter **"Teaming Agreement")** on 10th August 2010 whereby the Applicant would provide Electronic Container Tracking Services **(ECTS)** while the Respondent shall provide Fleet Management Services to prospective clients.

c) The **Article IX (9.2)** of the said Reseller Agreement provided that disputes between the parties would be settled under the Rules of Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with the said rules.

d) A dispute arose between the parties and the same was referred to Arbitration under the dispute resolution clause in the said Agreement.

e) The Arbitral proceedings commenced before the Arbitrator and the Final Award in favor of the Applicant herein was published on

20th April 2015.

f) On 17th July 2015, the Respondent filed an application in Nairobi ***Misc. Civil Case 331 of 2015 Tracer Ltd vs SGS Kenya Limited & Olufukunye Adekoya***, seeking to set aside the Arbitral Award issued on 20th April 2015; however, the application was dismissed vide a Ruling dated and delivered on 18th October 2017.

g) The Respondent has not challenged and/or appealed the ruling dismissing its application to set aside the Arbitral Award.

h) A duly certified copy of the [Final] Arbitral Award made on 20th April, 2015, the Reseller Agreement dated 15th February ,2011 & Teaming Agreement dated 10th August, 2010 were duly filed.

i) The Respondent neglected and failed to make good the Arbitral award.

In the supporting affidavit sworn by Albert Stockell; Managing Director of the Applicant, he stated that the dispute between the parties was heard at the International Chamber of Arbitration as ICC international Court of Arbitration ***Case No. 18619/ARP/MD/TO*** in Paris, France.

That after hearing of the Dispute, the Arbitrator delivered and published the Arbitral Award on 20th April 2015. The Award was in favor of the Applicant as follows:

AWARD

a) The sum of USD $ 325,349.84 being the total value of unpaid invoices issued to the Respondent under the Reseller Agreement.

b) The sum of USD 230,718.44 being the pre-award compound interest calculated from 20th April 2012 being 30 days after 20th March 2012 being the date of the composite statement of account till 20th April 2015 the date of the Award.

c) Compound interest from the date of the Award, being 20th April 2012 at the rate of 1.5% per month on (a) above.

d) The sum of USD 159,500 being the value of the invoice from security Group improperly diverted to Autolog.

e) The sum of USD 43,506.67 being simple interest at the rate of 8% per annum on the sum of USD 159,500 being the value of the invoice from Security Group improperly diverted to Autolog as from 21st November 2011, 30 days after the date of the said invoice until 20th April 2015.

f) Simple interest at the rate of 8% per annum on USD 159,500 as from the date of the award till the sum awarded in (d) above is made.

g) Costs and expenses of the proceedings to the tune of USD 176,299 and costs of the Arbitration at USD 65.000.

A certified copy of the published Arbitral Award dated 20th April 2017 is marked "**AS-3".**

On 17th July 2015, the Respondent filed an application in Nairobi ***Misc. Civil Case 331 of 2015 Tracer Ltd vs SGS Kenya Limited & Olufukunye Adekoya*****,** seeking to set aside the Arbitral Award issued on 20th April 2015, annexed copy of the Ruling by Hon Lady Justice G. Nzioka delivered on 18th October, 2018.

REPLYING AFFIDAVIT

The application was opposed by an affidavit of Alikhan Shajani the Managing Director of the Respondent, dated 4th December 2018, where he stated that the Arbitral Award was inconsistent with the laws of Kenya and contravened the **Kenya Revenue Authority Act,** Kenya's **Public Procurement and Disposal Act,** among other laws.

He deponed that the Arbitral Award was in conflict with the public policy of Kenya and inconsistent with the Laws of England.

The Respondent stated that the Arbitral Award contained decision on matters beyond the terms of reference or Arbitration. That the Arbitrator's jurisdiction was limited to the Reseller Agreement dated 15th February 2011. Marked "A" is the Reseller Agreement dated 15th February 2011 and the Terms of Reference of the Arbitration dated 4th February 2013.

The Arbitrator made the finding that

> ***"From the issues ventilated in the claim and counterclaim I find that the Teaming Agreement is connected with the Reseller Agreement. In ascertaining the rights and obligations of the Claimant to the Respondent which are based solely on the alleged breaches of the Reseller Agreement, any breaches of the Teaming Agreement which are connected with the Reseller Agreement are within the scope of the dispute submitted to Arbitration"***

The Respondent submitted that the Arbitral Award dealt with disputes, agreement, parties and matters beyond the terms of reference in the arbitration. This materially affected the findings on the contract and the relations between the parties.

The Respondent submitted that the Arbitral Award has decisions and findings on a Teaming Agreement, and includes a party SGS Soceite Generale DE. Suveilance SA, that was not before the Arbitral Tribunal, that was not part of the Reseller Agreement, and that was not within the terms of Reference of the Arbitration.

The Respondent deposed that in the Reseller Agreement, the Applicant represented itself as licensed by Kenya Revenue Authority to provide Electronic Container Tracking Services. The findings in the Arbitral Award are that the Applicant was so licensed. The findings are in conflict with Kenya's Public policy and contravene the **Kenya Revenue Authority Act & the Public Procurement & Disposal Act** among other laws.

The Respondent took issue with the Fact that the Arbitrator admitted electronic evidence contrary to **Section 5(2) & (4) of Civil Evidence Act 1968 & Section 8 of Civil Evidence Act of 1965 of England.**

The Respondent stated that by awarding compound interest to the 1st Respondent, the Arbitral Award was in conflict with public policy of Kenya. Further that, the award of compound interest contravened the **Late Payment of Commercial Debts (Interest) Act 1998 of England.**

That the Arbitral proceedings prepared by the Arbitrator were incomplete. Part of the proceedings of **16th January 2014 and 17th January 2014** are missing. These are the part of the proceedings that dealt with the Respondent's misrepresentation that it was licensed to carry out electronic container tracking services in Kenya. Marked "G" is a copy of the proceedings.

APPLICANT'S SUBMISSIONS

The Applicant submitted that the law on enforcement and recognition of an Arbitral Award is set out under **section 36 and 37 of the Arbitration Act No. 4 of 1995** (hereinafter **"the Act")**

That it is not in dispute that the Arbitral Award in question is an international Arbitration Award within the meaning of the Act. In relation of this, **Section 36(2)** of the Act provides that:

> ***"An international Arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards."***

That in assessing the criteria under **Section 37 of the Act** for grounds on which recognition or enforcement may be refused by the Court, they are an exact reflection of the criteria stipulated under **Article V of the New York Convention**. **Article V(1)** specifies that in the present case, recognition and enforcement of the Arbitral Award should be permitted unless the Respondent proves that:-

> ***a) The parties to the (arbitration agreement) were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.***
>
> ***b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or***
>
> ***c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or***
>
> ***d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement, was not in accordance with the law of the country where the arbitration took place; or***
>
> ***e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.***

In the Applicant's submission, whether the arbitral Award made on 20th April 2015 by Mrs Olufunke Adekoya, the Arbitrator was contrary to public policy, the Applicant relied in case of ***National Oil Company (1987) 2 All ER 769***, where Sir Johnson Danaldson M. R. observed;

> ***"consideration of public policy can never be exhaustively be defined, but they should be approached with extreme caution. As Burrough J. remarked in Richardson vs Mellish 'it is an element of illegality or that the enforcement of the award would be clearly injurious to the public good or possible that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of public on whose behalf the power of state are exercised."***

The Applicant on whether the Arbitrator went beyond the scope or terms of reference in reaching the award relied on **Section 37(1)(a)(iv) of Arbitration Act** which lays basis for not recognizing and enforcing the Final Arbitral Award. The Respondent alleged that the Arbitrator's terms of reference was limited to the Reseller Agreement and did not include the Teaming Agreement. The Applicant submitted that the Respondent came late in in the day to raise this objection. This is because **Section 17 (3) of the Arbitration Act** provides;

> ***"A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."***

In ***Joma Investments Limited vs N. K. Brothers Limited [2018]eKLR***, the court dealt with the effect of **section 17 (3)** of the Act and what happens when a party fails to raise an objection at the first instance;

> ***"Given the foregoing, my take is that since the arbitrator did not deal with any substantive aspect of whatever dispute that was before him, instead of filing the instant summons, the applicant ought to have followed the procedure stipulated under section 17 of the Arbitration Act and challenged the arbitrator's jurisdiction to determine those claims it felt went beyond the scope of his authority once the arbitral proceedings began as had been directed by the arbitrator in his ruling.'***

> ***"32. The arbitral tribunal should have been given an opportunity to rule on its own jurisdiction as provided for in section 17 (1) of the Arbitration Act. Had this been done, the parties would have been heard on the allegation that some of the claims made by the respondent exceeded the arbitrator's jurisdiction and a decision would have been made on the merits. The applicant would then have been at liberty to apply to this court if it was aggrieved by the arbitrator's decision."***

It was their submission that the Arbitrator's discretion in the award on the issue of interest is provided by **Section 32 (c) of the Arbitration Act** which states;

> ***"Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provisions for the payment of simple or compound interest calculated from such date at such rate with such rests as may be specified in the award."***

The Applicant submitted on whether the Court has jurisdiction to interfere with the factual findings of the Arbitrator, it is trite law that the Court is not clothed with powers to interfere with the factual findings of the Arbitrator. In ***Tcat Limited vs Joseph Arthur Kibutu [2015] eKLR,*** the court stated as follows;

> ***"if the court would look into the issue of whether there was enrichment as invited to do, it is my finding that the same would be tantamount to the court trying to render itself on a question of fact. The Arbitrator used the facts before him in determining whether or not there was breach of any of the terms of the subject Agreement. And as the Arbitrator remains the master of the facts, the Court can only make a finding as to an error in law and not of fact. See the case Kenya Oil Company Limited & Another vs Kenya Pipeline Company [2014] eKLR, Moran vs Lloyds (1983) 2 ALL ER 200 and DB Shapriya & Co. vs Bishint (2003) 3 EA 404, where there is judicial consensus that;***
>
> > ***"all questions of fact are and always have been within the sole domain of the Arbitrator…. The general rule deductible from these decisions is that the court cannot interfere with the findings of facts by the Arbitrator."***
>
> ***"The arbitral tribunal was therefore seized of relevant material and facts which were placed before it by the Applicant. It considered all relevant material. It inquired into the existence of the facts in the case and decided on the extent of the Respondent indebtedness. The court cannot thus be called to disturb the award on that front.***

The Applicant submitted that its application met the threshold required for grant of the orders sought. The Court to uphold the spirit of Arbitration as espoused **Section 32A of the Arbitration Act**, provides;

> ***"except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."***

RESPONDENTS SUBMISSIONS

The Respondent submitted that **Section 37(1)(a)(iv)** of the **Arbitration Act** provides that the High Court may refuse to recognize or enforce an award if 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.

The Respondent submitted that the Teaming Agreement was not part of the terms of Reference of the Arbitration. It was also not part of the dispute before the Arbitral Tribunal. The performance of the Teaming Agreement was not part of the issues before the Arbitral Tribunal. The Teaming Agreement was entered into by the Respondent and an entity known as Societe General de Surveillance SA. Societe Generale de Surveillance SA which was not a party to the Arbitration.

The Respondent submitted that the Arbitral Tribunal exceeded its jurisdiction;

a) In connecting the Teaming Agreement to the Reseller Agreement.

b) In connecting the performance of the Reseller Agreement with that of the Teaming Agreement.

c) In connecting the performance of the Reseller Agreement to Societe Generale de Surveillance SA a party that was before it.

d) In re-writing Article 8.2 of the Reseller Agreement between the parties by amending the terms of the Agreement.

Paragraph 7 at Pg 13-14 & **Paragraph 10 at Pg 39** of Applicant's Affidavit, the Arbitral Tribunal framed issues for determination and they demonstrate that the Teaming Agreement & Societe Generale de Surveillance SA were not in issue. They were not listed as part of issues for determination.

The Respondent relied on the case of ***Airtel Networks Kenya Ltd vs Nyutu Agrovet Ltd, [2011]eKLR***; where the Arbitration clause/ agreement limited the dispute to those arising out of or relating to the Agreement or breach thereof.

The Respondent submitted that the Arbitral Tribunal incorporated the Teaming Agreement and Societe Generale de Surveillance SA in order to circumvent the misrepresentation of the Applicant in the Reseller Agreement that was licensed by the Kenya Revenue Authority to provide Electronic Container Tracking Services in Kenya.

The Respondent submitted that recognition and enforcement of the Arbitral Award would be contrary to public policy as it would contravene **Section 4(3) & 5 of** Kenya **Revenue Authority Act** and **Section 2,31& 34 & 129 of the Public Procurement and Disposal Act.**

In ***Christ for all Nations vs Apollo insurance Co. Ltd (2002) 2EA 366;*** the Court held that an Arbitral Award could be set aside if it was shown that it was;

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 or morality.

The Respondent referred to the following case-law to fortify its position;

a) Dewdrop Enterprises Ltd vs Harree Construction Ltd (2009) eKLR

Where the Court held, the Arbitrator rendered a decision outside the scope of reference to arbitration by declining award costs to the Applicant.

b) ***Open Joint Stock Co Zarubezhstroy Technology vs Gibb Africa Ltd [2017]eKLR*** on definition of public policy to include;

A set of socio-cultural, legal, political and economic values, norms and principles that are deemed so essential that no departure therefrom can be entertained.

c) Anne Mumbi Hinga vs Victoria Njoki Gathara (2009) eKLR; the C.A. held that failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good.

d) Glencore Grain Ltd vs TSS Grain Millers (2002) 1KLR;where the Court observed that contrary to Sections 19 & 23 of Stamp Duty Act the Arbitral Award was not registered and could not be received as evidence in proceedings.

e) Evangelical Mission for Africa & Anor vs Kimani Gachuhi & Anor

(2015) eKLR; where the Court described public policy as some matter which concerns public good and public interest or what would be injurious or harmful to public good or public interest.

The Respondent submitted that contrary to **Section 5 of Civil Evidence Act of 1968 amended by Civil Evidence Act 1995**, the Arbitral Tribunal admitted electronic evidence illegally. This was a document of electronic data obtained from a laptop and produced through an undated and unsigned draft expert report. The Respondent objected to production of secondary electronic evidence on grounds of chain of custody preservation to ensure non tampering of the evidence and there was no signature of the expert and no certificate was provided.

Article 9 of International Bar Association Rules on taking of Evidence in International Arbitration provides that the Arbitral Tribunal should not consider inadmissible document(s).

The Respondent submitted that the Transcript of the Arbitral Proceedings omitted critical parts of Witness evidence that dealt with misrepresentation by the Applicant that it held certification from Kenya Revenue Authority to provide Electronic Container Tracking Services.

DETERMINATION

In considering the pleadings, submissions and oral high lights by parties through respective Counsel, the following issues commend themselves for analysis and determination;

1. **Should the Court recognize and enforce the Final Arbitral Award of 20th April 2015?**

2. Should the Court decline to recognize the Final Arbitral Award and find that it is in conflict with public policy of Kenya and inconsistent with the Law of England?

ARBITRATION AGREEMENT/CLAUSE

The Applicant SGS Ltd and Respondent Tracer Ltd entered into a Reseller Agreement on 15th February 2011, the Applicant appointed the Respondent a non-exclusive reseller of electronic cargo tracking systems equipment and services to 3rd Parties. **Article IX (9.2)** of the Reseller Agreement provided that dispute resolution between the parties would be as follows;

Article IX- Governing Law & Jurisdiction

1. This Agreement is governed by, and interpreted in accordance with substantive laws of England exclusive of any rules with respect to conflict of laws.

2. All disputes arising out of or in connection with the present Agreement will be finally settled under Rules of Arbitration of International Chamber of Commerce by one or more Arbitrators appointed in accordance with the said Rules. The parties agree that communications with external and in house legal Counsel are fully protected by Attorney –Client privilege. The proceedings will take place in Paris(France) and will be conducted in English.

A dispute arose between the parties and the same was referred to arbitration on the terms of the Arbitration clause. After conduct of Arbitral proceedings where both parties participated and were represented by respective Legal Counsel, the Final Award was published on 20th April 2015 and qualifies as an International arbitration award as espoused by **Section 3(3) Arbitration Act.**

On 17th July 2015, the Respondent, Tracer Ltd filed an application seeking to set aside the International Arbitral award issued by the 2nd Respondent, Olufunke Adekoya; sole Arbitrator, on 20th April 2015 in Paris France. The Applicant SGS Ltd raised a Preliminary Objection, that the Court lacked jurisdiction to hear and determine setting aside of the Arbitral Award. The Court, Hon LJ G. Nzioka by Ruling delivered on 18th October 2018 held;

"I find that the parties herein agreed that the agreement which formed the subject of Arbitration proceedings is governed and interpreted in accordance with substantive law of England. It was agreed all disputes would be determined under Rules of International Chamber of Commerce. The seat of Arbitration was agreed on as Paris, France. The reference to Kenyan Law in the Appendix to the main contract cannot override these provisions. The Applicable law establishes the primary jurisdiction of the Court."

The Court upheld the Applicant's Preliminary Objection that the Court lacks jurisdiction to set aside the Final Arbitral Award. It is the decision of a court of similar, equal, competent and concurrent jurisdiction to this Court. I shall say no more on matters relating to setting aside the Final Arbitral award.

Thereafter, the Applicant filed the instant application seeking recognize and enforce the Final Arbitral Award of 20th April 2015.

1. What is the jurisdiction of this Court?

Section 36 & 37 of Arbitration Act provide;

Section 36

(2) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

(3) 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 a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

37. Grounds for refusal of recognition or enforcement

(1) 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 to the High Court proof that—

(I) ……

(ii) ……..

(iii) ……..

(iv) the arbitral award deals with a dispute not contemplated byor 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 decisions 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 recognised and enforced;

……

(vii) the making of the arbitral award 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 becontrary to the public policy of Kenya.

These provisions on recognition and enforcement of International Arbitral Awards are replicated from **Article V of New York Convention (Convention on Recognition & Enforcement of Foreign Arbitral Awards- 1958)**

The Court has requisite jurisdiction on recognition and enforcement of International Final Arbitral Award.

The Applicant complied with **Section 36(2) Arbitration Act** and filed ***certified*** copy of arbitration agreement & Final Arbitral Award.

The Respondent raised issues within **Section 37 of Arbitration** to curtail the grant of recognition and enforcement of the Final Arbitral Award. It is noted that the issues raised have nothing to do with setting aside an award as provided for in **Section 35 of the Arbitration Act.** Although the grounds are similar as to **Section 37 of the Arbitration Act**, the Court lacks jurisdiction to consider setting aside the Final Arbitral Award as primary jurisdiction is at the seat of Arbitration Paris, France.

2. Are the findings and decisions in the Final arbitral award beyond the terms of the reference of arbitration?

The Respondent submitted that the finding by the Arbitrator was beyond the terms of reference of Arbitration as the Arbitrator included Teaming Agreement;

"I find the Teaming Agreement is connected with the Reseller Agreement. In ascertaining rights and obligations of the Claimant & Respondent which are based solely on the alleged breaches of Reseller Agreement, any breaches of the Teaming Agreement which are connected with the Reseller Agreement are within the scope of the dispute submitted to Arbitration."

The Respondent stated that the dispute related to Reseller Agreement only. The Arbitral Award –proceedings and referring Teaming Agreement, included a party, Societe Generale de Surveillance SA who was not party to the Arbitration proceedings. These persons and these documents were not part of the Terms of Reference of the Arbitration.

The Applicant submitted that the Respondent ought to have raised the objection at the earliest opportunity as provided by **Section 17 (3) of the Arbitration Act** which provides that an issue with regard to the Arbitral tribunal exceeding its scope of its authority ought to be raised as soon as it arises during arbitral proceedings. The Applicant cited ***Joma Investments Ltd vs NK Brothers LTd [2018] eKLR supra*** on the point.

Secondly, the Applicant submitted that the Respondent in Answer to Claim & Counter Claim of Respondent at International Chamber of Commerce (ICAC) filed in Arbitration proceedings at Pg 189 Volume 1 of Respondent's Replying Affidavit; Paragraph 5.2 reads;

In addition, the Respondent aver[s] that it entered into a Teaming Agreement dated 10th August 2010 and the Reseller Agreement dated 15th February 2011. Annexed herewith and marked TKL2 & TKL3 is a copy of the Teaming Agreement and Reseller Agreement respectively.

At Pg 200, Volume 1 of Respondent's Replying Affidavit; the Respondent's Counterclaim to Claimant's Claim; Summary of Facts reads;

The basis of the dispute between the Claimant in the Counter claim and the Respondent I the Teaming Agreement dated 10th August 2010 and the Reseller Agreement dated 15th February 2011. The Respondent makes reference to Annexture marked as TKL2 & TKL3 in its Answer to the Claim.

The Court perused the Terms of Reference filed with the Arbitrator. It is housed in the Respondent's Replying Affidavit at Pg 22. The Respondent makes reference to both Agreements, the Reseller Agreement and the Teaming Agreement at Paragragh 19. Clearly, the Respondent disclosed and relied on the twin Agreements for resolution of the dispute. It was not contrary or beyond the terms of reference of Arbitration.

On whether, the consideration the Teaming Agreement by Arbitrator was beyond the Arbitrator's jurisdiction donated by the Arbitration

agreement or not can only turn on an interpretation of the Arbitration Clause/Agreement itself.

> ***All disputes arising out of or in connection with the present Agreement will be finally settled under Rules of Arbitration of International Chamber of Commerce by one or more Arbitrators appointed in accordance with the said Rules.***

From the Terms of Reference Parties disclosed the Teaming Agreement and the Respondent relied on the Teaming Agreement in its pleadings. '***All disputes arising out of or in connection with the present Agreement'*** included what parties disclosed and intended to rely on in the Terms of Reference to the Arbitrator.

In ***Open Joint Stock Co Zarubezhstroy Technology vs Gibb Africa Ltd [2017]eKLR supra Onguto J*** was inclined towards liberal interpretation of the construction of Arbitration Agreements as outlined in the case of ***Fili Shipping Co Ltd Vs Premium Nafta Products & Others [2007] UKHL40*** as follows;

> ***"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen are inclined to have intended any [all] disputes 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 this presumption unless the language makes it clear that certain questions were intended to be excluded from the Arbitrator's jurisdiction."***

Similarly, in the instant case, where parties disclosed and relied on the Teaming Agreement in their pleadings as per the Terms of Reference it cannot be contested that in the Arbitrator's finding that the Teaming Agreement is connected with the Reseller Agreement was beyond the Arbitrator's jurisdiction. The Arbitration Clause did not expressly exclude the particular aspect of the dispute from being heard and determined in their chosen forum; arbitration.

The Court finds that in interpretation of the Arbitration clause, the parties pleadings on the Claim and Counterclaim and the Terms of Reference the Arbitrator's finding and reliance on the Reseller Agreement and reference to the Teaming Agreement was not beyond the Arbitrator's jurisdiction and/or terms of reference of Arbitration. The Arbitrator's finding or referring to Teaming Agreement was therefore not contrary to **Section 37(1) (iv) of Arbitration Act** and does not form the basis of refusal to recognize and enforce the Arbitral Award.

The Arbitrator drew findings from the pleadings filed before the Arbitral Tribunal by the parties through their respective advocates. In the case of;

PT Prima International Development v Kempinski Hotels SA and other appeals [2012] SGCA 35 **where the court held that;**

> ***"It is therefore incorrect for [Prima] to argue that jurisdiction in a particular reference was not limited to the pleadings or that there was no rule of pleading that requires all material facts to be stated and specifically pleaded as would be required in court litigation. An arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a court and before a tribunal. I was therefore surprised that [Prima] argued that it was not required to plead material facts because this dispute was being adjudicated by an arbitrator."***

The Respondent Claim & Counter Claim at ICAC filed in Arbitration proceedings found at Pg 189 Volume 1 of Respondent's Replying Affidavit and referred to the Teaming Agreement.

The Respondent filed Summary of Facts at At Pg 200, Volume 1 of Respondent's Replying Affidavit and relied on the Teaming Agreement.

The Terms of Reference filed and found in the Respondent's Replying Affidavit at Pg 22 of Volume 1, the Respondent makes reference to both Agreements, the Reseller Agreement and the Teaming Agreement at Paragragh 19.

The Arbitrator in the impugned finding **clause 3.2** of the Final Arbitral Award relied on the pleadings filed by parties specifically by the Respondent who introduced the Teaming Agreement and sought to rely on it. The Respondent cannot disown pleadings where it disclosed the Teaming Agreement.

The Teaming Agreement annexed to the Applicants application, was executed between Societe Generale de Surveillance SA (SGS) and Tracer Ltd (FMC)on 10th August 2010. SGS was licensed by KRA to provide Electronic Container Tracking Services (ECTS) and were teaming with FMC to provide Fleet Management Services (FMS) to provide combined service to FMS users who are by law were required to be users of ECTS

The Reseller Agreement was executed on 15th February 2011, between SGS Kenya Ltd and Tracer Ltd. SGS was licensed by KRA to provide Electronic Container Tracking Services (ECTS) Tracer Ltd to provide Fleet Management Services (FMS)to transport Companies.

Interestingly, the Respondent entered into Teaming Agreement with **Societe Generale de Surveillance SA** and Reseller Agreement with SGS (K) Limited and did not raise any objection at any stage in the execution of the contract and/or performance of both contracts. The Respondent did not raise the objection to difference of parties of the Teaming Agreement and/or Reseller Agreement during Arbitration proceedings. The Respondent actually introduced the Teaming Agreement in its pleadings. The Arbitrator dealt with the dispute(s) under the Terms of Reference and pleadings filed before the Arbitral Tribunal.

> **3. Is the Final Arbitral Award issued by the Arbitrator in conflict with public policy of Kenya?**

This Court considered various authorities submitted by parties' Counsel that define and expound on what constitutes public policy whose compliance is required in recognition & enforcement under **Section 37(1) (b) (ii) of Arbitration Act.**

In ***Christ for all Nations vs Apollo insurance Co. Ltd (2002) 2EA 366;*** the Court held that an Arbitral Award could be set aside if it was shown that it was;

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 or morality.

The Respondent relied on the following grounds on noncompliance of Laws of Kenya and actions that may be contrary to justice or morality;

a) Arbitrator's holding that the Certificate of Approval by Kenya Revenue Authority issued on 12th May 2010 to Societe Generale de Surveillance SA authorized the Applicant to provide Electronic Container Tracking System services in Kenya. See paragraphs **10.1.8 -10.1.14; 10.4.10-10.4.12; 10.4.12; 10.4.21at Pg 42-43,59-60& 63** of Applicant's Affidavit. The findings were contrary to Reseller Agreement;

b) The findings were contrary to **Sections 4(3) Kenya Revenue Authority & Section 2, & 129 of Public Procurement & Assets Disposal Act.**

KENYA REVENUE AUTHORITY

SECTION 4(3)

Every document purporting to be an instrument issued by the Authority and to be sealed with the seal of the Authority authenticated in the manner provided by subsection (1) or (2) shall be deemed to be such an instrument and shall be received in evidence without further proof.

5. Functions of the Authority

(1) The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collection and receipt of all revenue.

PUBLIC PROCUREMENT & ASSETS DISPOSAL ACT

SECTION 129. Contract requirements

(1) The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following—

(a) the contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and

(b) the variations shall be such that if the proposal, with those variations, was evaluated again under section 127, the proposal would still be the successful proposal.

(2) The contract, which shall be in writing, shall set out either—

(a) the maximum amount of money that can be paid under the contract; or

(b) the maximum amount of time that can be paid for under the contract.

The Respondent asserts that by virtue of the cited provisions of law of Kenya, the Arbitrator's finding was contrary to the law; after the tender and certificate was issued by Kenya Revenue Authority to Societe Generale de Surveillance SA, only SGS Societe Generale de Surveillance SA that could supply Electronic Container Tracking Services as the successful bidder.

The Respondent indicated the Kenya Revenue Authority had no authority to grant Societe Generale de Surveillance SA to assign its certificate to the Applicant under the Laws of Kenya. The correspondence by KRA to Societe Generale de Surveillance SA of 14th May 2010, 24th June 2010, 22nd June 2010, 22nd July 2010 & 6th August 2010 Pg 212-217 of Replying Affidavit Vol 1confirmed the contracting party with KRA. In reaching contrary findings the Arbitral Tribunal turned a blind eye to these letters.

The Arbitral Tribunal relied on Common Law principles of assignment to circumvent the requirement for the Applicant to have publicly tendered for, won and had been awarded a public contract by KRA to supply Electronic Container Tracking Services. The Statute law is superior to Common Law Principles.

The Applicant was required under **Section 5 of KRA Act & Section 31& 34 of Public Procurement & Assets Disposal Act** to have a licence from KRA inorder to provide and operate Electronic Container Tracking Services.

The Respondent submitted that Arbitral Award involved an illegality by being contrary to public policy.

The Respondent relied on the cases;

Airtel Networks Kenya Ltd vs Nyutu Agrovet Ltd

Where the Court found that the Arbitrator went beyond the mandate based of resolution of the dispute based on the contract to tort of negligence and awarded damages, the award was set aside.

Dewdrop Enterprises Ltd vs Harree Construction Ltd (2009) eKLR where the Court found that the Arbitrator considered issues that were not within the terms of reference.

The Applicant opposed the Respondent's claim and relied on the case of ***Joma Investments Ltd vs NK Brothers Ltd [2018] eKLR*** supra; where the Court held that the Applicant ought to have invoked **Section 17(3) of the Act** and challenged the Arbitrator's jurisdiction to determine claims it felt went beyond the scope of his/her authority.

Alleged breach of Laws of Kenya being contrary to public policy

The Arbitrator found contrary to the Respondent's contention against the Certificate of Approval, at Pg 21 of the Final Arbitral Award and at **Clause 10.1.11** as follows;

> ***"I have reviewed the Certificate of Approval [Exhibit CLA6] provided to SGS SA on 12th May 2010 and I note that on its face it is addressed to SGA SA and refers to its local distributor as SGS Societe Generale with its address at PO Box 72118-00200 Nairobi.This confirms Mr Aswegen's evidence indicating an assignment at the time of tender.***
>
> ***As such the Respondent's argument that the approval was limited to SGS SA is incorrect since the document refers on its face to a Local Distributor. I hold that the letter of 3rd December 2012 is from KRA to SGS Kenya in its capacity as the Local distributor of SGS SA in Nairobi, as it refers to 'applications dated 23rd August 2009 and the subsequent engagement with the KRA on the matter.'***

These are findings of fact by the Arbitrator from evidence in form of documents and testimony from witnesses of the parties. This Court lacks jurisdiction to deal with the findings of fact as held in the case of;

Kenya Oil Co. Ltd & another vs Kenya Pipeline Co. [2014]eKLR where the court held 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.***"

The Certificate of Approval by Kenya Revenue Authority (KRA)at Pg 137 Vol 1 of Respondent's bundle refers to **Societe Generale de Surveillance SA (SGS) as local distributor of P.O. Box 72118-00200 Nairobi,Kenya was issued on 12th July 2020.**

It is the same outfit described by KRA in letter dated 3rd December 2012, pg 602 Vol 2 Respondent's bundle as SGS Kenya Ltd and made reference to earlier engagement on similar terms.

On the issue of the Final Arbitral Award being contrary to public policy by contravention of Sections 4(3) & 5 of Kenya Revenue Authority (KRA) and Section 31,34 & 129 of Public Procurement & Disposal Act;

It is the contract between KRA and **Societe Generale de Surveillance SA** that can/may confirm exclusion of the successful bidder performing the contract directly without a local distributor or not. It is also the contract that would determine whether assignment distributorship or licensing was dealt with. The Respondent did not furnish such proof to this Court or evidence that the same was presented before the Arbitrator. The Respondent did not furnish the court with the contract between KRA & SGS Kenya Ltd. The Arbitrator upheld assignment by **Societe Generale de Surveillance SA of its contractual obligation to SGS Kenya Ltd** based on reference to English law Chitty on Contract which recognized assignment without written agreement. At this point, the Court noted that in both Reseller and Teaming Agreements provided for their choice of law as English law. The Arbitration Clause stipulates the Reseller Agreement shall be governed by Laws of England.

The public procurement process housed in the **Public Procurement & Assets Disposal Act 2015** revised 2017 prescribes that the lowest bidder at the completion of procurement process, shall enter into contract with the public entity through Accounting Officer on terms of the procurement after 14 days of announcement of winner of the tender to allow any objections to be raised and resolved. **Sections 126, 127,128**

129 & 135 of Public Procurement & Assets Disposal Act spell out the evaluation process, the lowest successful bidder as successful tenderer and negotiations with Accounting Officer culminating to a written contract based on terms of the Procurement bid and cost of services or goods procured. The terms of this contract cannot be varied in price, delivery of goods or services. Assignment denotes transferring interest/obligation in an existing contract to 3rd party. The contract is the document that would confirm if assignment was outlawed or not.

The Reseller Agreement Article 2 Obligations of SGS;

The Applicant retained the same contracted terms with the KRA in Reseller Agreement as follows;

> ***All equipment & services are provided to Reseller under the SGS General Conditions of Service & Sale for Kenya Revenue Authority Electronic Cargo Tracking System (ECTS) attached under Appendix II of this Agreement.***
>
> ***Article 3- Obligations of Reseller***
>
> ***The Reseller shall ensure that it conforms with ALL legislation rules regulations and statutory requirements existing in Kenya.***

There was no variation of price/cost of goods or services or variation of terms of reference as envisaged under **Section 129 Public Procurement & Assets Disposal Act.** In the absence of such proof furnished to the Court by the Respondent, the Final Arbitral Award cannot be contrary to public policy. **Section 31 & 34 of Public Procurement & Assets Disposal Act** relate to Tenure of Office of Procurement Review Board members & County Procurement services and are not relevant here.

Section 4(3) & 5 of KRA Act are not contravened in that even if the Certificate of Approval from KRA was not sealed, there is the contract executed between the KRA & successful lowest bidder **Societe Generale de Surveillance SA** that set out the terms of procurement by KRA of goods/services from the Applicant. This Contract is what settled the contract terms between the parties which if produced would confirm if KRA approved the tender or not.

Furthermore, lack of a seal does not render the document *void abinitio*, evidence may be adduced to confirm its legality or authenticity.

Additional alleged breaches of law

The Respondent stated that the Arbitral Tribunal admitted electronic evidence that had been illegally obtained. In doing so, the Tribunal disregarded **Section 5 of Civil Evidence Act as amended by Civil Evidence Act 1995.** The Act provides that a statement contained or produced by a computer shall subject to Rules of Court be admitted if a certificate that identifies the document and is signed by a person in a responsible position on admission of secondary evidence. The Arbitral Tribunal Findings were against public policy as they contravened the **Civil Evidence Act 1995.** It was also contrary to **Article 9 of International Bar Association Rules of Taking Evidence in International Arbitration;** the Arbitral Tribunal should not consider any document that is inadmissible.

In *Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR* to illustrate that the **Civil Procedure Rules** do not apply to Arbitration. In the above case the Court of Appeal held that;

> ***"a careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states;***
>
> ***"Except as provided in this Act no court shall intervene in matters governed by this Act."***

This Court is bound by rules of recognition and enforcement or refusal of the same in International Arbitral Awards as prescribed by the **Arbitration Act 1995. Section 37 (b) (ii)** prescribes grounds for refusal to recognize and enforce the International Arbitral Award when it would be contrary to public policy of Kenya. **Civil Evidence Act 1995** is not part of Kenya Law. The objection should have been raised during Arbitration proceedings.

> **The Rules of Procedure are provided for under the Arbitration Act are as follows;** and are a replica of **Article 19 International Chamber of Commerce Rules of Arbitration** which is what parties in the Arbitration Clause agreed to finally settle their dispute.
>
> ***20. Determination of rules of procedure***
>
> ***(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.***
>
> ***(2) Failing an agreement under subsection (1), the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.***
>
> ***(3) The power of the arbitral tribunal under subsection (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.***

In consideration of the admissibility of electronic evidence without a certificate as required by Section **5 of Civil Evidence Act, 1968** the Respondent did not clarify whether the statute was amended, repealed or upheld in **Civil Evidence Act 1995**, to determine whether it is contrary to public policy it is prudent to consider the place of Civil Procedure Code/Rules in Arbitration, in Kenya. The above -cited case provides exclusion of Civil Procedure as the **Arbitration Act 1995** is a complete Code. Hence, in applying **Section 20 of Arbitration Act 1995,** the Arbitral Tribunal was clothed with power to determine admissibility of any evidence. The Arbitral Tribunal's finding of admitting secondary electronic evidence without a certificate is not contrary to public policy, as arbitration proceedings are not civil proceedings conducted in Courts in Kenya or England but proceedings conducted by parties' choice of forum– arbitration. Within Arbitration parties are allowed to agree on the procedure and if not the Arbitral Tribunal decides and that is what the Arbitrator did in this instant matter.

The Respondent stated that contrary to **Section 1 of Late Payment of Commercial Debts (Interest) Act of 1998** that provides that it is an implied term in a contract that any qualifying debt created by the contract carries simple interest. The Reseller Agreement made no reference to compound interest.

The Court again relies on the **Arbitration Act 1995** on interest;

> **Section 32C. Interest**
>
> ***Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award.***

In ***Kenyatta International Convention Centre (KICC) vs Greenstar Systems Limited [2018] eKLR*** where the court held that;

> ***"… 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 D. Manji Construction Limited vs. C & R Holdings Limited [2014] eKLR 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..."***

The Respondent stated that the transcript of the Arbitral proceedings omitted critical parts of witness evidence that dealt with the issue of misrepresentation by the Applicant that it held certification from KRA to provide ECTS. This Court was not furnished with proof of missing evidence, the content of **Pg 1289 Vol 2** shows statement made by witness Mr. Gerald Van Aswegen in form of incomplete sentence. That by and of itself would not aid this Court in determination of whether evidence is actually missing, if so, how much of it was omitted, was it relevant? Also was it the Arbitrator recording proceedings or the transcript was processed from oral testimony? It would be an uphill task to decipher what happened in the absence of the Respondent furnishing proof or evidence adduced in this Court. Conversely, this court lacks jurisdiction to conduct such an enquiry by virtue of **Section 10 of Arbitration Act 1995**.

The Respondent raised the issue of the law that the Arbitral Award was/is contrary to **Section 23 of Stamp Duty Act.**

In the case of ***Foxtrot Charlie Inc vs Afrika Aviation Handlers Limited & Another [2012]eKLR***, it was held;

> ***"42. With regard to the contention that the award is not stamped and therefore should not be received or acted upon in these proceedings, my perusal of the Partnership Agreement is that the same is duly stamped in Kenya. The Partial and Final Awards are also stamped in Switzerland. Although Section 23 of the Stamp Duty Act requires that instruments executed out of Kenya by any person should be stamped before being acted upon, the same Act at Section 117(1)(i) exempts arbitral awards from stamp duty hence the necessity for stamping is obviated in respect of the Partial and Final Awards. I therefore find that the two instruments in do not contravene the Stamp Duty Act.***

DISPOSITION

> **1. The Court lacks jurisdiction to set aside International Arbitral Award by virtue of the Arbitration Agreement and Section 36 & 37 of Arbitration Act.**
>
> **2. This Court being of competent and concurrent jurisdiction associates itself with Ruling of the Court that delivered of 8th October 2017 on preliminary Objection and found that the Court lacks jurisdiction to set aside Final Arbitral Award of 20th April 2015**
>
> **3. The Arbitral Tribunal did not conduct arbitration proceedings contrary to Section 37 (1) (iv)(vii) Arbitration Act 1995**
>
> **4. The Arbitral Tribunal Did not conduct Arbitration proceedings and culminated to the Arbitral Final Award contrary to Public Policy of Kenya, Section 37 (b) (ii) of Arbitration Act 1995.**
>
> **5. The Final Arbitral Final Award of 20th April 2015 is upheld, recognized and to be enforced as judgment of the Court of**

Kenya.

6. The Application to refuse recognition and enforcement is dismissed.

7. Each party to bear own costs.

DELIVERED DATED & SIGNED IN OPEN COURT ON 6TH NOVEMBER 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. NDOLO H/B MS KETHI FOR THE RESPONDENT

MIRIU, MUNGAI & CO. ADVOCATES FOR THE APPLICANT – N/A

COURT ASSISTANT- TUPET

MR. NDOLO: There is request for leave of appeal

COURT: The issue of applying for leave to appeal is subject to a formal application as there is emerging jurisprudence that indicates that the grant of leave to appeal in Arbitration matters is not automatic.

MR. NDOLO: I seek 30 days stay to file the application.

COURT: The stay is granted for 30days for the Applicant/Respondent to file the formal application.

M.W. MUIGAI

JUDGE