REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

MISC APPL NO. 3 OF 2018

IN THE MATTER OF THE ARBITRATION ACT, 1995& THE ARBITRATION RULES,1997

BETWEEN

ROYAL EXCHANGE PLC.....APPLICANT

AND

PATRICK NYAEMBA TUMBO.....RESPONDENT

RULING

BACKGROUND OF THE APPLICATION

By chamber summons dated 8th February 2018, the Applicant prayed for orders that;

a) The Arbitral Award dated 5th May 2017 issued by Mr Olumide Aju (Arbitrator) be adopted and recognized by the court;

b) Leave be granted to the Applicant to enforce the arbitral award dated 5th May 2017.

The application was based on the grounds that;

a) The Applicant and the Respondent entered into an employment contract dated 19th February 2016,where the Respondent was employed as the Group Managing Director of the claimant in Lagos;

b) A dispute arose and was then referred to arbitration where an arbitrator was appointed by the President of the Chartered Institute of Arbitrators UK(Nigeria Branch) to resolve the dispute;

c) The Arbitrator delivered the award on 5th May 2017 awarding the Applicant a sum of USD 115,400 with interest at the rate of 4% p.a and NGN 7,500,000 as the costs of the arbitration proceedings plus a simple interest of 10% p.a.

The application was supported by the affidavit of **Sheila Ezeuko** the Group General Manager of the Applicant herein. She stated that although the Respondent declined to take part in the proceedings the dispute was heard by the arbitrator who rendered the award on 5 th May 2017 after duly notifying the parties via email marked as "**SE-1**". She also stated that upon proper filing of the application to enforce the award, there was no challenge or appeal against the award.

PRELIMINARY OBJECTION

The Respondent filed a preliminary objection dated 20th of March 2018 on the grounds that;

1. The award dated 5th May 2017 was not binding;

2. The award was arrived at without proper and legally valid notification of the arbitration proceedings to the Respondent;

3. The Respondent was not afforded a fair opportunity to be heard under the rules of justice, the Constitution and statute;

4. The Respondent was never given proper notice for the appointment of the Arbitrator;

5. The award arose from the misconduct of the Arbitrator in confirming his appointment unilaterally;

6. The application for the recognition and enforcement is fatally defective and null *ab nitio;*

7. Kenya has no reciprocal enforcement with Nigeria where the arbitral award was made;

8. The award was a foreign award which proceeded *ex-parte* and as such is not enforceable;

9. The recognition and enforcement of the award would be contrary to public policy hence making it irregular and illegal.

SUPPLEMENTARY AFFIDAVIT

The Applicant responded to the preliminary objection by a supplementary affidavit dated 13th April 2018. The deponent, who was the Group General Manager of the Applicant herein stated that the Respondent was indeed informed of the arbitration proceedings and afforded a fair opportunity to be heard but chose not to participate as evidenced in **paragraphs 12-18 of the Arbitral award**. The deponent also confirmed that an email with a tracker was sent to the Respondent, having attached the notification of arbitration which was read by the Respondent as exhibited as "**Ai, Aii and Aiii**".

She also stated that the Respondent was informed of the appointment of the arbitrator pursuant to the terms of the agreement as covered in **paragraphs 7 and 8** of the award. The deponent also stated that the award was not a foreign judgment, neither was it contrary to public policy.

REPLYING AFFIDAVIT

The Respondent replied to the application dated 8th February 2018 in an affidavit dated 8th June 2018. The Respondent stated that it was not served with any notices on the referral of the matter to arbitration and the appointment of an arbitrator and that there was no evidence that the mode of service was ever effected.

FURTHER SUPPLEMENTARY AFFIDAVIT

In response to the replying affidavit dated 8th June 2018, an affidavit sworn by an Information Technology officer in the office of the **Applicant's Nigerian Punuka Attorneys and Solicitors**, confirmed the service of all arbitration processes in the Respondent's email address; ***patricktumbo@gmail.com*** which the Respondent had provided.

The deponent further stated that the Applicant had also attempted delivery of the physical copy to the Respondent's address by courier but the Respondent refused to accept the documents claiming that he did not know the Applicant as marked in **exhibit A(vii).**

The deponent also confirmed that service upon the Respondents via email was delivered as shown by the email tracker which exhibits he had attached herein.

APPLICATION TO SET ASIDE AN AWARD

By chamber summons dated 24th May 2018, the Respondent (Applicant) prayed for orders that the Arbitral Award herein be set aside. The grounds of the application were based on;

1. The Applicant was not given proper notice and did not participate in the proceedings;

2. The Applicant was not notified and did not participate in the appointment of the arbitrator;

3. The recognition and enforcement of the arbitral award would be contrary to public policy.

GROUNDS OF OPPOSITION

The Applicant opposed the chamber summons dated 24th May 2018 through grounds of opposition dated 11th June 2018 on the grounds that;

1. The court does not have jurisdiction to set aside the Arbitral Award;

2. The Arbitral Award having been issued in Nigeria may only be set aside by courts in Nigeria;

3. The only recourse available in Kenya against the arbitral award is against its recognition and enforcement.

RESPONDENT'S SUBMISSIONS

The Respondent in written submissions dated 12th July 2018 submitted that the following issues were for determination;

1. Whether the High Court has jurisdiction to set aside an international arbitral award

2. Whether the arbitral award should be recognized and enforced in light of the factual and legal issues pointed out the Respondent

1. Whether the court has jurisdiction to set aside an international arbitral award

The Respondent relied on section 35(2) of the Arbitration Act which provides for the grounds of setting aside an international award. The Respondent relied on the case of ***Iran Aircraft Industries vs Avco Corporation US Court of Appeals Second Circuit 24th November 1992, Yearbook Commercial Arbitration 1993,605*** , the Judge stated that the District Court properly denied enforcement of the award pursuant to **Article VI (b) of the New York Convention** because it was unable to present its case to the tribunal.

The Respondent therefore submitted that each party ought to have a chance to comment on the case as they claimed that they were never notified nor served with the appointment of the arbitrator and the arbitral process.

2. Whether the arbitral award should be recognized and enforced in light of the factual and legal issues pointed out the Respondent

The Respondent submitted that the arbitral award and proceedings violated **Article 47 and 50 of the Constitution** as the arbitrator did not inform the Respondent of his appointment in his intention to proceed with the arbitration proceedings.

The Respondent also submitted that the award and arbitral proceedings offend the general principles of arbitration under **Section 19 & 20 of the Arbitration Act and Section 14 of the Nigerian Arbitration Act** with regards to the arbitrator's mandatory duty to act fairly, impartially and equitably between the parties, as the Respondent claimed to have been excluded from proceedings.

The Respondent also submitted that the arbitral proceedings and the arbitral award were erroneous in law on the mode of service. It was the Respondent's position that the preferred mode of service both in the **Act of Nigeria** and the contract between the parties was physical service as the first option followed by postal address. The Respondent further claimed that there was no evidence of service of the documents and relied on **Order 5 of the Civil Procedure Rules**. The Respondent submitted that the arbitrator should have followed up on the reasons for the Respondents default, which the arbitrator failed to do and consequently led to an added advantage to the Applicant.

The Respondent also submitted that the award was against public policy. The Respondent relied on **section 37 of the Arbitration Act** and **section 20 of the Nigeria Act** where an award cannot be enforced if it was/is against public policy.

RESPONDENTS FURTHER SUBMISSIONS

The Respondent reiterated the affidavit sworn in the submissions dated 12th July 2018 and further affidavit sworn on 15th August 2018. The Respondent submitted that the Applicant indeed did not effect physical service upon the Respondent and that the purported electronic email had been disguised which was a violation of **clause 1.4** of contract.

The Respondent also submitted that the email tracker had limitations that were even acknowledged by the Applicant and hence service could not have been guaranteed.

The Respondent further submitted that by the time the purported email was sent, the arbitrator had already been appointed hence denying the Respondent an opportunity to put forth his Defence to the Applicants claim. The arbitral award should therefore not be recognized since it falls under the circumstances contemplated in **Section 37(a)(iii)** of the **Arbitration Act**.

APPLICANT'S SUBMISSIONS IN RESPONSE

In response to the Respondent's submissions dated 12th July 2018, the Applicant stated that the Respondent had not denied he was the owner of the email address to which the service of the arbitration documents were made to neither did the Respondent deny that they intentionally refused to participate in the arbitration proceedings. The Applicant relied on the case of ***In the Matter of an Arbitration Narottam Mulji Khatan vs Kenya Orient Insurance Co. Ltd [2005]eKLR*** where Maraga J refused to allow the Respondent who failed to participate in arbitration proceedings to apply to set aside the award and the application for enforcement.

The Applicant submitted that in determining whether a party was offered an opportunity to be heard in arbitration, the court ought to be guided by the award. The Applicant relied on the case of ***National Oil Corporation of Kenya Ltd vs Prisko Petroleum Network Ltd [2014] eKLR*** where the court held that;

> ***"I shall now turn to the issue of whether the Respondent was denied the right to be heard contrary to Article 50 of the Constitution. In this instance, what must be established is that the party complaining was not afforded the opportunity to present its case. An examination of the Award dated 3rd June 2013 and filed in court on 28th January, 2014 clearly shows that the Respondent was fully informed of the whole arbitration process. From the commencement of the same; letters dated 23rd February 2012, 7thMarch 2012 and 13th March 2012 were sent to the Respondents on the appointment of the Arbitrator. The said letters did not yield any response from the Respondents prompting the appointment of the Sole Arbitrator under Section 12(3) (c) of the Arbitration Act. The Respondent was also served with the respective pleadings and the award. From the foregoing, it is a legal transgression to allege the Respondent was not afforded an opportunity to participate or be heard in the***

arbitral proceedings. It was invited to participate in the selection of the Arbitrator, to file a response to the Applicant's statement of claim and call evidence in support of its position."

The Respondent stated that the Arbitrator at **paragraph 17** of the Award relied on **Article 2 of the First Schedule (Arbitration Rules) to the Nigerian Arbitration and Conciliation Act**, **Chapter 19**, **Laws of Federation of Nigeria 1990** for the legal position that communication effected by email is deemed to have been received if it is transmitted through an electronic mail.

The Applicant submitted that the Respondent cannot challenge the arbitrator's facts and relied on the case of ***Kenya Oil Company Ltd &another vs Kenya Pipeline Co. [2014]eKLR*** where the Court of Appeal cited with approval, the case *of* ***Geogas S. A v Trammo Gas Ltd (The "Baleares") [1993] 1 Lloyd's L R 215*** which 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…."

The Applicant responded to the allegation that the arbitral award was against public policy by stating that the award was consistent to **Article 2(6) of the Constitution** and **section 36(2) of the Arbitration Act**. The Applicant submitted that a successful party to an award under the **New York Convention** had a *prima facie* right to recognition and enforcement and relied on **Article III of the New York Convention** which states that;

"***Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…"***

APPLICANT'S SUBMISSIONS

(*In respect to the Respondent's chamber summons dated 24th May 2018, the Respondent's Preliminary objection dated 20th March 2018 and the Applicants chamber summons dated 8th February 2018.*)

The Applicant relied on **section 36(2) of the Arbitration Act** which states that an award shall be binding and enforced in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral award. The Applicant also relied on **Article V (1) (e)** of the **New York Convention** which provides that the jurisdiction to set aside an arbitral award vests in the country in which the arbitration was heard and determined and relied on the case of ***Tanzania National Roads Agency vs Kundan Singh Construction Ltd [2013]eKLR, Misc Civ. Appeal No.171 of 2012*** hence submitting that the proper law of the contract in which the arbitration is embedded is the law of Nigeria.

With regard to the **Respondent's preliminary objection,** the Applicant submitted that the preliminary objection raised factual assertions that dispute the facts set out in the award yet it should only raise points of law as was stated in the case of ***Independent Electoral & Boundaries Commission vs Jane Cheperenger& 2others[2015] eKLR.***

The Applicant also submitted that the award is binding on the Respondent as there is no agreement between the parties that would render the award non-binding on the parties under **section 32A of the Arbitration Act**.

The Applicant also denied the objection that the application to enforce the award was defective as the Applicant had provided a certified copy of the award and arbitration agreement contained in the contract and applied as per **Rule 9 of the Arbitration Rules**.

In response to the allegation that the arbitral award was illegal, irregular and unlawful, the Applicant relied on the case of ***Susan Wairimu Ndiangui vs Pauline W. Thuo& another[2005]*** where the court with regards to preliminary objection held that;

"It ***should clearly inform both the court and the other party or parties in sufficient details what to expect. That way, the opposing party will not be taken by surprise and may either concede to the same or prepare himself to counter the objection and thus save time and enhance the quality of the legal output."***

The Applicant submitted that such an allegation serves no purpose in court as the Respondent did not show how exactly such allegations arose.

With regard to the application to enforce the award made by the Applicant; the Applicant relied on **Article IV (1)** of the **New York Convention** and **section 36(3).** The Applicant also relied on the case of ***Njuca Holdings Co. Ltd vs Nyayo Tea Zones Development Corporation [2015] eKLR*** where the court held that;

"I have looked at Section 36 of the Act. Under the Act, International arbitration award is to be enforced in accordance with the provisions of the New York Convention, or any other convention to which Kenya is signatory and relating to arbitral awards."

The Applicant further submitted that the Respondent bears the burden of proof to the grounds for refusal to recognize an arbitral award under **Section 37(1)** of the **Arbitration Act**. The Respondent ought to have shown evidence of how he was prevented from presenting its case.

DETERMINATION

ISSUES

The court has considered the parties submissions and issues for determination as follows;

1. If the court has jurisdiction to recognize and enforce the international arbitral award?

2. If the court should recognize and enforce the Arbitral award?

3. If the Court should set aside the international Arbitral award?

ANALYSIS

By application filed on 8th February 2018; the Applicant annexed the employment contract of 19th February 2016; between the Applicant and Respondent which at **Clause 4;1** provides for dispute resolution;

'by arbitration in accordance with provisions of the **Arbitration & Conciliation Act Cap A18 Laws of the Federation of Nigeria (LFN) 2004**. In the event parties are unable to agree on a single Arbitrator, any of the parties can request the President for the time being of the **Chartered Institute of Arbitrators UK (Nigeria Branch)** to appoint the Arbitrator. The Arbitration proceedings shall take place in Lagos and at such other venue as may be agreed upon by the parties or as ordered by Arbitrator. The Administering Authority for the Arbitration shall be Chartered Institute of Arbitrators UK **(Nigeria Branch)** and the arbitration shall be conducted in English'

1. If the court has jurisdiction to recognize and enforce the international arbitral award?

The Arbitration proceedings culminated with the Final Award of 5th May 2017 the subject of the proceedings herein. The Applicant deposed that since then, there was no objection or challenge to the award hence applied to this Court for its recognition and enforcement.

To determine the legal questions posed for determination; the issue of the applicable law is pertinent. The Arbitration clause provides for Nigerian law as applicable law by virtue of **Arbitration & Conciliation Act Cap A18 Laws of the Federation of Nigeria (LFN) 2004** and the seat of Arbitration shall be Lagos, Nigeria. The Applicable law ought to be Nigerian law. However, since the award sought to be enforced in Kenya,is from another jurisdiction it does not fall within domestic award and is thus an International Arbitral award. The applicable law as espoused in ***Foxtrot Charlie Inc vs Afrika Aviation Handlers Ltd & Anor HCCC 557 of 2004***; is the **Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 also referred to as the New York Convention. Article III** of the Convention prescribes recognition and enforcement of international arbitral awards as follows;

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with rules of procedure of the territory where the award is relied upon, under conditions laid down in the following Articles."

Kenya is signatory to New York Convention and the Convention is applicable under **Article 2 (6) Constitution of Kenya (COK) 2010**

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution."

Section 36 (2)of Arbitration Act 1995 reinforces reliance on **New York Convention thus;**

"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."

From the above provisions, Kenya's High Court has jurisdiction in recognition and enforcement of **International/Foreign Arbitral Awards** except where the award is found wanting by any of the grounds set out in **Section 35 &37 of Arbitration Act 1995.**

2. **If the court should recognize and enforce the Arbitral award of 5th May 2017?**

Article V of the Convention on Recognition and Enforcement of Foreign Arbitral Awards also called New York Convention 1958 is replicated by Section 35 & 37 of Arbitration

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) Article V provides;

1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:……..

Section 37 of Arbitration Act 1995 provides;

(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 <u>that party furnishes to the High Court proof that</u>-

i) 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, under the law of the state where the arbitral award was made;

iii) <u>The party against who 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</u>; 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 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; 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 award was induced or affected by fraud, bribery, corruption or undue influence;

b) If he 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) <u>The recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya</u>.

This Court is a competent authority which can recognize and enforce the international/foreign award subject to grounds for refusal of such recognition or enforcement.

The parties to the arbitration proceedings that culminated to the Final Award of 5th May 2017, based on the Arbitration Clause in the Employment Contract that the choice of forum or seat of arbitration is Lagos Nigeria and the choice of law Nigerian Law. So although the section **35 36 & 37 Arbitration Act (Cap 49, Laws of Kenya)** allows and provides for recognition and enforcement and/or the setting aside of both domestic and international awards; the Applicable law in the instant case is Law of Nigeria. The seat of arbitration chosen being Nigeria then the appropriate Court ought to be Nigeria's Courts. Nigeria is the country of primary jurisdiction which parties to the Employment contract chose and are bound by.

Kenya only has a secondary jurisdiction role in terms of recognition and enforcement of arbitral awards. Therefore, this Court agrees with the Applicant's submission that this Court lacks jurisdiction to set aside the international /foreign arbitral award.

Article 34 of United Nations Commission on International Trade Law (UNCITRAL) provides that after the final award, a party may apply to Court in the place of arbitration to set it aside. It is understood that review of awards by the Courts at the seat of arbitration promotes efficiency in International arbitration by enhancing trust of the parties in the arbitration process.

In ***<u>Tracer Limited vs SGS Limited & Olufunke Adekoya HC Misc Case 331 of 2015</u>*** reference was made to the case of ***<u>C vs D (2007), EWHC 154</u>*** where it was held that;

> ***"The seat of arbitration brings in the law of that country as the curial law and it is analogous to an exclusive jurisdiction clause. Not only is there an agreement to curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the Arbitration, <u>so that by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made by the courts of the place designated as the seat of arbitration"</u>***

<u>Kundan Singh Construction Limited vs Tanzania National Roads Agency HC Misc App 171 of 2012</u> dealt with similar issue and the court stated as follows:-

> ***"However it is also clear from the Award itself that the place and the seat of Arbitration is Stockholm, Sweden. Thus, despite the contract applying Tanzanian law, I find and hold that the proper law of the contract in which the arbitration is embedded is the law of Sweden which in terms of NYC is the law of the primary jurisdiction and to my mind, <u>the Swedish Courts are the appropriate authority under which the Applicant herein should be applying to set aside the Award if it be so minded</u>''.***

In terms of consideration of whether the international/foreign arbitral award is recognized and enforceable in Kenya; the Court considered the contested issue of service of notices and pleadings with regard to the arbitration. The Applicant reiterated in submissions that the Respondent who raised Preliminary Objection and contested recognition and enforcement of the Arbitral award lacked valid objection but was merely delaying the conclusion of the matter through litigation.

The Applicant submitted that the Respondent's objection that he was not served with notices of arbitration process, appointment of Arbitrator and commencement of Arbitration proceedings is not borne out by evidence. The Applicant stated that the Respondent was served through email address patricktumbo@gmail.com and the tracking system proved receipt of the documents. He was served via post and the Respondent sent back the documents. Therefore, the Respondent denied the notices served on him and denied service without proof. The Applicant relied on the case of ***Narottam Mulji Khatan vs Kenya Orient Insurance Co Ltd [2005] eKLR Misc Cause 818 of 2004*** where the Court refused the Respondent's claim of non-service and failed to participate in the arbitration proceedings.

The Applicant referred to proof of their position by relying on the Further Supplementary Affidavit by **Mayowa Boluro-Ajayi**, the Information Technology Officer of **Punuka Solicitors, Nigeria**. He deposed that using the tracker system, he confirmed that all emails sent to the Respondent reached him. Further reliance is on the Arbitrator's award of 5th May 2017 where from **paragraph 12-14** the issue of service of notices to the Respondent was considered; the Arbitrator was informed that all notices were served to the Respondent. To that extent, the Applicant is satisfied that the arbitral award should be recognized as binding to the parties and enforced against the Respondent. The Respondent contests the recognition and enforcement of the Final Award.

3. If the Court should set aside the International Arbitral award?

Article V of New York Convention stipulates;

> ***2) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:***
>
> ***a) The parties to the agreement referred to in article II were, under the 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; or***
>
> ***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) …….***
>
> ***d) ……***
>
> ***e) ……***

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ;

> ***(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;***
>
> ***(b) The recognition or enforcement of the award would be contrary to the public policy of that country.***

These requirements are a replica of **Section 35 & 37** of the **Arbitration Act 1995** applicable in Kenya.

The Respondent opposed the application of 8th March 2018 by Preliminary Objection of 20th March 2018 and application to set aside the international arbitral award of 24th May 2018. Both raise similar issues; that the Respondent was not served with the requisite notices on pursuit of arbitration, appointment of Arbitrator and on the commencement of Arbitration proceedings.

The Respondent relied on the affidavit of **Charles Ondieki Mokaya** an Information Technology expert who claimed that the tracker system confirms e-mail delivered to the recipient's mailbox but it cannot confirm if recipient downloaded the mail in full or in part and read it as alleged.

Based on these issues, the Respondent contended that the Arbitral award was contrary to public policy of Kenya as envisaged by **Section 37 1(b)(ii) of Arbitration Act of Kenya and Section 52(i) (a) of Nigeria's Arbitration Act.** It is also against the fundamental right of the Respondent to a **fair hearing (Art 50 COK)** and offended **Art 47 COK** right to fair administrative action.

The Respondent submitted that lack of service of requisite notices denied him the opportunity to participate in arbitration proceedings and offended the principles of arbitration under **Sections 19 & 20 (2) Kenya's Arbitration Act and Sections 14-15 of Nigeria's Arbitration Act.** These provisions mandate equal treatment of parties and parties should be afforded fair and reasonable opportunity to present their cases. The legal and evidential burden of proof on requisite service of notices and pleadings to the Respondent can only be discharged by the Applicant. From the evidence provided of emails sent to the Respondent's e-mail, this Court finds it is not sufficient proof on a balance of probabilities that the effective service was conducted with regard to the Respondent. There is no evidence to confirm the Respondent downloaded the e-mail and read it. There is no evidence of registered post delivery or better still direct service through an agent as was the case in service of the instant application as was evidenced by the affidavit of service filed in court. This Court is not satisfied that the Respondent was properly served under **Article 5** of New York Convention and **Section 37 (1) (a) (iii) of Arbitration Act 1995**. Therefore recognition and enforcement of the arbitral award is refused.

a) Alleged breach of public policy in Kenya

Section 37 (1) (b) (ii) Arbitration Act 1995 which is mirrored from Article V of NewYork Convention curtails recognition of an arbitral award that is contrary to public policy. Public Policy is a very fluid concept and encompasses different standards in society at different periods of time. However, its content can be reduced broadly to; 'State's notions of morality and justice'.

Kenya Shell Ltd vs Kobil Petroleum Ltd [2006] eKLR, where the court held that;

> ***"Public policy , which is a favor we may consider in the exercise of our discretion , is of course an indeterminate principle or doctrine. In years of yore, it was branded "an unruly horse, and when you get astride it, you never know where it will carry you"- Richardson vs Mellish [1824] 2 Bing 229. Nevertheless, it clearly has reference to ideas which for the time being prevail in a country as to the conditions necessary to ensure its welfare. It is variable and must fluctuate with the circumstances of time.***

Ringera J (as he then was) examined several authorities in ***Christ For All Nationals vs Apollo Insurance Co. Ltd [2002] 2 EA 366*** *and formed the view that:-*

> ***" although public policy is a most broad concept incapable of precise definition …….an award could 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 either it was;***
>
> ***a) Inconsistent with the constitution or other laws if Kenya , whether written or unwritten or***
>
> ***b) Inimical to the national interest of Kenya or***
>
> ***c) Contrary to justice and morality "***

The clearest standard of Public Policy is the impugned act or omission violates the standards set in the Constitution and Other legislation and is contrary to justice and morality. In this case, proper notice and service was not done which directly denied the Respondent right to fair hearing and fair administrative action granted by Constitution of Kenya 2010.

b) Alleged breach of service of relevant notices and pleadings

The impugned actions/omissions are that the Respondent claims he was not served with the requisite notices. He challenged the service by e-mails through expert evidence deponed by **Charles Ondieki** and submitted he was not served. Similarly, the Applicant relied on expert evidence of **Mayowa Boluro –Ajayi** that the Respondent was served.

Although the Arbitrator in the Arbitral award was assured service was complied with; evidence of such service was not availed save for email letters whose confirmation of receipt and being read by Respondent was not availed or proved. The Respondent raised the issue of proof of postal service by registered post as contemplated by **Clause 1.4** of the Employment Contract which was not complied with.

This Court finds service of notices, pleadings is an integral part of fair hearing as it confirms a party's right and opportunity to participate in proceedings and ventilate its case for resolution. Similarly, service enhances equality of treatment of parties in arbitration proceedings as provided by **Section 19 of Kenya's Arbitration Act 1995** and **Sections 14-15** of **Nigeria's Arbitration Act**.

The Arbitrator considered the issue of service in the Final Award; and requested confirmation of service. The Claimant's Counsel stated that all the documents so far sent to the Respondent through postal address he provided in the Employment contract were returned after they were opened and resealed. The same documents were sent by email address the Respondent provided and the emails were not returned.

Whereas service of sending documents is confirmed by email as copies of emails are annexed to the application, it is not confirmed the Respondent actually downloaded and read the same. The experts' evidence are divergent and inconclusive to prove actual service by email and receipt by recipient of the said emails.

With regard to postal service, apart from the deposed fact of service, there is no evidence of postal service preferably the Registered post receipt or Courier services receipt to acknowledge postage and/or delivery to the Respondent outside the jurisdiction. The Applicant could have effected service through the Process Server and affidavit of Service filed as the service of the instant application was conducted by personal and direct service of the application to the Respondent. The Respondent acknowledged service wherein he asked that the application be served to his advocates.

Better still, since the Respondent resided out of jurisdiction of the seat of arbitration, substituted service by advertisement in local media could have been employed**.** All the suggested methods would have yielded proof of service and confirmation that the Respondent was availed opportunity to defend his case and participate in the proceedings. In the absence of such proof of registered post , courier services and/or return/affidavit of service after direct service or substituted service by print media notice, this Court is not satisfied that the Respondent was duly served.

Was service sufficient according to Nigerian Law (the seat of Arbitration)?

In the case of ***Mohammed Mari Kida vs Ogunmola Supreme Court of Nigeria SC 383 of 2001*** where 1st and 5th Defendants were served directly with the Writs, the 2nd 3rd & 4th Respondents were to be served by substituted service by pasting the Writ of Summons at their last known place of abode **4A Ahmadu Bello Close GRA**, Maiduguri. The 2nd 3rd & 4th Defendants contested service and sought setting aside of the default judgment. The Court observed;

> *"Now, there is no dispute and it is common ground that the Respondent was no longer resident within the jurisdiction of the Court when the Writ was filed and that is why the Appellant obtained an order to issue and serve the Respondent with Writ and Summons outside the jurisdiction of the Court….*
>
> ***For a defendant to be legally bound to respond to the order for him to appear in Court to answer a claim of the Plaintiff he must be resident within the jurisdiction….***
>
> ***Substituted service can only be employed when for any reason, a defendant cannot be served personally with processes within the jurisdiction of the Court for example when the Defendant cannot be traced or when it is known the Defendant is evading service. Also where at a time of the issue of the Writ, personal service could not in law be effected on the defendant who is outside jurisdiction of the Court….***
>
> ***As mentioned before in this judgment service of process on a party to a proceeding is crucial and fundamental. Failure to serve process where service of process is required is a fundamental vice.***

The law of Nigeria emphasizes on direct service where possible if the Defendant is within the jurisdiction and proper service where the Defendant resides outside the jurisdiction. In the instant case, the arbitration proceedings were in Lagos Nigeria, the Respondent resides in Kenya. Save for emails whose delivery is contested, there is no evidence of Respondent's service of the notices and pleadings.

c) Alleged breach to Fair hearing

The contested issue of service of notices and pleadings to the Respondent goes to the determination of recognition and enforcement of the arbitral award. At this stage since the contested service is contrary to **Section 37 (1) (iii) and 1(b) (2) of the Arbitration Act 1995;** that is the Respondent contests proper notice of appointment of Arbitrator, of the Arbitration proceedings and he was unable to present his case; the lack of proper service is the basis of lack of fair hearing as provided by **Article 50** of **Constitution of Kenya** and therefore contrary to public policy of Kenya.

DISPOSITION

> **1. The Application of 8th February 2018 on recognition and enforcement of international /foreign arbitral award of 5th May 2017 is not granted and the recognition and enforcement is refused.**
>
> **2. The setting aside of the international /foreign arbitral award of 5th May 2017 can only be heard and determined in the Courts at the seat of arbitration, Nigeria.**
>
> **3. Each party to bear its own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH JULY 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. NGUGI FOR THE RESPONDENT

MR. NGUGI HOLDING BRIEF MR. WAWERU GATONYE LEAD COUNSEL FOR RESPONDENT

COUNSEL FOR APPLICANT – ABSENT

COURT ASSISTANT – MR. ISAIAH OTIENO

Mr. Ngugi: We apply for judgment and proceedings.

COURT: The judgment and proceedings to be provided upon request and payment of requisite fees.

M.W.MUIGAI

JUDGE