REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION N0. 272 OF 2017

IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME AND LEAVE TO FILE OUT OF TIME AN APPLICATION TO SET ASIDE ARBITRAL AWARD

BETWEEN

DINESH CONSTRUCTION COMPANY (K) LIMITED.....APPLICANT

AND

KENYA SUGAR RESEARCH FOUNDATION.....RESPONDENT

RULING

[1] The Respondent/Applicant herein, **Kenya Sugar Research Foundation**, moved the Court vide the Notice of Motion dated **19 July 2017** pursuant to **Articles 159(2)(a) and (e) and 165(3)(e)** of the **Constitution of Kenya, Section 35(3) of the Arbitration Act, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 51 Rule 1** of the **Civil Procedure Rules**, for Orders that:

[a] Spent

[b] Spent

[c] That the Applicant/Respondent's enforcement application dated **19 June 2017** be re-opened and be heard afresh on the merits by setting aside the orders granted on **11 July 2017;**

[d] That the Respondent/Applicant be granted leave to oppose the Applicant/Respondent's enforcement application dated **19 June 2017** and be allowed to file and serve its Grounds of Opposition and Replying Affidavit;

[e] That time be enlarged, extended and consequently leave be granted to file out of time an application seeking to set aside the Arbitral Award delivered on **19 September 2016** together with the addendum dated **3 October 2016;**

[f] That the costs of the application be in the cause.

[2] The grounds of the application are that the Arbitral Tribunal delivered its Final Award on **19 September 2016**, and, upon application by the Respondent, added an addendum on **3 October 2016**; and that given the colossal amounts involved and the variance between the matters referred to arbitration and the award, the Applicant had to seek advice from the relevant Ministry and the Office of the Attorney General on the way forward. That it took a while before the relevant communication was received and by the time a decision was made to have the Arbitral Award reviewed or set aside, the time within which to make such an application had lapsed. It was further averred that, the Arbitral Award as delivered by the Arbitrators is an unjust decision; is against public policy and stands to occasion gross injustice to the Applicant and the public at large, granted that the funds will have to be paid from the public coffers.

[3] The application was supported by the Affidavit of the Applicant's Director General, **Eliud Kireger**, sworn on **19 July 2017**. **Mr. Kireger** averred that the Applicant entered into an agreement dated **17 August 2007** with the Respondent for the phased construction, supply, delivery, installation and commissioning of office complex, laboratories, library, green houses, conference center, main store, screen

house, dispensary and associated external civil engineering works. That a dispute subsequently arose in respect of which the Applicant issued a Notification of Dispute dated **13 May 2013**, as required by **Clause 37** of the Contract. The dispute was ultimately referred to arbitration and an Award made dated **19 September 2016** as well as an Addendum dated **3 October 2016** by which the Respondent was awarded a sum of over **Kshs. 123,000,000/=.**

[4] It was further the averment of **Mr. Kireger** that around the same time of the arbitration, certain changes were happening that directly involved the Applicant following the enactment of the **Kenya Agricultural and Livestock Research Act, 2013;** and that as a result, it took quite some time for the reorganization and consolidation of the institutions to be completed, which included resignations and re-designations. He added that, by the time the remaining personnel came to appreciate the import of the award and thereafter seek advice and directions from the Parent Ministry, the National Treasury and the Attorney General, the time within which to make an application for setting aside, in accordance with the advice given, had already expired. Nevertheless, instructions were issued to the firm of **Milimo Muthomi & Co. Advocates** to appeal and/or apply for the setting aside of the Arbitral Award.

[5] It was therefore the averment of **Mr. Kireger** that the delay in moving the Court was not deliberate, but was due to circumstances beyond the control of the Applicant. Regarding the Order of **11 July 2017**, it was the contention of the Applicant that the same was obtained ex parte without any notice to it or invitation to fix a suitable hearing date, and therefore that, contrary to the rules of natural justice and the Constitution, the Applicant was condemned unheard. It was contended that the application to set aside the Award is meritorious and ought to be allowed and the Award set aside, as the Respondent is merely out to unjustly enrich itself to the detriment of the Applicant and the Kenyan taxpayers.

[6] The Applicant/Respondent, **Dinesh Construction Company Kenya Limited**, opposed the application. An affidavit to that end was filed herein on **16 August 2017**, sworn by the Respondent's Projects Manager, **Fredrick Opondo**; wherein it was confirmed that the Applicant and the Respondent entered into a contract dated **17 August 2007** for the construction, supply, delivery, installation and commissioning of office complex, laboratories, library, green houses, conference center, main store, screen house, dispensary and associated external civil and engineering works at the contract price of **Kshs. 634,562,520/=;** and that the said contract had an arbitration clause, in the event of a dispute arising.

[7] It was further confirmed by **Mr. Opondo** that a dispute was thereafter declared by the Respondent/Applicant (hereinafter "the Applicant") vide a letter dated **13 May 2013**, and that although the Respondent tried to dissuade the Applicant from the arbitral process on the ground that it could be expensive, the Applicant insisted on arbitration by three Arbitrators; and that the Tribunal heard oral evidence from both parties and thereafter delivered its Award on **19 September 2016,** which was thereafter corrected by way of an Addendum dated **3 October 2016** on account of computational errors. The Award was thereafter recognized and adopted for purposes of enforcement. Thus, according to the Respondent, it is now desirous of enforcing the Award and therefore urged that the process should be left to run its full course to enable it realize the fruits of its Decree.

[8] While the application was pending hearing, the Applicant brought a second application dated **25 July 2017** seeking stay of execution of the Final Award and Decree issued herein and for the recall of the warrants of attachment and sale of its movable property in execution. The application was however abandoned after **Mr. Nyaanga** provided his undertaking to forestall any precipitate action pending the hearing and determination of the first application.

[9] Having opted to proceed with the Notice of Motion dated **19 July 2017,** directions were given on **31 July 2017** for the filing of written submissions, which were highlighted on **26 November 2017**. I have carefully considered the Notice of Motion, the affidavits filed in connection therewith as well as the submissions made herein by Learned Counsel. The factual foundation of the application is basically uncontested. Thus, it is not in dispute that the parties entered into an agreement dated **17 August 2007** for the phased construction, installation and commissioning of office complex, laboratories, library, green houses, conference center, main store, screen house, dispensary and associated external civil engineering works. It is further not contested that a dispute subsequently arose in respect of which the Applicant issued a Notification of Dispute dated **13 May 2013**, as required by **Clause 37** of the Contract. That Notification was exhibited at page 47 of the documents annexed to the application.

[10] The dispute was accordingly referred to arbitration and a Final Award dated **19 September 2016** was made by the Arbitral Tribunal; which Award was thereafter amended in accordance with the Addendum dated **3 October 2016.** In enforcement of the Final Award, the Applicant/Respondent ("the Respondent") moved the Court, vide the Chamber Summons dated **19 June 2017** for recognition and subsequent execution, pursuant to **Section 36** of the **Arbitration Act.** As far as the record shows, that application was duly served on the Applicant; and as there was no appearance by or for the Applicant, the Court proceeded to allow the same and to grant the orders prayed for, namely:

> **[a]** That the Final Award (including the addendum) prepared by **Eng. Paul T. Gichui, QS. Ones Mwangi Gichuiri** and **Eng. Isaac G. Wanjohi** on **3 October 2016** be and is hereby recognized and adopted as a Judgment of the Court;
>
> **[b]** That leave be and is hereby granted to the Applicant to enforce the said Award as a decree of the Court;
>
> **[c]** That the costs of the application be payable by the Respondent.

[11] It was the contention of **Mr. Kireger** that around the same time that the arbitration was taking place, an Act of Parliament was passed, being the **Kenya Agricultural and Livestock Research Act, 2013;** which had the effect of merging **Kenya Sugar Research Foundation** with other similar entities into **Kenya Agricultural and Livestock Research Organization (KALRO)**. Again this is an uncontested fact. The Respondent however disputed the contention by **Mr. Kireger** that the re-organization is a good excuse for the failure by the Applicant to move the Court within the three months' window provided for in **Section 35(3)** of the **Arbitration Act**, in respect of which extension of time has now been sought.

[12] According to **Mr. Kireger** following the enactment of the **Kenya Agricultural and Livestock Research Act, 2013**, it took quite some time for the reorganization and consolidation of the institutions to be concluded. He added that, by the time the remaining personnel came to

appreciate the import of the award and thereafter sought and obtained advice and directions from the Parent Ministry, the National Treasury and the Attorney General, the time within which to make an application for setting aside award had already expired. Nevertheless, instructions were issued to the firm of **Milimo Muthomi & Co. Advocates** to appeal and/or apply for the setting aside of the Arbitral Award; hence the instant application.

[13] Starting with the preliminary issues raised herein, Counsel for the Applicant, in the written submissions filed herein on **8 September 2017,** raised two points for the Court's determination in limine. Firstly, was the question whether the enforcement proceedings can stand against **Kenya Sugar Research Foundation,** in view of the aforementioned changes in the applicable legal and institutional framework; and secondly, whether the ex-parte orders issued on **11 July 2017** were regularly made. Counsel for the Applicant cited the case of **Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints [2016] eKLR** to support the argument that, at the time of the enforcement application, **Kenya Sugar Research Foundation** was non-existent by dint of **Section 58** of the **Kenya Agriculture and Livestock Act.**

[14] The Respondents counter-argument was that the character and identity of the Applicant has never been in dispute; and that, in the same vein, the Applicant is in no doubt that it entered into an agreement with the Respondent and that agreement is the foundation its application; which in any event has been brought in the very name of **Kenya Sugar Research Foundation.** It was therefore submitted that the Applicant, in raising this issue, is simply being dishonest. Counsel relied on the case of **Republic vs. Town Clerk of Webuye County Council & Another HCCC No. 448 of 2006** and urged the Court to find that the liability herein was inherited by the successor institution, in this case **KALRO**.

[15] There is no gainsaying that, with the coming into effect of the **Kenya Agricultural and Livestock Research Act**, the **Kenya Sugar Research Foundation** ceased to exist as an entity. This is because, in **Section 3** of the Act, **KALRO** was created with the objects, inter alia, of promoting, streamlining, coordinating and regulating research in crops and livestock. In effect therefore, it took over the functions of **Kenya Sugar Research Foundation,** as is explicit in **Part IV** of the Act. Indeed, **Kenya Sugar Research Foundation** is one of the Former Institutions listed in **Schedule Four** of the Act as having been taken over under the **KALRO** umbrella.

[16] And, whereas **Section 58** provides that **Kenya Sugar Research Foundation** was one of the institutions to be wound up on the appointed day upon the coming into force of the Act, the Act is not without appropriate transitional clauses. For instance, **Section 54** of the Act provides that:

> **"On the appointed day--**
>
> **(a) all funds, assets and other property, moveable and immovable, which, immediately before such day were vested in the former institutions, shall, by virtue of this paragraph, vest in the Organisation as the Cabinet Secretary may, by order determine;**
>
> **...**
>
> **(c) all rights, powers, liabilities and duties whether arising under any written law or otherwise howsoever, which immediately before the appointed day were vested in, imposed on or enforceable by or against a former institution shall, by virtue of this paragraph, be transferred to, vested in, imposed on or enforceable by or against the Organisation."**

[17] In respect of pending legal proceedings, **Section 55** is even more explicit. It provides that:

> **"On or after the appointed day, all actions, suits or legal proceedings whatsoever pending by or against a former institution shall be carried on or prosecuted by or against the Organisation as the case may be, and no such action, suit or legal proceedings shall in any manner abate or be prejudicially affected by the enactment of this Act."**

[18] Clearly therefore, any argument by Counsel for the Applicant that this is a matter that ought to be dismissed simply because the Applicant ceased to exist on the appointed day is not only untenable in the light of the transitional provisions aforementioned, but is also self-defeating, as the Applicant would similarly be precluded from pursuing its instant application in the name of **Kenya Sugar Research Foundation** in the first place. Accordingly I find no merit in the argument. Indeed I would agree with and adopt the holding by **Majanja, J.** in **Republic vs. Town Clerk of Webuye County Council & Another HCCC No. 448 of 2006** that:

> **"...a decree holder's right to enjoy the fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights..."**

[19] In connection with the ex-parte orders of **11 July 2017** it was the submission of Counsel for the Applicant, on the authority of **James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR**, that the application for enforcement dated **19 June 2017** was never served; and therefore that the resultant ex-parte order is an irregular order that ought to be set aside ex debito justitiae. Counsel argued that though the application was purportedly served upon the Applicant's former Advocates, **M/s Wamalwa, Abdi & Co. Advocates**, the said firm of Advocates did not have instructions to receive service. He added that it was not automatic that, having acted for the Applicant in the arbitral proceedings, the said firm of Advocates had been retained for purposes of the enforcement application. He thus submitted that it was imperative for the Applicant to be personally served with the enforcement application. Counsel further pointed out that a look at the Affidavit of Service in respect of the enforcement application revealed that service was in any case effected on **Hassan, Mutembei & Co. Advocates**, contrary to the averment in the Replying Affidavit of **Mr. Opondo** that that service was done through the law firm of **Wamalwa, Abdi & Co. Advocates.**

[20] On this point, it was the submission of Counsel for the Respondent that the Applicant is less than candid. He reiterated the Respondent's contention that service was effected on **Wamalwa Abdi & Co. Advocates** and that thereafter the Applicant instructed the Advocates now on

record to take over the matter. He added that the Notice of Change dated **22 June 2017**, which was filed about three days after the filing of the enforcement application, was endorsed with the date of **11 July 2017** at the top right corner, thereby confirming that the Applicant was all along aware of the hearing date. He added that the firm of **Wamalwa, Abdi and Co. Advocates** mutated into **Hassan Mutembei & Co. Advocates.** However, this was merely a statement from the bar, as there appears to be nothing in the Replying Affidavit or in the Affidavit of Service to support the assertion.

[21] Having considered the Affidavit of Service sworn on **23 June 2017** by **Martin Kimani Kirima**, the Court was satisfied that service was properly effected; and having considered the submissions made herein by the Applicant, I find no reason to go back on that decision. More importantly however, **Rule 6** of the **Arbitration Rules**, does recognize that:

> **"If no application to set aside an arbitral award has been made in accordance with Section 35 of the Act, the party filing the award may apply ex parte by summons for leave to enforce the award as a decree."** (emphasis supplied)

Hence, I subscribe to the view that the Respondent was under no particular obligation to serve the enforcement application. (see **DHL Exel Supply Chain Kenya Limited vs. Tilton Investments Limited [2016] eKLR)** Thus, I find no merit in the argument that failure to effect personal service of the enforcement application on the Applicant rendered the ex parte order of **11 July 2017** irregular. In the same vein, not much turns on the argument that service was effected on **Hassan, Mutembei & Co. Advocates** and not **Wamalwa Abdi & Co. Advocates**.

[22] A third and more fundamental preliminary point, which was taken by the Respondent, is the question whether the Court has jurisdiction to entertain the application for extension of time under **Section 35(3)** of the **Arbitration Act.** That provision reads thus:

> **"An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award."**

[23] The Final Award herein was delivered on **19 September 2016** and amended on **3 October 2016**. No application for setting aside Award had been made by **11 July 2017** when the Award was adopted for enforcement pursuant to **Section 36** of the Arbitration Act. Hence the pertinent issue for determination is whether the Court has the jurisdiction to grant extension of time to enable the Respondent file an application for setting aside the Final Award.

[24] The Applicant's arguments were hinged on the provisions of **Articles 24, 159(2) and 165** of the **Constitution of Kenya** as well as **Sections 3, 3A** and **63** of the **Civil Procedure Act,** which give the Court inherent and unlimited jurisdiction, including jurisdiction to extend time where necessary, to meet the ends of justice. It was thus the argument of the Applicant that any law that purports to oust the jurisdiction of the Court to do anything in essence is a limitation of access to justice, and therefore must be explicit, not only as to the terms of the limitation, but must also pass muster in terms of **Article 24** of the **Constitution**. The postulation of Counsel for the Applicant was that **Section 35(3)** of the **Arbitration Act** ought not to be construed restrictively, as to do so would be tantamount to limiting the right to approach the Court for extension of time for purposes of filing an application for setting aside award. He added that his argument is in consonance with the provisions of **Article 159(2)(d)** of the **Constitution**, which mandates the Courts to administer justice without undue regard to procedural technicalities.

[25] Counsel relied on **Republic vs. Public Procurement Administrtive Review Board Ex parte Syner-Chemie Limited [2016] eKLR** in connection with the interpretation of the words **"shall"** and **"may"** to support his argument that, since **Section 35(3)** of the **Arbitration Act** employs the use of the word "may", the Court has the discretion to grant extension of time under that provision. Reliance was also placed on **DHL Excel Supply Chain Kenya Limited vs. Tilton Investments Limited [2017] eKLR** in which the Court of Appeal held that where a legislation is silent on a particular thing, the same does not act as a bar to the doing of that particular thing so long as there is a basis for doing it. In particular, the Court of Appeal held that the fact that **Section 35** of the **Arbitration Act** is silent on whether a decision under that provision is appealable to the Court of Appeal does not, per se, bar the right of appeal.

[26] Counsel for the Respondent, **Mr. Nyaanga**, however approached the matter from the perspective that **Section 10** of the **Arbitration Act** expressly prohibits any intervention by the courts in arbitration matters. He submitted that it would therefore not be lawful for the orders sought to be granted by the Court. He further argued that **Article 159(2)** of the Constitution also requires, vide **Sub-article (b),** that justice be expedited. He relied on **Nairobi Flying Services vs. Kenya Airport Authorities [2016] eKLR** and **Christ for All Nations vs. Apollo Insurance Co. Ltd [2002] 2 EA 366** to underscore the principles of autonomy of parties and finality of arbitral proceedings.

[27] Article 159(2)(c) of the Constitution does recognize arbitration as one of the alternative dispute resolution mechanisms set out thereunder; and, as was pointed out by the Court of Appeal in **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR,** where parties opt for arbitration, it is to be understood that they expect nothing but finality and due expedition from the process. The Court of Appeal expressed itself thus on the matter:

> **"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about."**

[28] Accordingly, **Section 32A** of the **Arbitration Act** explicitly provides that:

> **"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."**

Similarly, in **Section 10** of the **Arbitration Act, No. 4 of 1995** is the stipulation that:

> **"Except as provided in this Act, no court shall intervene in matters governed by this Act."**

[29] In the light of the aforementioned provisions, **Nyamu, J.** expressed the view, in **Prof. Lawrence Gumbe & Another Vs. Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 of 2004, that:**

> **"Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented..."**

[30] Mr. Milimo, Learned Counsel for the Applicant conceded that the **Arbitration Act** does not provide for the procedure for the setting aside of enforcement under **Section 35(3)** or the extension of time under that provision**.** He thus opted to take refuge in **Rule 11** of the **Arbitration Rules** which provides that:

> **"So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules."**

He thus posited that, there being a lacuna in the Act, **Order 50 Rule 6** of the **Civil Procedure Rules** would apply in conjunction with **Section 59** of the **Interpretations and General Provisions Act, Chapter 2** of the **Laws of Kenya**.

[31] However, in **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR,** 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".**
>
> **In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award. In this regard we note that because of the number of the applications filed in the High Court outside the provisions of the Arbitration Act the award has not yet been enforced for a period close to 10 years now. The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo motu because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd1989 KLR 1."**

[32] Although it was the submission of **Mr. Milimo** that **the Hinga Case** has since been overruled by the Court of Appeal in **DHL Excel Supply Chain Kenya Limited vs. Tilton Investments** (supra), having carefully perused that decision, I find nothing therein from which it can be inferred that the aforestated aspect of **the Hinga decision** has been overturned. The Ruling was in respect of an application under **Section 39(3)(b)** of the **Arbitration Act** for leave to appeal against a Ruling of the High Court made under **Section 35** of the **Arbitration Act**; and while the Court ruled that a right of appeal lies from **Section 35** decisions, it reiterated that:

> **"...We appreciate that the Act is based on a Model Law on international commercial arbitration adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). One of the principles underlying the Model Law and in turn the Act is the restriction on the role of the court in the arbitral process. That principle finds expression in section 10 of the Act which stipulates that:**
>
> **"Except as provided in this Act, no court shall intervene in matters governed by this Act."**
>
> **Section 32A also provides that:**
>
> **"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."**

[33] Hence, in holding that there was a right of appeal from a decision under **Section 35** of the **Arbitration Act**, the **Court of Appeal** was explicit that:

> **"...this does not mean that wherever the Act allows the High Court's intervention such a decision is appealable to this Court. The scenario would obviously be different wherein the Act allows the High Court's intervention in a particular issue**

but expressly bars an appeal to this Court..."

[34] It is manifest therefore that what fell for determination in **DHL Excel Supply Chain Kenya Limited vs. Tilton Investments (supra)** is incomparable to the scenario that has presented itself herein. In that case, the **Arbitration Act** expressly permitted the Court's intervention under **Section 35(1)** and a decision made by the High Court in the exercise of that jurisdiction. The Court of Appeal further acknowledged that **Section 39** of the **Arbitration Act** permitted appeals to it where a point of law is involved. In the instant matter, there is no specific provision in the Act or the rules thereunder providing for the setting aside of an enforcement order, let alone allowing extension of time to file an to file an application for setting aside award. Indeed, **Mr. Milimo** conceded that there is a lacuna in this regard. Clearly therefore, the facts of this case are distinguishable from the facts that presented themselves before the Court of Appeal in the **DHL Excel Case**.

[35] Thus, there being no specific provision in the **Arbitration Act** for the setting aside of an enforcement order, I would be of the view that there is no jurisdiction to either to grant stay of execution, or set aside the enforcement order of **11 July 2017,** or to extend time for purposes of setting aside the Arbitral Award. This being my view of the matter, it would be superfluous to consider the merits of the Applicant's Notice of Motion dated **19 July 2017**, save to restate the expressions of **Odunga, J.** in **Erad Suppliers & General Contractors Ltd vs. National Cereals and Produce Board** thus:

> **"It is not law that in very suit where a decision has been made against a body set up under statute and funded by the Treasury that courts should, as a matter of course, grant stay. Statutory bodies are, ordinarily, legal persons with capacity to sue and be sued. They enter into contracts just like any person and accordingly must be liable for their actions...I am not, therefore, expected to base my decision merely on the ground that one party is funded by public resources..."**

[36] In the result, I would dismiss the Applicant's Notice of Motion dated **19 July 2017** with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH 2018

OLGA SEWE

JUDGE