REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 1600 OF 2002

TRASNATIONAL CONSTRUCTION &

MATERIALS SUPPLIES LIMITED ………...……………..…… PLAINTIFF

VERSUS

KENYA WILDLIFE SERVICES ………………………....…….. DEFENDANT

RULING

1. What is before this Court is the Chamber Summons of the Applicant dated 24th of October 2002 brought under the auspices of **section 35** of the Arbitration Act (1995), **Rule 4 (1), (2), 7 and 11** of the *Arbitration Rules 1997* plus **section 3A** of the *Civil Procedure Act*. The Application seeks the principle Order that this Court be pleased to set aside the Arbitration Award dated 2nd April 2002. The second prayer of the Application sought of this Court to be pleased to give directions and guidelines to the Arbitrator as to the determination of the issues of grievance to the Applicant. To this end, **Ibrahim J.** (as he then was) in his Ruling dated 17th August 2012 (delivered by **Musinga J.** (as he then was) on 5th October 2012 had directed that the proceedings herein be suspended for a period of 90 days so that the Arbitrator, Mr. Norman Mururu, be given an opportunity to take corrective action as, in his opinion, will eliminate the grounds for setting aside the arbitral award. The Court noted that the learned Arbitrator had been served with the Court's Order to this end but had not complied with the learned Judge's direction. This Court understood this to mean that the Arbitrator was satisfied with his Award as delivered to the parties in April 2002. It should be noted that the proceedings before **Ibrahim J.** had been concluded on 23rd April 2004.
2. The Chamber Summons dated 24th October 2002 was based on 2 grounds as follows:

"1.The learned Honourable Arbitrator erred in proceeding to act and making an award in excess of the jurisdiction conferred upon him by the parties and proceeding to deal with various disputes that were not contemplated by the parties, disputes not falling within the terms of the reference and beyond the scope of the Arbitration as more succinctly set thereunder;

2. The learned Honourable Arbitrator erred in proceeding to act in excess of the jurisdiction conferred upon him by the parties to determine the dispute between the parties in accordance with the terms of the contract in issue.

3. The Arbitral award is conflict with the public policy of Kenya."

The Applicant then proceeded to set out the detailed grounds in support of the Application referring to the contract as between the parties dated 16th December 1997 (hereinafter "the Contract") which included A) Interest method of calculation and rate; B) Credible start date for calculating interest; C) Extension of time; D) Recalling of the advanced payment – guarantees (bonds); E) Termination. The Application was supported by the Affidavit of the Applicant's Managing Director one **George Mwangi** sworn on 24th October 2002. That Affidavit went into considerable detail as regards the grounds in support of the Application A) to E) as above. The deponent then proceeded to annex to his said Affidavit the documents in four volumes that had been placed before the Arbitrator, as well as a copy of the Arbitrator's Award dated 2nd April 2002 exhibited as "GM 1".

3. The Respondent filed an Affidavit in response through **Joel B. Munyori** its Head of Technical Services, the same being sworn on 10th January 2003. The deponent detailed that all the matters A) to E) as raised by the Applicant as above, had been put to the Arbitrator by the parties. Evidence was given on these matters by witnesses on both sides, such witnesses being cross examined on all such matters. Further, the deponent declared that the Respondent had paid to the Applicant all sums due under the Award of the Arbitrator. He noted that by letter from the Respondent's advocates dated 9th August 2002, the sums of Shs. 1,739,031/-and Shs. 6,313,057/15 had been paid being in the amount awarded under clauses 40.3 to 40.5 of the Arbitrator's Award. By a further letter from the Respondent's advocates dated 9th September 2002, the sum of Shs. 873,203/60 had been paid covering the Arbitrator's fees and the initial amount awarded after the Award was amended under section 34 of the Arbitration Act.
4. On 10th January 2003, the Respondent also filed Grounds of Opposition to the said Applicant's Chamber Summons dated 24th October 2002. Those Grounds detailed as follows:

"1. The application is incompetent in that:

a. **The applicant has failed to file the Award in the High Court as required by Rule 4 of The Arbitration Rules, 1997.**

b. **Further or in the alternative the applicant has not given notice to the respondent of the filing of the award as required by Rule 5 of the Arbitration rules, 1997.**

c. **An application under section 35 of the Arbitration Act can only be filed by summons in the cause in which the award has been filed pursuant to Rule 4 (2) of the Arbitration rules, 1997.**

In the circumstances the court has no jurisdiction to hear the application which should be struck out.

This point will be taken by way of preliminary objection.

2. The Court can only intervene on the specific grounds set out in Section 35 of the Arbitration Act – section 10 of the Arbitration Act.

3. The court cannot sit on appeal from the Award of the Arbitrator.

4. The applicant is seeking to appeal against findings made by the arbitrator on disputes which at all times were contemplated by or fell within the terms of reference and were within the scope of the reference to arbitration.

5. None of the matters complained about in the application give jurisdiction to the High Court under s 35 of the Arbitration Act.

6. The applicant has already exercised the right to request correction or interpretation under s 34 of the Arbitration Act.

7. Nothing in the arbitration award is in conflict with the public policy of Kenya.

8. The Arbitrator did not find that any sum should have been certified as due to the applicant under clause 43.1 prior to the termination of the contract on 14th May, 1999.

9. The amounts which the Arbitrator awarded to the applicant were in respect of amounts due at the termination of the contract.

10. No sums were found due to the applicant in respect of the application made by the applicant on 15th November, 1999 and therefore clause 43.1 of the Contract has no application.

11. The arbitrator held that the document submitted by the applicant dated 15th November, 1998 did not qualify as a proper document on which a valuation could be prepared.

12. There was no time fixed for the assessment of claims or the issue of a certificate to the applicant.

13. There is no basis for alleging that the assessment should be done and a certificate issued within 21 days.

14. The time for making payment after the issue of a certificate was 90 days not 45 days clause 43.1 of the Contract as amended by page CD (5) of the Contract.

15. The rate of interest claimed by the applicant was 59% pa not 32% pa.

16. There was no proof of a rate of interest of 32% pa before the Arbitrator.

17. The Adjudicator directed in clause 12 of his decision that there had been fundamental breach of the contract by the applicant and the accounts should be taken on that basis in accordance with the provisions of the contract. In such circumstances the provisions of clause 60.1 had to be given full effect and that is what the Arbitrator has done.

18. The question of the accounts to be taken and the amounts to be paid on termination were raised by both parties in the pleadings before the Arbitrator.

19. The effect of clause 60.1 of the Contract including the percentage to apply to the value of the work not completed was properly before the Arbitrator.

20. The Adjudicator considered the question of the extension of time in his decision and the question was properly before the Arbitrator.

21. The recall of the advance payment guarantee was before the Adjudicator – see his letter of 16th June, 1999 – and the Arbitrator was within his jurisdiction to deal with the matter.

22. The question of the termination of the Contract was considered by the Adjudicator in his decision and was therefore properly before the Arbitrator.

23. when considering the question of costs the Court should consider the bulky and unnecessary exhibits which have been produced by the applicant.

24. If the Court sets aside the Award then it must be a condition of such order that the Claimant must immediately refund to the respondent all sums paid by the respondent to the claimant under the award together with interest thereof".

5. Through the said **George Mwangi**, the Applicant filed a Supplementary Affidavit dated 23rd January 2003. The deponent admitted receipt of the payments made by the Respondent as awarded

against it by the Arbitrator. However, the deponent maintained that the cheques forward were at the election of the Respondent as part payment of what was due to the Applicant. He went on to say that he was aware that the Award of the Arbitrator was filed in court on 21st October 2002 and notice thereof was given to the Respondent through the Applicant's advocates' letter dated 23rd October 2002. Finally, the deponent reiterated the contents of his previous affidavit sworn on 24th October 2002 to the effect that the Award of the Arbitrator dated 24th April 2002 was in excess of jurisdiction and wrong in law.

6. The Applicant's submissions were filed herein on 30th August 2013. After setting out the background to the Application, the Applicant identified its issues for determination as follows:

"1) Whether the Arbitrator acted outside and in excess of jurisdiction contrary to the contract dated 16th of December, 1997.

2) Whether the Award made by the Arbitrator was in conflict with the public policy of Kenya?

3) Whether the Award dated 24th April, 2002 be set aside wholly or in part."

Thereafter, the Applicant set out its submissions in relation to the dispute under the various subheadings A) to E) as above. Such were as follows:

A. The Arbitrator had awarded interest at 20% on a simple rate basis as from the commencement of the Arbitration in July 1999 up to the date of the Award which position contradicted and/or contravened Clause 43.2 of the Contract between the parties which provided that the interest should be calculated from the date upon which the measured amount would have been certified in the absence of a dispute. The Applicant submitted that interest should therefore have been paid from 1st April 1999 of measured work and materials on site. The Applicant further submitted that the Contract provided for formula and the rate of calculating interest as being "at the prevailing rate of interest at commercial borrowing" as per Clause 43.1 of the Contract. The Respondent had not challenged the rate of 32% per annum which the Applicant maintained was provided for in the Contract contrary to the finding of the Arbitrator.
B. As regards the critical start date for the calculation of interest, the Honourable Arbitrator had use the date of commencement of the arbitration being July 1999 which was contrary to Clause 43.2 of the Contract which provided that such should be a date of certificate in the absence of a dispute. It was the Applicant's submissions that interest on accrual is as regards its claim should be calculated from 45 days commencing 8th January 1999.
C. The Applicant noted that, in his finding as to extension of time, the Arbitrator had upheld the decision of the Adjudicator made on 21st June 1999 to award an extension of time of 79 days which would have the effect of extending time to 30th October, 1998. Clause 28.1 of the Contract imposed an obligation on the Project Manager to extend the intended completion date once a compensation event occurred or a variation order was issued while Clause 28.2 obligated the Project Manager to decide within 21 days from when the Applicant applied. The Applicant noted that the intended completion date was March 1999. The Project Manager had failed to adjust the intended completion date within the said 21 days of application and as a result the completion date was "at large".
D. As regards the recording of the advance payment (Guarantees/Bonds), the Applicant noted that the Arbitrator had held that the termination was unlawful and as a result, the recalling of the Guarantees was also unlawful. This decision ignored Clause 60.1 which provided for the system of recovery of the advance payment in the event of lawful termination. Whereas about Shs. 3.7 million had already been recovered, the Respondent requested its bank for the entire amount of Shs. 9 million which sum was even more than what was paid to the Applicant by way of advance payment. The Applicant submitted that penalties of 59% should be paid by the Respondent because, on recalling the guarantees, even the amount borrowed by the Applicant also attracted penalty.
E. Finally as regards termination, the Applicant submitted that as per the Contract such could only take effect if there was a fundamental breach as per clause 59. Any further fundamental breaches

could only be brought on board as per the provisions of clause 59.3. Termination could not take effect on account of any other breaches. The alleged breach of "slow progress" by the Respondent was its own creation due to its failure to assess claims, work done and extension of time quite apart from the failure to pay even what had been valued by its consultants. It was the Applicant's contention that termination could therefore not be lawful. The Arbitrator in declaring a fundamental breach, erred in proceeding to determine such issues contrary to the Contract between the parties. As a result, the Arbitrator had veered off his jurisdiction and/or acted in excess thereof.

7. In support of its submissions, the Applicant cited 4 authorities in which arbitrators had been held to have gone beyond the terms of the reference and thus exceeded authority given to them by the parties. Such cases were **Gitonga Warugongo v Total Kenya Ltd Civil Appeal No.113 of 1998 (unreported), Mustill and Boyd: The Law and Practice of Commercial Arbitration in England (1989) Butterworth's at P. 312, Kenya Pipeline Company Ltd v Kenya Oil Company Ltd & Anor. HCCC No. 13 of 2010** and the **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (K) Ltd (1989) KLR 1**. As regards its submission that the Arbitrator's Award was contrary to public policy, the Applicant submitted that, by the Arbitrator failing to abide by the provisions of the Contract between the parties and relevant laws, he had breached the public policy of Kenya as envisaged in such laws and the basis of arbitration as a dispute resolution mechanism. The Applicant went on to cite the following cases: **Holman v Johnson (1775) 1 Cowp 341, Glencore Grain Ltd v TSS Grain Millers Ltd (2002) 1 KLR 606** and more particularly, **Christ for all Nations v Apollo Insurance Co Ltd (2002) 2 EA 366** as well as **Air East Africa v Kenya Airports Authority (2001) 2 EA 323**. Finally, the Applicant submitted that the Application was made within time and referred to the said Ruling of **Ibrahim J.** in which the learned Judge had found that there were errors and mistakes in the Award and had remitted the same to the Arbitrator for rectification. The Arbitrator had failed to act on the Judge's directions, hence the reasons why the remission was ordered still remained intact and that this Court ought to set aside those impugned portions of the Award.
8. In turn, the Respondent's submissions were filed in Court on 25th September 2013. They took the form of commentary upon the Grounds of Opposition as set out above. Dealing with Grounds Nos. 2 -5 first, the Respondent pointed out that section 10 of the Arbitration Act 1995 prevented any intervention by the Court except as provided therein. There was therefore no longer any general or common law jurisdiction to intervene in arbitration proceeding. The Respondent noted that **section 35 (2) (a)** of the *Arbitration Act 1995* set out five grounds for setting aside an arbitration award on the basis of misconduct of the arbitrator. The paragraph relevant to the Application before Court was paragraph (iv) which had three grounds for setting aside:

"(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;"

The Respondent emphasised that the burden of proof in relation to paragraph (iv) above was on the Applicant and any allegation that the arbitrator had exceeded the scope of his authority should be raised immediately. The Respondent submitted that at no time during the arbitration proceedings did the Applicant raise such objection. In its opinion, all that the Applicant was trying to do by its said Application was to try to get a right of appeal and there is no such right. The Respondent however agreed that it was important to establish as to what were the terms of the reference to arbitration. In reference to the Contract between the parties, the Respondent pointed to clauses 22 to 25 thereof. Under clause 24.1, the Applicant could refer any decision of the Project Manager to the Adjudicator. If the Applicant was dissatisfied with the decision of the Adjudicator he could refer, under Clause 25.2, the Adjudicator's decision to an arbitrator. It surmised that the starting point had to be the decision of the Adjudicator. Thereafter, the Respondent pointed to clauses 7 and 8 of the Arbitrator's Award as regards the matters that had been referred to the Adjudicator. Such included termination, extension of time and breach of clauses 42 and 43 regarding payments. The actual decision of the Arbitrator in this connection was contained in clauses 10 – 12 of his Award. The

Respondent submitted that as per the Replying Affidavit of Mr. Munyori, all matters complained of by the Applicant were within the matters referred to arbitration.

9. Continuing with its submissions, the Respondent maintained that it was important to realise that the Applicant had already exercised the power to request the Arbitrator to make corrections to and/or to interpret his Award. Such was dealt with by the Arbitrator in his amended Award dated 21st August 2002 in which he corrected his Award to allow for the recovery of the over recovery of the advance payment bond with interest. Otherwise, none of the matters raised in the Applicant's request for correction (dated 1st August 2002) were brought to the Arbitrator's attention when that application was made. Turning to the question of whether the arbitral award is in conflict with the public policy of Kenya, the Respondent maintained that such required dealing with matters such as corruption or bribery or fraud. Kenyan law required that the award must reflect something illegal or immoral. The Respondent submitted that the Arbitrator had not gone outside the Contract between the parties or made any new contract but, even if he had, such would not contravene public policy. As regards the complaint relating to interest, the Respondent pointed to its Grounds of Objection Nos. 8 to 16 and submitted that there was no basis for any complaint in relation to the award of interest under the provisions of **section 35 (2) (a) (iv)** of the *Arbitration Act 1995*. It maintained that once it was accepted that the Arbitrator had jurisdiction to award interest, the matter was at an end despite the efforts of the Applicant to have this Court award a greater sum of interest. Thereafter, the Respondent went into some detail in its submissions as regards amounts awarded by the Arbitrator to be due at the termination of the Contract. It maintained that clause 43.1 of the Contract had no application. The Arbitrator had dealt with all matters concerning amounts due arising out of the Applicant's allegations and had made it clear that the balance sum in favour of the Applicant, as at the date of termination, was due to the wrongful recovery of the full of the advance payment.
10. As regards the time for making payments after the issue of a certificate, the Contract was quite clear that this was 90 days not 45 days – clause 43.1. The Respondent maintained that if the 90 day time limit applied then it should be noted that the Arbitration commenced on 1st July 1999. The termination of the Contract was on 14th May 1999. If one calculated 90 days back from the commencement of the arbitration then one would arrive at the date of 1st April 1999. The termination therefore fell within that period. The claim was as at 15th November 1998. Even if the claim was in an acceptable form, the delay was not unreasonable and there was no basis for moving the date at which interest commenced backwards, beyond the start of the arbitration. As regards the rate of interest applicable, the Respondent submitted that the rate claimed by the Applicant was 59% not 32%. That rate was challenged in the Respondent's submissions before the Arbitrator. There was no proof of a rate of 32% produced before the Arbitrator. As a result, the award of interest was within the jurisdiction of the Arbitrator and there was no basis for interfering with the interest award in that regard.
11. As regards extension of time, the Respondent referred to Grounds Nos. 17 to 20 of its Grounds of Opposition as aforesaid. It maintained that the Arbitrator had fully considered the claim for an extension of time which arose from the finding of the Adjudicator. The Applicant had raised all these matters before the Adjudicator and the point was canvassed in the Respondent's submissions to the Arbitrator. It was obvious that the matter was clearly before the Arbitrator. There was no basis for the Court to interfere with the decision of the Arbitrator in that regard. The Respondent maintained that the Contract work was not done and on that basis the termination of the same was correct. As regards the fourth complaint of the Applicant D) as above, the Respondent detailed that the recall of the advance payment guarantee was before the Adjudicator and that this was one of the matters upon which the Applicant asked for a correction of the Award under **section 34** of the *Arbitration Act*. The Arbitrator had dealt with the matter in his amended Award of 21st August 2002. The Respondent also commented upon the Applicant's complaint E) as above as regards the termination of the Contract. The matter had been considered by the Adjudicator who had made a decision thereon which the Applicant had queried and the matter was referred to the Arbitrator. In the Respondent's view the matter was properly before the Arbitrator and was ruled upon accordingly in the Award. Here again, the Respondent was of the opinion that the Applicant was attempting to appeal the Arbitrator's decision in this regard. Finally, the Respondent referred to its Grounds Nos. 23 and 24. It reminded the Court that the Applicant had submitted 4 bulky volumes

of exhibits for which there was no need and such amounted to an unnecessary expense for which the Applicant should not be compensated. The Respondent also noted that if this Court should set aside the Arbitrator's Award, then there must be a condition that the Applicant must immediately refund all sums paid by the Respondent under the Award together with interest thereon.

12. The Respondent referred this Court to a number of authorities including **International Commercial Arbitration in UNCITRAL Model Law Jurisdictions 1st edition – Dr. Peter Binder,** **Gitonga Waugongo v Total Kenya Ltd** **(supra),** **Air East Africa v Kenya Airports Authority** **(supra)** (which the Respondent maintained was wrongly decided as the provisions of **section 10** of the *Arbitration Act 1995* had not been brought to the attention of the Court hearing the matter), **Halsbury's Laws of England Volume 22 – 5th Edition reissue, Stroud's Judicial Dictionary of Words and Phrases Volume 2 – 6th Edition,** **Christ for all Nations v Apollo Insurance Company Ltd** **(supra), Chitty on Contracts 31st edition volume 1 and Goff & Jones – The Law of Restitution 7th edition**.

13. *The Arbitration Act 1995* which was applicable to these matters at the date of the arbitration before the Arbitrator (the same has since been amended and the amendments are now incorporated in the *Arbitration Act, Cap 49 Laws of Kenya*), was based on the UNCITRAL Model Law and as a result Chapter 7 of Dr. Peter Binder's volume on International Commercial Arbitration In UNCITRAL Model Law Jurisdictions as cited to court by the Respondent, has proved most useful. That Chapter refers to Article 34 of the Model Law which is worded very much along the same lines as **section 35** of the *Arbitration Act 1995*. As stated in Dr. Binder's useful book:

"Most importantly, however, Article 34 deals with the issue that is of the utmost importance in the delicate balance between the autonomy of arbitration on the one hand and judicial control on the other. This balance weighs arbitration's quest to achieve the greatest possible independence from the court in order fully to accomplish the advantages of speed and efficiency, which are commonly lost when a municipal court becomes involved, against the confidence in arbitration, and especially in the awards rendered by arbitral tribunal, which can only be achieved if there remains the option to set aside an award that was made under an evidently unjust procedure."

Later in his volume, the learned author goes on to say:

"The grounds for setting aside an arbitral award mentioned in Article 34 (2) (a) have to be proven by the party wishing to raise them. In other words, the party claiming the existence of these grounds has the burden of proof. If, in the court's opinion, that party fails sufficiently to prove the existence of the ground, the court will confirm the award."

14. It was the Respondent's Ground of Opposition No. 5 that none of the matters complained about by the Applicant gave rise to the jurisdiction of this Court under **section 35** of the *Arbitration Act 1995*. Indeed, I find that the Applicant has already exercised its right to correction and interpretation of the Award under **section 34** of the Act and the Arbitrator issued an Amended Award on 21st August 2002, taking into account the Applicant's complaints in that regard. It is somewhat surprising to this Court that the Applicant did not raise with the Arbitrator, while exercising its right to correction as above, what it now raises before this Court as regards the 5 issues A) to E) detailed as above. I would address each of those issues as follows:

A) Interest method of calculation and rate.

As per the Contract clause 43.1, the same provides that where the Respondent makes a late payment, the Applicant shall be paid interest on the late payment in the next payment. The clause goes on to say:

"Interest be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest at commercial borrowing for each of the currencies in which payments are made."

The Respondent has submitted that no evidence was led during the arbitral proceedings as to the rate of interest for commercial borrowing. Indeed, there would seem to be some difference as between the parties as to whether the interest rate should be 59% or 32%. In all the circumstances, I can see no misconduct by the Arbitrator in using his undoubted discretion by adjudging the commercial rate of interest applicable to the Contract at 20% calculated on a simple interest basis.

B) Critical Start Date for Calculating Interest

The Applicant submitted that that the Arbitrator had used the date of commencement of the arbitration (July 1999) as the start date for calculating interest contrary to Clause 43.2 of the Contract. It maintained that the interest on accrual is should be calculated from 45 days starting 8th January 1999. The second sentence of Clause 43.2 of the Contract reads:

> **"Interest shall be calculated from the date upon which the increased amount would have been certified in the absence of dispute."**

It was the Respondent's submission in this regard that the Arbitrator did not find that any sum should have been certified as due to the applicant under Clause 43.1 prior to the termination of the Contract 14th May 1999. Further, the Respondent submitted that the amounts awarded by the Arbitrator to the Applicant were such that were due at the termination of the contract and that no sums were found due to the Applicant in respect of its application made on 15th November 1998. In my view, that would seem to be the correct position as adjudged by the Arbitrator at paragraph 10.1 of his Award in which he found that the Applicant had only submitted a draft valuation and the valuation derived from those notes showed quite clearly that the correct value of work done and materials on site as 15th November 1998 was not as claimed by the Applicant. As a result, I cannot fault the Arbitrator in his subsequent finding as to the critical start date for interest under this heading.

C) Extension of Time

Under this heading, the allowance for extension of time was taken to the Adjudicator by the Applicant. The former assessed such extension at 79 days. All that the Arbitrator did, as per paragraph 3.1 of his Award, was to review the Adjudicator's decision and to find the same reasonable. Clause 24.1 of the Contract provided that if the Applicant considered a decision taken by the Project Manager was either outside his authority or wrongly taken, it could be referred to the Adjudicator. Clause 25.2 reads in the last two sentences:

> **"Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding."**

It is my understanding that the Applicant herein referred the Adjudicator's decision with regard to extension of time to the Arbitrator who concurred with that decision. I cannot see how the Arbitrator has gone outside the provisions of the Contract in that connection, as submitted by the Applicant.

D) Recalling of the Advance Payment – Guarantees (bonds)

Clause 60.1 of the Contract as referred to this Court by the Applicant reads as follows:

> **"If the Contract is terminated because of a fundamental breach of Contract by the Contractor, the Project Manager shall issue a certificate for the value of the work done and materials ordered less advance payments received up to the date of the issue of the certificate and the less the percentage to apply to the value of the work not completed, as indicated in the Contract Data. Additional Liquidated Damages shall not apply. If the total amount due to the Employer exceeds any payments due to the Contractor, the difference shall be a debt payable to the Employer."**

As I understand it from the submissions of the Applicant, Shs. 3.7 million had already been recovered by it. However, the Respondent had gone to the bank to obtain the entire amount of Shs. 9 million. The Applicant maintained that the penalties at the bank at 59% should be paid by the Respondent. From the submissions of the Respondent, the Arbitrator had made it clear that the balance in favour of the Applicant as at the date of termination was due to the wrongful recovery by the Respondent of the full of the advance payment. I have perused paragraph 5.1 of the Arbitrator's Award and it is quite clear that he dealt with this matter to the extent that he declared that there was double recovery by the Respondent in the amount of Shs. 1,568,997/-. Indeed, the Arbitrator would seem to have included that sum in his paragraph 40.5 when he determined that the total payment to be made by the Respondent to the Claimant came to Shs. 8,052,088.15. That figure was later adjusted by the Arbitrator in his Amended Award dated 21st August 2002 in which he also awarded interest. In my opinion, the Arbitrator dealt with this matter in accordance with the provisions of the Contract and I would tend to agree with the Respondent that what the Claimant is trying to achieve under this heading, is an appeal as against the Arbitrator's decision and no more.

F. **Termination**

Under this heading, the Applicant queried the direction that the Arbitrator had taken as per paragraphs 16.0, 16.1 and 16.2 of his Award as regards the termination of the Contract. The Applicant submitted that termination could only take effect if there is "a fundamental breach". To this end, it referred to clause 59.3 of the Contract. It detailed that the Arbitrator was not asked by either party to declare a fundamental breach. I have noted that the fundamental breaches of the Contract were detailed and set out at clause 59.2 thereof. It was the Arbitrator's position in this connection that the heading to clause 59.2 read:

"Fundamental breaches of Contract shall include, <u>but shall not be limited to</u>, the following:" (emphasis added).

He then went on to say that two questions arose firstly, whether there were factual reasons to justify the termination of the contract and secondly was the procedure followed contractual? The Arbitrator proceeded to evaluate those questions and came to the conclusion that that the notices were proper and that the actual termination was effected in accordance with the Contract. I can find no fault with that decision at paragraphs 16.2 and 34.0 of the Award. To my mind, the Arbitrator did not find that there was a fundamental breach of Contract as submitted by the Applicant. In any event, the question of the termination of the Contract was before the Arbitrator as a result of the Adjudicator's decision which was appealed by the Applicant. Here again, I agree with the submissions of the Respondent that what the Applicant is trying to do is to appeal the decision of the Arbitrator.

15. Turning now to the issues for determination as highlighted by the Applicant herein in its submissions, in view of my comments on the five headings of complaint as above, I do not consider that the Arbitrator acted outside and in excess of jurisdiction contrary to the Contract. Further, I do not consider that the Arbitrator was purporting to impose terms upon the parties or making a new contract as between them as envisaged by the decisions in the **<u>Gitonga Warugongo</u>** and **<u>Kenya Pipeline</u>** cases (supra) as well as the **Air East Africa** case which emphasised that an award must be certain. I have no doubt that the Award of the Arbitrator in this matter was indeed certain and in a form that could be enforced as a judgement of this Court. I do not consider that the Award was made outside what was contemplated in the reference to arbitration.
16. The second issue floated by the Applicant was that the Award was contrary to public policy. I have no quarrel with the quotations from the authorities cited by the Applicant as regards public policy being the **<u>Holman v Johnson</u>** and **<u>Glencore Grain Millers</u>** cases (supra) cited by the Applicant in this connection. Beyond those authorities, both parties hereto relied upon the finding of **Ringera J.** (as he then was) in the **<u>Christ for all Nations</u>** case (again supra) when he held:

"An award can be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten, or (b) inimical to

the national interests of Kenya, or (c) contrary to justice and morality."

In my view, I would also adopt the definition of public policy as expressed at **paragraph 430 of Halsbury's Laws of England in Volume 22 of the 5th Edition** as follows:

"The question whether a particular agreement (or in this case Award) **is contrary to public policy is a question of law, to be determined like any other by the proper application of prior decisions. It has been indicated that new heads of public policy will not be invented by the courts for the following reasons: (1) judges are more to be trusted as interpreters of the law than as expounders of public policy which should be a matter for Parliament; and (2) it is important that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable. However, the application of any particular ground of public policy may well vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise. Conversely, many transactions are now upheld that in former times would have been considered against the policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion. In fact, the adaptability of the rules of public policy derives in large part from the generality, and even ambiguity, with which those rules are expressed."**

17. Try as I may, I cannot see that the Arbitrator in this matter has failed to abide by the provisions of the Contract nor contradicted the same as well as the relevant laws. I find that the Arbitrator has not breached public policy and I would find for the Respondent on this issue. As a result, I will not set aside the Award of the Arbitrator dated 2nd April 2002 nor indeed the Amended Award dated 21st August 2002. Accordingly, I dismiss the Applicant's Chamber Summons dated 24th October 2002 with costs to the Respondent.

DATED and delivered at Nairobi this 1st day of April, 2014.

J. B. HAVELOCK

JUDGE