REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

CIVIL SUIT MISC. NO. 762 OF 2003

DEEKAY CONTRACTORS LIMITED ….....PLAINTIFF/APPLICANT

Versus

CONSTRUCTION & CONTRACTING LIMITED.... DEFENDANT/RESPONDENT

RULING

Enforcement of award

[1] The application I am deciding is dated 6th July, 2007 and is seeking the leave of this court to enforce the award made by Brain Barton Esq, on the 19th July, 2003, and filed in court by the Defendant on the 14/08/2003. The application is expressed to be brought under section 36 of the Arbitration Act, Rule 4(2) of the Arbitration Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of law.

APPLICANT'S SUBMISSION

[2] The plaintiff/applicant submitted that the arbitrator herein was appointed by parties to this suit pursuant to a clause in building contract for a residence entered into on 15/02/1999 with the Plaintiff as the contractor and the Defendant as the employer. Upon appointment, the arbitrator took evidence from the witnesses and delivered his final award to the parties herein on 19/07/2003. On 14/08/2003, the award, together with an originating Notice of Motion for Appeal was filed in court by the Defendant. The originating motion was later on withdrawn by the Defendant. After the withdrawal, the Defendant filed the Chamber summons dated 05/11/2003 which was dismissed with costs on 12/03/2004 for being statute barred. An application for review of the dismissal order was similarly dismissed by the court on 02/12/2005.

[3] There being no pending application in this matter or any legal bar, the plaintiff filed the application for enforcement of the award. Further there is no statutory provision for review of the orders of the court of 12/03/2004. The grant of leave will make the award to be the decree of the court, thus, enabling the plaintiff to realise the fruits of the award from which it has unreasonably been kept away for over 10 years.

[4] The Defendant through the replying affidavit sworn by its managing director, Matere Keriri, on 10/09/2008 has raised grounds similar to those it had raised earlier and which were determined by this honourable court in its two previous rulings dated 12/03/2004 and 02/12/2005. Therefore, those issues are res judicata. The Deponent has regurgitated his two previous

applications. The alleged delay of 5 years before seeking enforcement should be seen within the fact that no application for enforcement could have been commenced before the numerous preliminary applications by the Defendant had been dealt with. This was only possible after December, 2005. The applicant field its chamber summons on 24/06/2007.

[5] On the allegation that the award offends the rules of natural justice, it was submitted by the Plaintiff' that the Defendant's interpretation of the *ratio decidendi* of the matter is skewed. All applications for setting aside the award had been dispensed with, when the court found that the Defendant's application was statute barred. Section 35 places a legal bar which no application for setting aside an award could survive. For those reasons, the honourable court should grant enforcement orders sought herein.

DEFENDANT'S SUBMISSION

[7] The Defendant posits that court's jurisdiction to try an application brought under Section 36, is derived from Section 37 of the Arbitration Act. In particular, the said Section 37 specifies the grounds upon which the court may refuse to recognize or enforce the arbitral award. The said Section states as follows:-

> **"(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only-**

a. **At the request of the party against whom it is invoked if that party furnishes to the High Court proof that –**

> **(iii) the party against whom the arbitral award is was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or <u>was otherwise unable to present his case</u>; or**

> **(iv) the arbitral deals with a <u>dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the s cope of the reference to arbitration,</u> 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 …" (emphasis added)**

[8] The Defendant filed a replying affidavit on 11th September, 2008 opposing the application in accordance with the provisions of Section 37. The specific grounds of objection to recognition or enforcement of the award are as below:

a. **Defendant alleges was denied the right to present its case**

Under Section 19 of the Arbitration Act...***"the parties shall be treated with equality and each party shall be given full opportunity of presenting his case."*** Any proceedings which are conducted or an award that is made in breach of Section 19 of the Arbitration Act, are unlawful and cannot be recognized or enforced by this court under Section 37 (1) (a) (iii) of the statute. Similarly, section 24 of the Arbitration Act provides for mandatory requirements as to what is to be pleaded in the statements of claim and defence by the parties to Arbitration proceedings. Section 24 of the Arbitration Act states as follows:-

> **"(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required particulars of such statements.**

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Except as otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."

[9] According to the Defendant, the Arbitral Tribunal will not, therefore, have jurisdiction to determine a dispute based on an issue which is not pleaded or raised by any of the parties as a point at issue in the pleadings. Any decision made in those circumstances would be unlawful, null and void for lack of jurisdiction, and cannot be recognised by this Honourable Court under Section 37 (1) (a) (iii) of the Statute for the simple reason that the parties have not been heard on that issue. It would also be contrary to the law and the rules of natural justice to make an adverse finding against a party when he has not been heard on the issue.

[10] The Defendant went on. In the present case, this court has made a finding that the award which the plaintiff seeks to enforce is based on a finding made by the Arbitrator on a matter which the parties were not heard. The purpose and object of Section 24 is to enable parties; 1) to know the nature of the claims or defences raised in the dispute, 2) to identify and agree on the points at issue; and 3) to be heard on these points at issue before a determination is made by the Arbitrator. In arbitration, the pleadings exchanged and the evidence adduced set out or fix the limits of the dispute to be determined by the Arbitrator as contemplated by the parties. The pleadings contain matters to be decided upon by the Arbitrator, and any decision on a matter which is not pleaded exceeds the jurisdiction of the arbitrator. The arbitrator can only make decisions or determinations on points at issue as contemplated and expressly provided for in Section 24 of the Arbitration Act. Where the Arbitrator makes a decision or determination adverse to one party on a point which is not an issue in the pleadings, or at the trial, then the determination or award so made would be unlawful and contrary to the statute on the ground that it dealt with the dispute which was un-pleaded by the parties during the arbitral proceedings. It will also be unlawful and contrary to the statute on the ground that it contains decisions on matters which were not before the Arbitrator to decide and which therefore cannot be within the scope of the reference to Arbitration.

[11] The Defendant did not stop there. The award that forms the subject matter of the present proceedings has already been found by this Honourable Court to be based on an issue which was not pleaded and on which parties were not heard, and is therefore unlawful and in breach of Section 24of the Arbitration Act, 1995. It ought to be refused recognition by this Honourable Court under Section 37 (1a) (iv) of the Arbitration Act.

b. **Stage for raising the objection under Section 37(1a) (iv)**

[12] It was contended that the Plaintiff's submissions are erroneous in contending that the Defendant had raised the above issues before, and by implication, the issue cannot be raised again as it is res judicata. What is clear from the provisions of Section 37(1a) (iv) and from the decision of this court is, that Section 37(1a) (iv) can only be used as a shield to defend and not as a cause of action. It is akin to the principle of estoppel, which is also used only as a defence or a shield. Section 37(1a) (iv) provides a defence to be pleaded and relied upon by a party that wishes to oppose an application for recognition or enforcement of an arbitral award. In other words, the grounds set out in Section 37 (1a) (iv) can only be used and relied upon where the party in whose favour the arbitral award was made moves the Court for recognition or enforcement of the award under Section 36. This issue has in fact already been determined by this Honourable Court in the same proceedings in a ruling delivered on 2nd December, 2004 which is attached to the Defendant's said Replying Affidavit as Exhibit "JMK2". The passage of the said ruling which contains the principle is referred to in paragraph 13 of the said affidavit, and for ease of reference, it is reproduced below:-

"It is true that this subsection has two limbs. It is also true that the ruling which is sought to be reviewed addressed only the first limb but not the second limb. During the hearing of the application, counsel for the applicant is recorded as having said that since the second limb was not addressed, the result is that the applicant will be denied a right given to it by statute to challenge the award <u>if the request is made for enforcement of the award</u>. Going by the concerns of learned counsel, <u>it seems to me that the right granted by the second limb of the subsection in question is practical and not theoretical. It is also conditional. It arises only if a request had been made under section 36. Whereas the record is replete with references as to the date of the award being 19th July, 2003, and the date of publication being 2st July, 2003, no evidence has been tendered as to whether a request was made. Further, if such a request had been made</u>, there is no indication as to the date when, if at all, the request was disposed of by the arbitral award. Consequently, to engage in a determination of the applicability or otherwise of the second limb without any particulars thereon would have been no better than in engaging in an academic exercise, or in what Senior Counsel described, a lot more graphically, as intellectual acrobatics. <u>In my view, to invoke any such particulars at this stage will risk courting the wrath of the doctrine of res judicata.</u>" *(Emphasis added)*

[13] It cannot be clearer: the Defendant submitted. The honourable court declined to deal with the issue at that stage because there was no application before it under Section 36 of the Act. The court expressly stated that it would not determine the issue out of concern as such a decision would lead to the application of the doctrine of res judicata, thereby barring the defendant from relying on the defences contained in Section 37 at the appropriate time. In view of the said decision of this Honourable Court, the Plaintiff is estopped form raising and relying on the principle of res judicata as a basis for preventing the defendant from relying on the provisions of Section 37 to challenge or oppose the present application.

c. **Court cannot sanction an illegality**

[14] Further submissions were made by the Defendant that recognition of Arbitral awards is about sanctioning such awards. The object and purpose of Section 37(1a) (iv) of the Arbitration Act is to prevent this court from giving its sanction to an illegality in arbitral award. It has been pointed out above that this court has made a finding of fact that the award herein which the plaintiff seeks this honourable court to sanction is unlawful and illegal. It will be contrary to the law and a breach of the express provision of Section 37 (1a) (iv) of the Arbitration Act for this Honourable Court to sanction such an obvious and glaring illegality.

d. **Costs**

[15] Costs also became an issue. The Defendant took the view that, based on this Honourable Court's rulings referred to above and delivered on 12th march 2004 and 2nd December, 2005 respectively, the Plaintiff knew or ought to have known that the award is illegal as it offends the express provisions of the statute, and cannot be enforced under the law. The plaintiff did not appeal against any of the said court judgment or ruling, and knew at all material times that it was bound by the said rulings having elected not to challenge them. The Defendant, therefore, humbly submitted that present application is an abuse of the court process. The application ought to be dismissed and the plaintiff to be ordered to pay the costs of the suit to the defendant.

COURT'S RENDITION

TWO ISSUES OF PRELIMINARY SIGNIFICANCE

Claim of delay

[16] The first issue of preliminary importance relates to claim that this application for

enforcement is made after inordinate delay of five years. I say; this application for recognition and enforcement is not vitiated by delay or laches. Events which intervened at the early stages of these proceedings were sanctioned in law and are reasonable explanations for the delay. I will proceed on that basis and determine the substantive issues raised by the parties.

The question of res judicata

[17] Yet again, this court finds itself dealing with arguments around section 35 and 37 of the Arbitration Act. The same issue was dealt with by Njagi J (as he then was) in a masterly fashion. I feel impelled to reproduce the relevant part of his ruling below:

> **"It is true that this subsection has two limbs. It is also true that the ruling which is sought to be reviewed addressed only the first limb but not the second limb. During the hearing of the application, counsel for the applicant is recorded as having said that since the second limb was not addressed, the result is that the applicant will be denied a right given to it by statute to challenge the award if the request is made for enforcement of the award. Going by the concerns of learned counsel, it seems to me that the right granted by the second limb of the subsection in question is practical and not theoretical. It is also conditional. It arises only if a request had been made under section 36. Whereas the record is replete with references as to the date of the award being 19th July, 2003, and the date of publication being 2st July, 2003, no evidence has been tendered as to whether a request was made. Further, if such a request had been made, there is no indication as to the date when, if at all, the request was disposed of by the arbitral award. Consequently, to engage in a determination of the applicability or otherwise of the second limb without any particulars thereon would have been no better than in engaging in an academic exercise, or in what Senior Counsel described, a lot more graphically, as intellectual acrobatics. In my view, to invoke any such particulars at this stage will risk courting the wrath of the doctrine of res judicata."**

[18] This court has also had occasion to deal with the same arguments and other related arguments on sections 35 and 37 of the Arbitration Act. But it suffices to adopt a work of this court in the case of **NATIONAL OIL CORPORATION OF KENYA v PRISCO LIMITED [2014] eKLR** reproduced below:-

> **Legal basis of objections**
>
> **[20] The Applicant challenged the legal basis for the objections by the Respondent which I find to be an issue of preliminary significance. I propose to deal with it as such. The Applicant has argued that the Respondent is precluded from raising objections to the award at this stage especially because it did not file an application to set aside the award within ninety days as provided for under section 35 of the Arbitration Act. According to them the right to apply or raise objections to the award was lost and cannot be exercised at the stage of enforcement. The Respondent on the other hand argued that section 37 provides them with an opportunity to raise objections to the award on grounds of lack of jurisdiction or acting on invalid contract and arbitration agreement. I wish to be clear and understood about section 35 and 37 of the Arbitration Act on the setting aside, suspension, refusing recognition or enforcement of the award. In light of the above arguments by counsels, I see great need to compare the jurisdiction of the court in the two sections at this preliminary stage. If I understood the Applicant's argument well, it seems to me to be suggesting that once the time prescribed under section 35 of the Act for applying to set aside the arbitral award has lapsed, the party against whom the award is made cannot apply for the setting aside of the award at the stage of recognition or enforcement of the award. That is a**

huge jurisprudential point around foreclosure of the right to access to justice and to be heard. The court had occasion to deal with the two sections and I am content to adopt a work of this Court in the case of SAMURA ENGINEERING LIMITED v DON-WOOD CO LTD [2014] eKLR that:

> **[8] There is no doubt that the application for enforcement of the award dated 22nd March, 2012 was made ex parte through a Chamber Summons dated 26th November, 2012. It was never served on the Applicant, and it proceeded ex parte. It was also granted as such by Mabeya J on 5th February, 2013. Section 36(1) of the Act allows a party to file an application for recognition and enforcement of the award. Rule 9 provides for the procedure of applying as follows:**
>
> > **An application under section 36 of the Act shall be made by summons in chambers.**
>
> **Another further but important detail: Rule 6 provides for an ex parte application in the following manner:**
>
> > **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.**
>
> **A cursory and shallow reading of rule 6 above may found a justification of sort that the application envisaged under section 36(1) of the Arbitration Act and rule 9 of the Arbitration Rules is to be made Ex parte especially where the person against whom the recognition and enforcement of the award is being invoked, has not filed an application to set aside the award under section 35 of the Arbitration Act. But, that kind of approach or interpretation will certainly excite serious constitutional objections on the front of the right to be heard. At least in this case, the objection has already been raised in that behalf; and it being a major constitutional matter, gives the court occasion to settle it in a more resounding manner.**
>
> **[9] Let me go back to section 36(1) and (3) of the Act which provides as follows:**
>
> > **36(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37**
> >
> > **36(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish.**

a. **The duly authenticated original award or a duly certified copy of it; and**
b. **The original arbitration agreement or certified copy of it."**

> **Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the Constitution. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified**

copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the award must be filed. Accordingly, by that requirement, I think, a notice will invariably be required and the provisions of rules rule 4 and 5 of the Arbitration Rules on filing of the award will abide, which provide that

> **The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.**

[10] The proposition I have made, finds support in the provisions of section 37 of the Arbitration Act [with] to which an application under section 36(1) of the Arbitration Act must comply. Section 37 gives the party against whom the recognition and enforcement of the award is being invoked, an opportunity to file an application in court for the setting aside or suspension of an arbitral award on the grounds set out in subsection (1)(a)(vi); and the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security. There are striking similarities on the grounds of setting aside the award under section 35 and 37 of the Arbitration Act. It is also clear that both sections give the party against whom an award has been made opportunities at different stages of the proceedings. But despite that clear position, I have heard many practitioners posit that there is a conflict between section 35 and 37 of the Arbitration Act, and that argument has bred two schools of thought on the matter. The proponents of one school of thought favour strict application of section 35 of the Arbitration Act and seem to assign legitimacy to an ex parte application being made under section 36(1) of the Arbitration Act without reference to the other party; while there are others who ascribe to the constitutional desire and principle of fair trial and right to be heard. The latter advert themselves to the argument that the right to a fair trial which includes the right to be heard in all substantive processes in a judicial proceedings is a constitutional right which cannot be circumvented, and in arbitration the right extends to the process of recognition, adoption and enforcement of the award as the order of the court. The process in section 36 and 37 of the Arbitration Act leads to the adoption of the award by the court, thus, the court super-adds its authority into and embodies the award as the order of the court; from that time, the person in whose favour the award is made can enforce the award, and the person against who the award is made runs the risk of suffering execution. On that basis, I agree that there is justification and merit in the argument that an application for recognition and enforcement of the award under section 36(1) of the Arbitration Act and Rule 9 of the Arbitration Rules should be served on the other party. Again, I do not think there is any conflict between section 35 and 37 of the Arbitration Act. Equally, I do not think section 35 of the Arbitration Act is a claw-back on the opportunity to be heard granted under section 37 of the Arbitration Act. In any event, the Arbitration Act as an existing law as at the effective date of the Constitution of Kenya, is the exemplar and classic promoter of the principles of justice enshrined in the Constitution. The opportunity to be heard in section 37 of the Arbitration Act is not, therefore, rendered otiose just because the person against whom execution of the award is sought has not filed an

> **application under section 35 of the Arbitration Act. Accordingly, by making specific reference in section 36(1) of the Arbitration Act that, recognition and enforcement of the award will be subject to section 36 itself and section 37, Parliament was not under any delusion, and the opportunity to be heard in section 37 of the Arbitration Act is not an unnecessary or superfluous addition or appendage; it is a substantive provision of the law aimed at providing substantive justice to all the parties in the arbitral proceedings. The process provided for in the Arbitration Act should also be seen within the nature of arbitration as a consensual and voluntary process. There is absolutely no prejudice that the party applying will suffer in adhering to the law and serving all processes on the other party. The practice of adhering to procedure in the Arbitration Act will only reinforce the probity of and sanctify the courts willingness to issue adoption orders, and undoubtedly, execution will be freed from unnecessary applications by unscrupulous parties who do not wish the arbitral process to end. I hope parties will so comply with the law and obviate a situation where the court will waste the precious judicial time on a convoluted matter such as this. I also would wish to see a recast of the Arbitration Rules in order to reconcile them with the requirements of the Act and the Constitution which encourages Alternative Disputes Resolution.**
>
> **[21] I do not, therefore, think the Applicant is doing the Respondent a favour by serving them with the application for recognition and enforcement of award under section 36 of the Arbitration Act. But, for completeness of my above earlier rendition, I am, however, of the opinion that where section 35 of the Arbitration Act has been fully utilized and specific issues had been raised and settled by the court, then the party against whom the award is issued should expect, and perhaps may have to surmount arguments on *res judicata* or that the issues were determined by court before seeking further opportunity to re-litigate them under section 37 of the Arbitration Act.**

[19] Njagi J (as he then was) was acutely aware of the correct position of the law and declined to determine any issues which befit an application for enforcement. Thus, I agree with counsel for the Defendant that the doctrine of res judicata does not arise in this matter.

[20] The hands of the court are now freed from those preliminary issues. Let me, therefore, determine the other substantive matters.

Denial of the right to present case

[21] I find myself agreeing with counsel for the Defendant that Section 19 of the Arbitration Act issues a peremptory command that...***"the parties shall be treated with equality and each party shall be given full opportunity of presenting his case."*** Any proceedings which are conducted or an award that is made in breach of Section 19 of the Arbitration Act, are unlawful and cannot be recognized or enforced by this court under Section 37 (1) (a) (iii) of the statute. Similarly, the long standing principle of law is that parties should plead their cases with such all particulars and details required in law in order to make the other aware of the kind of case the party is faced with, and also to enable that party to respond or defend the case appropriately. That is not all. Proper pleading enables the presiding tribunal to effectually and completely resolve the real issues in dispute. Thence, parties are bound by their pleadings. Section 24 of the Arbitration Act adheres to this principle of law by providing that:-

> **"(1) ...the claimant shall state the facts supporting his claim, points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the**

required particulars of such statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Except as otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."

[22] Only such matters or issues that have been pleaded or arise in the course of proceedings or are agreed on by the parties are to be determined by the Arbitral Tribunal. In case of issues which are not pleaded are led in evidence or arise during the trial, and the tribunal and or parties consider those issues to be pertinent and an integral part of the agreement, the tribunal should invariably give the parties full opportunity to present their respective arguments on the issues so arising. Even where the tribunal out of own industry finds a point of law which is most relevant to the case, and on which the decision of the tribunal might turn on the particular issue; the arbitral tribunal should afford the parties an opportunity to address it on the point. Therefore, as long as an issue is not pleaded or addressed by the parties during the trial, the arbitral tribunal can only determine such issue or dispute in violation of the law, hence, without jurisdiction. A decision so reached is unlawful, null and void. But where the arbitral award contains only some decisions on matters beyond the scope of the arbitration, the entire award may not be nullified, provided that the decisions on matters which were un-pleaded or uncanvassed can be separated from those within the scope of arbitration. In that case, only those decisions in the award which are properly within the scope of arbitration may be recognised and enforced. The impugned ones are null and void; cannot be recognised by the Court under Section 37 (1) (a) (iii) of the Arbitration Act. The reason will be that the parties were not heard on the impugned issue which is an affront of the right to fair trial guaranteed in the Constitution.

[23] Let me now apply the test I have formulated above to the circumstances of this case. I have perused the file and note from the recordings by the arbitrator in the award, that the Claimant therein raised the issue of failure by the Architect to issue certificate under clause 22 of the agreement in order to trigger a claim for deductions of liquidated damages. The issue was quite prominent and was addressed by the Claimant even in the submissions which were filed on 8th May, 2003. The arbitrator observed that the Respondent in the arbitral proceedings filed submissions on 26th May, 2003-afterr the ones by the Claimant, but, chose not to respond to the issue. It has not been alleged that the submissions by the Claimant were not served on the Respondent. The issue was before the arbitrator for determination. See the case of **HERMAN P. STEYN CHARLES THYS CIVIL APPEAL NO 86 OF 1996,** where the Court of Appeal quoted with approval a statement in the case of **ODD JOBS v MUBIA [1979] E.A 476** that:-

A court may base its decision on an un-pleaded issue if it appears from the course followed at the trial the issue has been left to the court for decision. On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.

[24] The issue of issuance or otherwise of the certificate under clause 22 of the agreement is an issue of fact and as the arbitrator is the master of facts, this court cannot fault facts as had been captured by the arbitrator. See the cases of **KENYA OIL COMPANY LIMITED & ANOTHER v KENYA PIPELINE COMPANY [2014] eKLR, MORAN v LLOYDS (1983) 2 ALL ER 200** and **DB SHAPRIYA & CO. v BISHINT (2003) 3 EA 404**, where there is judicial consensus that;

"All questions of fact are and always have been within the sole domain of the Arbitrator……..the general rule deductible from these decisions is that the court

cannot interfere with the findings of facts by the Arbitrator."

[25] Much reliance has been placed on the ruling by Njagi J (as he then was) where the Defendant claims that the learned judge made a finding that the award which the plaintiff seeks to enforce is based on a finding made by the Arbitrator on a matter which the parties were not heard on. I wish to state that the judge made several observations and dicta which were not the ratio of his decision because the judge decided the application in question on the basis of it being time barred. Even in the other ruling, the learned judge was careful not to expose matters meant for section 37 of the Arbitration Act to attacks on the front of res judicata or such other strictures. I, therefore, do not agree with the Defendant that the court made a finding that the award was made on a matter which parties had not pleaded and was thus not heard on the issue. The issue of certificate by the Architect was properly before the arbitrator for determination and was arising from the contract between the parties. It was not extraneous whatsoever. The above recapitulation of the facts and state of things as evidenced in the award brings me to the point where I should declare that, the two grounds that; the Defendant was otherwise unable to present his case; or the arbitral dealt 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 have not been established and so they fail.

Claim that court cannot sanction an illegality

[26] I have found the award was not an illegality or tinctured with any illegality as such. I agree the process of recognition of Arbitral awards is about sanctioning awards, but the process thereto, inherently affords the court occasion to reject awards replete of illegality. Accordingly, following my decision herein above, the award herein is fit for, and I order for its recognition and enforcement as an order of this court under section 36 of the Arbitration Act. It is so ordered.

About Costs

[27] Ordinarily, costs follow the event. The Plaintiff is the successful party and there are no deviant factors which would divest it of costs. On that see the following rendition in **NBI HCCC NO 191 OF 2008 ORIX OIL LIMITED v PAUL KABEU [2014] eKLR** where the court stated:

> ‘’...**costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do’’.**

[28] I do not agree with the Defendant that by the rulings of this Court delivered on 12th march 2004 and 2nd December, 2005, the Plaintiff knew or ought to have known that the award is illegal or it offended the express provisions of the statute, and cannot be enforced under the law. Failure to appeal against or challenge any of the said court judgment does not make the present application an abuse of the court process. The Plaintiff's application for enforcement of the award is perfectly in order. The Plaintiff is not divested of the advantage of the discretion of the court for an award of costs. I allow the plaintiff's application with costs to be paid by the Defendant.

Dated, signed and delivered in open court at Nairobi the 16th of July 2014

F. GIKONYO

JUDGE