REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

MISC CIVIL CASE NO. 27 OF 2014

NATIONAL OIL CORPORATION OF KENYA LIMITED…...…PLAINTIFF

Versus

PRISKO PETROLEUM NETWORK LIMITED.....DEFENDANT

RULING

Enforcement arbitral award

[1] The Applicant is seeking the leave of court to enforce the arbitral award dated 3rd June, 2013 and extract a decree in terms of the said arbitral award. The Applicant is also praying for any such orders that the Court may deem fit and for the costs of the application. It has applied through a Chamber Summons dated 23rd January 2014, which is expressed to be brought under Section 36(1) of the Arbitration Act, 1995, Rule 9 of the Arbitration Rules 1997 and section 1A and 1B of the Civil Procedure Act.

Applicant's case

[2] The Application is based on the grounds set out in the summons, the supporting affidavit of Lillian Waweru, sworn on 23rd January, 2014 and submissions by counsel. The Applicant contended that by an agreement between the parties dated 9th February, 2011 the Respondent was to supply 13,200 MT of Automotive Gas Oil (hereinafter "the product"). The Applicant would in turn sell the product to the oil marketers in Kenya. One of the key conditions of the said Agreement was that time was of the essence. A dispute arose between the parties with respect to delivery of the product and was referred to arbitration with Mr. Allen Waiyaki Gichuhi as the appointed sole Arbitrator. The arbitral proceedings, however, concluded in the absence of the Respondent who had been served with several invitations and hearing notices but in vain. The Applicant quickly added that, although the proceedings were heard ex parte, the matters were determined on merit and after considering the submissions and evidence by the Applicant. Ultimately, the Arbitrator issued the final award in favour of the Applicant.

[3] Averments in favour of the Applicant posit that, the Arbitrator awarded the Applicant; 1) USD$ 14,175,943.01 with simple interest of 12% per annum from the award until the payment in full; 2) USD $ 127,850 with simple interest 12% per annum from the date of the award until payment in full; and 3) costs of Kshs. 16,090,840/=. The Applicant alleged that despite several demands to make good the award sum, the Respondent failed or refused to satisfy any portion of or the amount owed on the award, hence this application for enforcement of the arbitral award. The Applicant further urged that the Respondent

had applied to set aside the award under Section 35 of the Arbitration Act. In the circumstances the Award is binding on the parties.

[4] Mr Karori, the legal counsel for the Applicant who canvassed the application filed submissions which he orally highlighted in court. The submissions primarily expounded the facts deposed in the Affidavits filed. In a summary, the Applicant argued that the Arbitrator had jurisdiction to entertain the dispute between the parties. To the Applicant, there was only one agreement between the parties and that the same provided for arbitration as a means of resolving any disputes that may arise therefrom. According to Mr. Karori, though the Respondent did not participate in the proceedings, it was fully informed of the arbitration process from the commencement until the rendering of the award. As such, the argument that the Respondent was not accorded a fair hearing is unfounded. Further, the Applicant stressed that the Respondent had the chance to raise the objection on procedural and substantive jurisdiction of the Arbitrator, but chose not to do so when it failed to participate in the proceedings. Mr Karori was categorical that any objection to the jurisdiction of the Arbitrator could only be raised by the Respondent pursuant to Section 17 of the Arbitration Act, and at the earliest opportune time in line with the statutory obligation thereto. The learned Counsel for the Applicant submitted that the objections to jurisdiction cannot be raised by the Respondent at this juncture. It was further submitted that the court's invitation by the Respondent to enquire into whether the Arbitrator had jurisdiction is tantamount to asking the court to interfere with the arbitration, which is expressly forbidden by section 10 of the Arbitration Act, 1995. To support his arguments, Mr. Karori cited the decision of the Court of Appeal in the case of **ANNE MUMBI HINGA v VICTORIA NJOKI GATHARA CIVIL APPEAL NO. 8 OF 2009;** it emphasized on the limited role of the court under section 10 of the Arbitration Act. In any event, counsel argued, the Arbitrator made a determination that he had the jurisdiction to determine the matter at hand which finding was never challenged through an appeal.

[5] Mr. Karori pressed further; that the Respondent through its Replying Affidavit, sought to introduce or advanced additional evidence which was not before the arbitral tribunal. That approach by the Respondent is an attempt to engage the court in a merit review of the Award by the Arbitrator. Such review is strictly prohibited under Section 10 of the Arbitration Act; the Court cannot delve into issues which properly belonged to an arbitral tribunal for determination. The Applicant, while acceding that there were two agreements with regard to the supply of oil product, was clear that the two were separate agreements, and therefore, the Agreement between the Applicant and the Russian Company could not supersede the agreement between the Applicant and the Respondent as argued by the Respondent. Despite the two agreements being distinct and on separate transactions, the Applicant posits that it still disclosed the agreement between the Russian Company and the Applicant to the arbitration tribunal but the Arbitrator found the same to be irrelevant to the arbitral proceedings.

[6] Mr. Karori did not stop there. He argued that the award was not induced or affected by fraud as alleged by the Respondent. He urged the court to dismiss those claims for being baseless and unsupported as the Respondent had failed to produce any evidence to that effect. He contended further that there was no mischief or misconduct on the part of the Arbitrator. Accordingly, Mr. Karori submitted, the Arbitrator duly considered the pleadings and the evidence before rendering the award. There is, therefore, no justification in the court interfering with the award or coming up with its own findings on the matter.

[7] According to Mr. Karori, the Respondent was trying to circumvent the provisions of Section 35 of the Arbitration Act which provides for a particular timeline for setting aside an arbitral award. Upon realizing that the ninety day period within which to apply to court to set aside the award had lapsed, the Applicant elected to have the same set aside through the back door by challenging the enforcement of the award under section 37 of the Arbitration Act. The Applicant further submitted that the Respondent had not demonstrated or established any of the grounds set out in section 37 of the Arbitration Act to warrant the refusal by the Court to recognize and enforce the Award. For those reasons Counsel urged the court to allow the application and the orders sought therein.

Respondent's vehement opposition

[8] In opposition, the Respondent filed Grounds of Opposition dated 6th March, 2014 and a Replying

Affidavit of Naphtali Mureithi, a director of the Respondent Company, sworn on 13th March, 2014. It was deposed that the making of the arbitral award was induced or affected by fraud. According to the Respondent, even in its absence, the arbitral tribunal still had the duty to scrutinize and evaluate the evidence adduced in support of the Applicant's claim. The Respondent alleged that the Applicant failed to disclose and the learned Arbitrator failed to appreciate that the relevant sale and purchase agreement of the product was not the agreement dated 9th February, 2011 between the Applicant and the Respondent. The pertinent agreement, according to the Respondent, which should have been considered and the subject of arbitration was the one entered into on the 14th February, 2011 by the Applicant and a Company known as OAO Ingushneftegaprom Company (hereinafter "the Russian Company").

[9] According to the Respondent, upon perusal of the Award, it was manifestly clear that there was material non-disclosure on the part of the Applicant on the existence of a contract between it and the Russian Company. Through a letter dated 29th January, 2011, the Respondent was mandated by the Applicant to source and deliver the product. It was further stated that in a bid to demonstrate that it could deliver the product, the Respondent disclosed the full identity and particulars of the end suppliers, which included the Russian Company. Further, the Respondent caused the Applicant and the Russian Company to establish a direct promise to purchase and sell the product through a Full Corporate Offer and Irrevocable Purchase Order dated 3rd January, 2011 and 3rd February, 2011 respectively. It was, therefore, averred that by virtue of these two agreements, the Russian Company undertook to supply the product to the Applicant in exclusion of any other party, including the Respondent. Accordingly, at all material times, it was intended that the Respondent was the agent to facilitate the relationship between the Applicant and the Russian Company. By virtue of these facts, the agreement between the Applicant and Respondent was no longer valid as it was superseded by the contract between the Applicant and the Russian Company. According to the Respondent, the learned Arbitrator failed to consider these facts and by failing to evaluate and appreciate this crucial piece of evidence, the efficacy of the arbitral proceedings is questionable.

[10] Conversely, it was alleged that the Applicant also failed to disclose to the Arbitrator that the sale and purchase agreement between the Claimant and the Respondent was subject to the Applicant establishing an irrevocable, Non-transferrable Documentary Letter of Credit (herein referred to as the "Letter of Credit") in favour of the Respondent. Thus, the Applicant omitted to comply with a fundamental term and in the foregoing, the Arbitrator should have inquired into the effect of such failure and the enforceability of the agreement between the parties due to such an omission.

[12] Further depositions alleged that the learned Arbitrator failed to consider and give effect to the fact that payment of US$ 127,850 to obtain the Purchase Approval Transaction Allocation Code was made to the Russian Oil and Gas Manufacturers and Exporters Association and was therefore not a payment to the Respondent. In any event the said payment presupposed the establishment of a letter of credit from which such an amount would subsequently be deducted. It was therefore the Respondent's assertion that the learned Arbitrator disregarded the terms of the purchase agreements and thereby acted without jurisdiction. The Respondent also deposed that no delivery of the product could take place without the timely issuance of a Local Purchase Order (LPO) by the Applicant. That in this instance, an LPO was issued on 15th February, 2011 only two days before the consignment was due to be delivered, which was insufficient time to supply the product as agreed by the parties.

[13] The Respondent filed written submissions on 4th April, 2014. During the oral highlights of the same, it was submitted that Respondent was not urging the court to review the merits of the arbitral award; rather it was requesting the court to inquire into the process that was undertaken by the Arbitral Tribunal. It is, nonetheless, vital to establish whether the Arbitrator had the jurisdiction to issue the award. SC Mr. Ojiambo, legal counsel for the Respondent reinforced the Respondent's conviction that there were two agreements relating to the sale and purchase of the product to the Applicant. One involved the Respondent who was the Applicant's local agent and the other involved the Russian Company, which was the foreign supplier of the product. The Applicant all along knew that the product was to be sourced from the Russian Company which prompted the Applicant to enter into an agreement with the Russian Company. It was therefore the Respondent's contention that the Arbitrator had failed to consider the latter

agreement which superseded the agreement between the parties herein. Senior Learned Counsel Mr. Ojiambo also pointed out that the agreement between the Russian Company and the Applicant had an arbitration provision to the effect that it was to be governed by English law and the law in Geneva. The Learned Senior Counsel further argued that an Arbitrator would be nominated from the International Chamber of Commerce. In sum, it was the Respondent's case that the agreement between the Russian Company and the Applicant was the governing contract and the transaction to the supply the product. According to Mr. Ojiambo, the Arbitrator did not hid to this fact, and that amounted to misconduct for the Arbitrator acted without jurisdiction.

[14] Since the arbitral process took place ex parte, the Respondent was not accorded an opportunity to be heard, which was a violation of the right to fair hearing provided for by Article 50 of the Constitution of the Kenya 2010. SC Mr. Ojiambo submitted that that Section 17 of the Arbitration Act, 1995 did not aid the Applicant's case as it did not apply where one party to the arbitration did not participate in the proceedings. In the opinion of SC Mr. Ojiambo, section 26 of the Arbitration Act is the relevant section to apply in the instant case and as such, the Respondent was entitled to raise the issue of jurisdiction at any stage of the proceedings. Mr. Ojiambo relied on the case of **STIRLING CIVIL ENGINEERING LIMITED v TM-AM CONSTRUCTION GROUP NAIROBI HCCC NO. 16 OF 2012** in support of his standpoint.

[15] The Respondent further submitted that the Applicant should have drawn the attention of the tribunal to the agreement between the Applicant and the Russian company, for it would have denied the Arbitrator jurisdiction over the matter. The non-disclosure of that fact amounted to fraudulent misconduct on the part of the Applicant. According to SC Mr. Ojiambo, the court under Section 37 of the Arbitration Act had the power to refuse to recognize or enforce the award. Under section 37 of the Arbitration Act, it is a formidable ground that there was another agreement between the Russian Company and the Applicant with the true arbitration agreement which makes any arbitral proceedings under Kenyan Law invalid. On that basis, the Respondent submitted, the arbitral tribunal acted without jurisdiction and was tainted with fraud. Mr. Ojiambo concluded that the resultant arbitral award cannot be recognized nor enforced by the Court. He urged the Court to dismiss the application with costs or in the alternative adjourn the instant application pending the setting aside of the award, pursuant to the appropriate legal provisions.

COURT'S RENDITION

[16] The Applicant is seeking the recognition and enforcement of the award dated 3rd June, 2013, which it says was made in accordance with law, it is final and binding on the parties. The Respondent has on the other hand contested the award on the basis that it was made without jurisdiction, having been based on the wrong arbitration agreement, which did not empower the arbitral tribunal to adjudicate the real dispute between the parties. Secondly, the Respondent bases its objection on the ground that the arbitral award was induced and/or affected by fraud. It is argued by the Respondent that the fraud was borne out in the conscious failure by NOCK to disclose to the arbitral tribunal the material fact that the agreement which should have formed the basis and foundation for the arbitration was not the one to which the learned arbitrator's attention was drawn and pursuant to which the tribunal acted. The Respondent vowed to show that the proper agreement did not give the arbitral tribunal in this case the power either to consider or to rule on the dispute. Accordingly, the arbitration was void ab initio and no award would have emanated from it.

[17] Each party urged their respective standpoints with zeal, clarity and great wit. After considering the affidavit evidence filed in court, the relevant judicial authorities provided as well as the rival submissions by learned counsels of the parties, I am able to formulate the issues for determination which will enable the court decide on whether or not it should order recognition and enforcement of the arbitral award dated 3rd June, 2013. These issues are:

> **a) Whether the Agreement between the Russian Company and the Plaintiff was distinct from, or superseded the Agreement between the Applicant and the Respondent. In discussing this issue, the court will not avoid determining which arbitration agreement governed the subject matter of the arbitral proceedings in question;**

b) Depending on the answer in (a), whether the arbitral tribunal conducted the arbitral proceedings hereto in accordance with the law and the Constitution. Under this issue, jurisdiction of the arbitral tribunal and the conduct of the Arbitrator will be discussed.

[18] I will, therefore, determine whether the Arbitral Award is final and binding upon the parties as envisaged in Section 32 A of the Act if an order for recognition and enforcement thereof is to issue. Stating the obvious, parties in arbitration are bound by the arbitration agreement, arbitral process and eventually the arbitral award made thereto. Except, I must add, the award should be made or obtained in accordance with the law-the Arbitration Act and the Constitution. And once an arbitral award is accordingly made Section 10 of the Act will shield it from interference by the Court except as provided in the Act. See the provision of section 10 below that:-

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

[19] An order for recognition and enforcement of the arbitral award herein under sections 36 of the Arbitration Act supplies the award with superadded authority of the Court and avails the process of the Court to the successful party to enforce the award by way of execution. But more heated discussion by parties was around Section 37 of the Arbitration Act 1995, which is the section that gives the court power to refuse recognition or enforcement of arbitral award when certain circumstances spelt out in the section exist. The section provides that:

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

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—

i. a party to the arbitration agreement was under some incapacity; or

ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

iii. the party against whom the arbitral award is invoked was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

vi. the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

vii. the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.

(b) if the High Court finds that—

i. the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii. the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), 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."

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 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.

[22] With that rendition I hold that the objections by Mr Ojiambo which aim at setting aside or postponing the recognition or enforcement of the arbitral award in question are properly before the court in so far as they relate to the validity of the arbitration agreement or that the arbitral award was obtained through fraud. They are not a nuisance or an abuse of process of the court. The Respondent is simply exercising a right to be heard and to seek remedy from the Court in accordance with the provisions of the Arbitration Act. But the question would be: are those objections properly grounded in law or meritorious? I will now proceed on that basis to determine the merit of the issues raised.

Prove of specific grounds

[23] I have stated that the Court has the power to refuse recognition or enforcement of an arbitral award if one or more of the specific grounds contained in section 37 are proved by an opposing party. The jurisdiction under section 37 is, however, limited to the grounds set out in the said section. From the Grounds of Opposition, the Replying Affidavit and submissions of the Respondent, it is clear that the application is being opposed on several fronts, including the alleged lack of jurisdiction for Arbitrator to undertake arbitral proceedings or make the award on the subject matter; alleged misconduct of the Arbitrator for falling to take into account relevant facts/evidence with regard to or to appreciate that the agreement between the Applicant and Russian company superseded the earlier one between the Applicant and the Respondent; and allegations that the award was induced by fraud because the Applicant did not disclose to the Arbitrator the existence of the agreement between the Applicant and the Russian Company. Are these grounds merited?

Arbitrator's Jurisdiction

[24] The jurisdiction of the Arbitrator has been vigorously challenged on the basis that he proceeded on an invalid arbitration agreement contained in the Agreement between the Applicant and the Respondent but which had been superseded by the subsequent Agreement between the Applicant and the Russian Company. The Applicant argued that the two agreements are distinct and the Agreement with the Russian Company did not supersede the one between the parties herein. The Applicant further argued that issues of jurisdiction ought to have been raised before the arbitral tribunal and not before this court. From the arguments of counsels, I decipher two issues; 1) whether the question of jurisdiction should have been litigated before the arbitral tribunal; and 2) whether this court can resolve the issue of jurisdiction at this stage.

[25] On jurisdiction, I am guided by the sweetest canticle in **MOTOR VESSEL "LILIANS" v CALTEX OIL (KENYA) (1989) KLR** that jurisdiction is everything and should be raised at the earliest opportunity with an obligation on the court seized with the matter to decide the issue forthwith on the material before it. The Arbitration Act also requires issues of jurisdiction of the arbitral tribunal to be resolved from the outset and at earliest possible opportune moments by the arbitral tribunal. Of course, the Respondent did not raise the issue of jurisdiction before the arbitral tribunal and at earliest opportune time because it did not participate in the proceedings in the first place. Determination of the Arbitrator's jurisdiction is reserved for the arbitral tribunal and the Court may not have Jurisdiction to entertain the application on jurisdiction. See Section 14 of the Arbitration Act, 1995 and Rule 15(3) and (4) of the Arbitration Rules 1998. Section 14 of the Arbitration Act, 1995 provides:

> **14 (1) Subject to subsection (3) the parties are free to agree on a procedure for challenging an Arbitrator.**
>
> **(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of any circumstances referred to in Section 13(3), send a written statement of reason for challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge**
>
> **(3) If a challenge under agreed procedure or under subsection (2) is of the decision to reject the challenge, apply to the high court to determine the matter.**

[26] See Section 17 of the Arbitration Act which is even more succinct that:

> **"17(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—**
>
> **(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and**
>
> **(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.**
>
> **(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an Arbitrator.**
>
> **(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.**
>
> **(4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3)**

admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitral award on the merits.

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under subsection (6) is pending before the High Court, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award."

[27] Rule 15(3) and (4) of the Chartered Institute of Arbitrators, Rules 1998, provides:-

"15B (3) Subject to Act, to decide any question of law arising in the arbitration;

(4) to decide any questions as to its own jurisdiction including any objections with regard to the existence or validly of the arbitration agreement."

[28] The statutory act of reserving the authority to determine objections to the Arbitral tribunal, aims at paying due deference to and serving as a mark of recognition of arbitration as a recognized mechanism for Alternative Dispute Resolution (ADR); by preventing th**e** Court from usurping the jurisdiction of the Arbitral tribunal and allowing the arbitral tribunal to exercise its jurisdiction without court interference. The basis of that approach draws from the doctrine of **Kompetenz Kompentez** which is replicated in most jurisdictions which have adopted the UNICITRAL Model Law on Arbitration. The Kenyan Arbitration Act follows after the UNICITRAL Model Law on Arbitration. See a work of. Nyamu JA, (as he then was) sitting in the Court of appeal in the case of **SAFARICOM LIMITED V. OCEAN VIEW BEACH HOTEL LIMITE & 2 OTHERS (2010) eKLR** where he held:-

"Although the English Arbitration Act 1996 is not exactly modeled on the Model law unlike our Act, I fully endorse the principles as outlined in the CHANNEL CASE (supra) because they are in line with the arbitral tribunal's jurisdiction as set out in section 17 of the Arbitration Act of Kenya. The Section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national Court to rule on the jurisdiction of an arbitral tribunal except by way of an appeal under Section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provision of Section 17 and in particular violated the principle known as "competence/competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is "compliance to decide upon its competence" and as expressed elsewhere this ruling in German it is "Kompetenze/Kompetenz and in France it is "competence de la competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrong but with jurisdiction" .

[29] Nevertheless, I should state that section 37 is one of the limited instances provided in the Act when the court can interfere with an award. The jurisdiction of the court in section 37 is, however, strict and limited to only those grounds provided thereunder. Some of the potent grounds for setting aside the award under section 37 and which have been cited here are; 1) that there is no valid arbitration agreement; and 2) that the award was obtained through fraud. If the arbitration agreement is impugned for invalidity, so also the arbitral award shall be blown off. See a literally work of **Dr. Kariuki Muigai** FCI Arb, Phd in his book, ***Settling Dispute through Arbitration in Kenya*** **(2012) 2nd Ed. Glenwood** at page 91 where he states that:-

"The fundamental principle, embodied in the Arbitration Act, 1995 (the Act), is that <u>where</u>

> **<u>there is a valid arbitration clause</u>, all issues falling within the jurisdiction of the arbitrator should be decided by the tribunal, and the court should not intervene. This preposition was well captured in the case of Shamji v. Treasury Registrar Ministry of Finance the court stated that it was a well settled proposition that where a dispute between the parties has been referred to the decision of a tribunal of their choice, the Court should direct that the parties go before the specified tribunal other than interfere with the party's choice of that forum". [Emphasis mine]**

Validity of arbitration agreement

[30] Therefore, the issues being raised by the Respondent tend to question the validity of the arbitration agreement and need be determined before I conclude whether the court should intervene. See **Mustill & Boyd's Commercial Arbitration 2nd Edition at page 641** and **Halsbury's Laws of England Vol. 11 4th Edition Paragraph 622**, on the Arbitrator's jurisdiction. The learned authors state that:-

> **"An Arbitrator who acts in manifest disregard of the contracts acts without jurisdiction. His authority is derived from the contract and is governed by the Act which embodies the principles derived from a specialized branch of law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from the Contract amounts not only a manifest disregard to his authority or misconduct *on his part but may be tantamount to a malafide action"***

[31] Further in the case of **ASSOCIATED ENGINEERING CO. v GOVERNMENT OF ANDHRA PRADESH (1991) 4 SCC 93 (AIR 1992 Sc. 232),** the Supreme Court of India held that the Arbitrator could not act arbitrarily, irrationally, capriciously or independently of the Contract. His sole function is to Arbitrate in terms of the Contract. The Court further held that the Arbitrator's authority is derived from the Contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency.

[32] From the foregoing, it is important to look at the agreement between the parties herein and also the other agreement with the Russian Company so as to determine whether the contract with the Russian Company superseded the one between the parties herein. The Agreement between the Applicant and the Respondent was entered into on 9th February, 2011 while that between the Russian Company and the Applicant was made and entered into on 3rd February, 2011. The date is clearly stated on the first page of the agreement although there are other dates, i.e. 14th and 15th February, 2011appearing on some sort of stamp sprinkled in the agreement. Both are for supply of AUTOMOTIVE GAS OIL.

[33] On perusing the two agreements in question, parties are different save that the Applicant is common in both. The parties in each agreement bore specific obligations. There is not express, specific or general, provision in any of the agreements which make reference to the other agreement or arbitration clause of the other. Similarly, there is no express provision, specific or general, which states that the Agreement between the Russian Company and the Applicant will supersede or alter or replace the one between the Applicant and the Respondent. There is not even any act of the parties which may be said to have mutually or individually represented to the other that the agreement with the Russian Company would supersede the one between the Applicant and the Respondent. No set of facts or state of affairs from which an inference or implication or necessary implication could be drawn that the agreement with the Russian Company would supersede the one between the Applicant and the Respondent. The Respondent was the seller and according to the agreement it had with the Applicant it was to deliver the agreed metric tons of oil produce. It was clear the origin of the oil produce was Russia Federation. But that is not synonymous with the Russian Company. If it was to use the same Russian Company to source and deliver its obligations in the Contract, it should have done so expressly or by assignment as provided in the contract with the Applicant. The Applicant paid a sum of USD 127,850 directly to the relevant Association as agreed between the parties and obtained the purchase approval Transaction allocation code from Russia. But the Respondent did not deliver the oil produce. The Respondent cannot, therefore, hide behind the agreement between the Applicant and the Russian Company. Indeed, the claim by the Applicant that it had to source for an alternative source as a result of the breach by the Respondent is

tenable. And, the suggestion by the Respondent that; through a letter dated 29th January, 2011, the Respondent was mandated by the Applicant to source and deliver the product, and that in a bid to demonstrate that it could deliver the product, the Respondent disclosed the full identity and particulars of the end suppliers, which included the Russian Company; and that the Respondent caused the Applicant and the Russian Company to establish a direct promise to purchase and sell the product through a Full Corporate Offer and Irrevocable Purchase Order dated 3rd January, 2011 and 3rd February, 2011 respectively; do not make the agreement with the Russian Company supersede the agreement with the Applicant. That argument can only work against the Respondent in the sense that they are admitting that the alleged arrangement was part of fulfilment of the Respondent's obligations in the agreement with the Applicant. The argument would be useful if the Respondent is saying that through the second agreement the earlier agreement was performed fully. But the Respondent is not saying that. The Respondent is simply saying that the second agreement superseded the earlier agreement between them which will be an unacceptable way of avoiding to be bound by the contract which it entered into voluntarily and after winning a tender for supply of oil produce.

[34] The doctrine of privity of contract will then kick in to prevent blind connexion or interfacing of the two distinct agreements. It would be contrary to law and practice in arbitration to impose terms of one contract on another contract without clear legal connexion and intention of the parties to so merge agreements or make one supersede the other. If such is the intention of parties, the agreement should say so expressly or through necessary implication from the agreements themselves or the conduct of the parties. Insistence of a party that a rescission, abandonment or substitution of agreements has occurred is not enough; cogent evidence from the agreements themselves or the conduct of the parties must be brought out if the court is to accept that there has been rescission, abandonment or substitution of contract. The case of **ADOPT-A-LIGHT LIMITED v MAGNATE VENTURES LTD & OTHERS, CIVIL APPEAL NO 254 OF 2009,** is a good guide here.

Agency to establish direct link

[35] The Respondent insisted that the Applicant appointed it as its agent to source for and supply the oil produce herein. The Respondent also insists that, it was, to the Applicant's knowledge, the agent of a disclosed principal, the end supplier of the product, namely AOA Ingushneftegasprom Company (the '**Russian Company'). ** Without sufficient evidence, the Respondent argued that, although the Respondent was in the initial agreement as the Seller of the product, the parties' real intentions were as finally contained in an agreement between the Applicant and the Russian Company. The Respondent referred to the Russian Company as its principal. There was nothing to show the Respondent was an appointed or ostensible agent of the Russian Company. That was the foundation of their argument that the agreement between the Applicant and the Russian Company superseded the one previously entered into between the Applicant and the Respondent.

[36] The Respondent attempted to prove direct relationship between the two agreements; that the two agreement related to the sale and purchase of the same lot of Automotive Gas Oil being imported by the Applicant; that the Respondent was named as the buyer of the produce in both agreements; the earlier agreement was made on 9th February, 2011 while the subsequent agreement was concluded on 14th February, 2011. The Respondent laid emphasis on clause 3.4 of the agreement between the Applicant and the Respondent which provided inter alia that:-

> **"It is… an absolute condition of this contract… that the buyer (NOCK) obtains the Purchase Approval Transaction Allowance Code from the Russian Oil and Gas Manufacturers and Exporters Association for legitimate approval to [NOCK] buyer Company to purchase crude oil and petroleum product from the Russian federation. Buyers make payment of ($127,850), to the Russian Oil and Gas Manufacturers and Exporters Association… to obtain the Purchase Approval Transaction Allocation Code for legitimate approval to Buyer Company to purchase crude oil and petroleum products from the Russian Federation…"**

[37] Unfortunately, the Respondent did not provide the full rendition of clause 3.4 whose last part reads:

> ‘’**…The payment of (127,850 USD) made by the buyer to obtain the purchase approval transaction allocation code will be deducted from the LC’’.**

Contrary to the submissions by the Respondent, Clause 3.4 did not appoint the Respondent as or prove that the Respondent was an agent for purposes of establishing a direct link between the Applicant and the Russian Company. It was a material condition precedent in the contract and created an obligation on the Applicant to pay a sum of $127,850 to the Russian Oil and Gas Manufacturers and Exporters Association and obtain the Purchase Approval Transaction Allocation Code for legitimate approval to the Buyer Company to purchase crude oil and petroleum products from the Russian Federation. The payment was part of the contract sum and was to be deducted from the Letter of Credit by the Applicant. See clause 7.1 and 8.5.6 of the agreement between the parties herein. Therefore, it is erroneous for the Respondent to claim tha the payment was to the Russian Oil and Gas Manufacturers and Exporters Association and not to the Respondent. The payment was pursuant to the agreement and was to be part of the agreement sum. Similarly, the Russian Company was not the subject matter of the said clause or the agreement between the Applicant and the Respondent whatsoever. The agreement between the Applicant and the Respondent was as a result of a tender which the Respondent won and which clear provided for obligations on each party. The agreement also clearly stated that the origin of the oil produce is Russia but which is a different thing altogether and does not refer to the Russian Company as argued by the Respondent. I am not, therefore, able to accede to the argument by the Respondent that **‘’the often repeated expression in the agreement between the Applicant and the Respondent that ‘the buyer company to purchase crude oil from the Russian Federation’’ left no doubt as to who the purchaser was, but also to the clear understanding that the true seller was a person other than Prisko, notwithstanding the apparent purport of the language of the local agreement’’.**

[38] The letter dated 29th January 2011 does not create any agency on the Respondent to procure a direct link between the Russian Company and the Applicant as claimed. It merely required the Respondent to: “**… set in motion arrangements to put in place the performance guarantee as agreed … and issuance of a comfort letter from your supplier … indicating ability to deliver both these parcels”.** This is not a strange requirement or an appointment of the Respondent to act as an agent to forge a direct link between the Applicant and the Respondent or peculiar to the agreement herein, it is a standard requirement in such procurements and supply of goods for provision of performance guarantee and also letter of comfort on the ability of the supplier to deliver. That requirement does not establish any direct link between the Applicant and the Russian Company or a demonstration of intention of the Applicant to be bound to that third party. That is stealth and insidious proposition in the law of contract. Underscore this; that there was even a more direct method of assigning the contract either totally or partially to any other Company provided under clause 21.1 which was never utilized by the Respondent. The emails between the Applicant and the Respondent on 2nd and 3rd February, 2011, although the latter complained that the Applicant had not been placed in ‘Direct contact with the supplier’, and also that it had received no response from ‘the purported signatory of FCO’ does not change the position I have deduced. Indeed my stand on the matter is reinforced by the email of 2nd February, 2011 that the purpose of the direct contact with the supplier was to enable the Applicant approve the FCO (acronym for Full Corporate Offer). See the email below:

> “**We cannot blanket approve the FCO and we must include the rider that our acknowledgement and acceptance of the FCO is subject to incorporation of our amendments”.**

The alleged non-disclosure

[39] I am glad that the Respondent admits that the FCO was produced before the tribunal. What I do not understand is the accusation levelled against the Applicant that it did not make full disclosure. I discern the alleged lack of full disclosure is in relation to what the Respondent says that the agreement between the parties herein had been superseded by the one between the Applicant and the Russian Company. Those are arguments which a party may urge before the tribunal; and when a party makes a different

reading of the state of affairs or set of facts can never be ‘’failure to make full disclosure’’. In any event, the arbitral tribunal considered the disclosures made and determined the issue of the relevant agreement for purposes of the subject matter before him. At page 15 to 18 of the award, it is clear that the Applicant disclosed the existence of the agreement with the Russian company. In paragraph 28 of the same, the Arbitrator noted;

> **“28. It was the Claimant’s contention that in order to ensure that once it had paid for the said Purchase Approval Transaction Allocation Code, the product was not released in the name of any other third party, the Claimant signed the agreement at page 79 to 108 with the refinery from which the Respondent was sourcing the product, that is, OAO Ingushneftegazprom company. This Agreement was meant to ensure that the refinery would only release the product ti the Respondent in the name of the Claimant and that the same would not be transferable without the Claimant’s consent.”**

[40] The Applicant, therefore, acted in accordance with what Warsame, J., said in (**NAI) HCCC NO 16 OF 2012 STIRLING CIVIL ENGINEERING LIMITED v TM-AM CONSTRUCTION GROUP (AFRICA)** that:-

> **‘’… Where a matter has been referred to arbitration, the parties are required to put all matters and evidence before the arbitrator…”**

[41] Accordingly, I am not able to read a conclusion from the documents provided to the court or from the Purchase Approval Transaction Allocation Certificate, that, at all times, the parties hereto intended to create, and did create, through the agency of the Respondent, a direct contractual relationship between thee Applicant and the Russian Company for the purchase and sale of the petroleum product described in the agreements herein.

Frustration, Abandonment or rescission

[42] In the circumstances of this case, it cannot be said that the earlier contract was frustrated by the conclusion of the agreement between the Applicant and the Russian Company. It is not possible from the stated facts herein to draw an inference that parties herein mutually agreed to abandon their contract. The Applicant did its part and the Respondent was expected to do its part. So the position taken by the Respondent that there was delay or inactivity on both sides is not defensible. In any case, all these matters being put forth now by the Respondent are matters of fact which ought to have been raised before the arbitral tribunal for determination, were it not for the aloof stand and deliberate refusal by the Respondent to participate in the proceedings. Such conduct negates the very intention of making arbitration a consensual process and should be frowned upon by the court. Equally, the Respondent has not established abandonment of the earlier contract by the parties either expressly or by their conduct. There is also nothing to support that there was any express or implied agreement that parties were to be bound only by the subsequent contract with the Russian Company. The two agreements are not inconsistent with one another but distinct and so there was no substitution or assignment of agreements or parties. Therefore, there is no rescission of the earlier contract which can be implied or presumed in the circumstances of this case.

Estoppel

[43] Following my findings herein, estoppel does not arise. Estoppel is not available for a party in default. Words which the Respondent have used that **‘’NOCK willingly, and without coercion or misrepresentation, signing the foreign agreement’’** are only powerful in appearance but are not supported by evidence.

Right to fair hearing

[44] I shall now turn to the issue of whether the Respondent was denied the right to be heard contrary to Article 50 of the Constitution. In this instance, what must be established is that the party complaining was

not afforded the opportunity to present its case. An examination of the Award dated 3rd June 2013 and filed in court on 28th January, 2014 clearly shows that the Respondent was fully informed of the whole arbitration process. From the commencement of the same; letters dated 23rd February, 2012, 7th March 2012 and 13th March 2012 were sent to the Respondents on the appointment of the Arbitrator. The said letters did not yield any response from the Respondents prompting the appointment of the Sole Arbitrator under Section 12(3) (c) of the Arbitration Act. The Respondent was also served with the respective pleadings and the award. From the foregoing, it is a legal transgression to allege the Respondent was not afforded an opportunity to participate or be heard in the arbitral proceedings. It was invited to participate in the selection of the Arbitrator, to file a response to the Applicant's statement of claim and call evidence in support of its position. I also note that the Arbitrator adjourned the proceedings several times to accommodate the Respondent. However, despite all these, the Respondent failed to participate in the proceedings. No plausible reasons were offered as to why the Respondent elected not to participate in the proceedings. Accordingly, the issue that the Respondent was denied the opportunity to be heard cannot arise since section 26 (c) of the Act is explicit that when a party to an arbitration fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. To encourage such ill-advised conduct to thrive amongst parties to a proceeding will defeat the purpose of adjudication of cases and the duty to comply with court summons or process. Indeed, arbitration will be hurt most by such discordant conduct of parties to an arbitration agreement.

Public policy question

[45] The argument that the award herein should be set aside for it violates public policy on account of errors of law and fact, I say the following. I admit, just as *Ringera J* proclaimed in **ALL NAKONS V. APPOLLO INSURANCE CO. LTD [2002] 2 E.A 366**, public policy is most broad concept incapable of precise definition. But that does not mean it is an impossible ground; it has been unpacked and a successful Applicant should establish facts that the award is:-

(a) Inconsistent with the Constitution or other laws of Kenya; or

(b) Inimical to the national interest of Kenya; or

(c) Contrary to Justice and Morality.

As *Ringera J* postulated, it is only the first category that is straight forward. The other two are not as straight forward, and neither the Court nor the Legislature can provide an exhaustive list of the elements or items that constitute; *inimical to the national interest or Kenya; or contrary to Justice and Morality*. It will all depend on the circumstances of the particular case, the facts being pleaded, and the evidence offered in support of those facts. However, public policy being an elastic ground it would require cogent proof if an award is to be set aside on that account. I see nothing has been presented to satisfy the test of public policy as a ground to set aside the award herein.

Conclusions

[46] The Respondent is the one alleging the fact of the contract with the Russian Company superseding the one between the parties herein and, therefore, bears the legal burden of proof. It has not discharged that burden to the required standard. Mere fact that the Russian Company which entered into a contract with Applicant could have been the same company which the Respondent intended to use in procuring and delivering of oil produce or that the subject matter of the contract with the Russian Company was oil, is not, alone or in itself, sufficient proof that the said contract superseded the contract between the Applicant and the Respondent. Much more is needed to establish the fact of superseding. In the absence of such evidence, I have already found and held that the contract between the Applicant and the Respondent was not superseded by the one between the Applicant and the Russian Company. Therefore, the dispute which arose in the contract between the Applicant and the Respondent was subject to domestic arbitration in accordance with clause 17 of the said contract. Those disputes were to be governed by the laws of Kenya with the arbitral seat is Kenya. The arbitral tribunal was accordingly

appointed after the dispute was declared under section 22 of the Arbitration Act and the Respondent refused to comply with the provisions on appointment of arbitrator in the contract. As such, any objections or defenses by the Respondent; the issue of the jurisdiction of the arbitral tribunal, the scope of his authority or the existence or validity of the arbitration agreement are matters which ought to have been raised and tackled by the Arbitration tribunal in the first instance. The preferred approach should be that, this Court would only intervene at the appellate stage in accordance with section 17(6) of the Arbitration Act. That is in tandem with the long standing principle that where a special procedure is provided for in law on a particular matter, then parties must invoke that jurisdiction to have their grievances resolved before they can utilize other corollary procedures of the Court. I admit the court should decline to entertain a proceeding which has been filed in breach of or side-stepping the provisions of the law such as sections 14 and 17 of the Arbitration Act. There is no doubt that the Respondent was aware of the arbitral proceedings herein and was bound by the law. But he ignored the proceedings; such was arrogant and ill-advised conduct by the Respondent. That behavior will have a bearing on the whether such party can be said in law to have been denied the right to be heard.

[47] Many other factual-based arguments being advanced by the Respondent were useful in the tribunal proceedings. For instance, allegations that: 1) no delivery of the product could have taken place without the timely issuance of a Local Purchase Order (LPO) by the Applicant; or 2) that the LPO herein was issued on 15th February, 2011 only two days before the consignment was due to be delivered, thereby leaving no sufficient time for the Respondent to supply the product as agreed between the parties; would be useful as a basis to declare a dispute between the parties and commence arbitral proceedings to resolve the issues or to have the contract rescinded all together, but not as proof that the contract between the parties herein had been superseded. The question as to whether a letter of credit in favour of the Respondent was issued by the Applicant's bank, and whether a performance bond together with a bill of lading was issued to the Applicant by the Respondent upon supply of the product, are questions of fact which are good in determining whether or not there was breach of any of the terms of the subject Agreement. And as the Arbitrator remains the master of the facts, the Court can only make a finding as to an error in law and not of fact. See the case **KENYA OIL COMPANY LIMITED & ANOTHER 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."**

In any event, the law as was stated in the case of **DB SHAPRIYA AND CO LTD v BISH INTERNATIONAL BV (2) [2003] 2 E.A. 404**, a mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on grounds of misconduct.

[48] The arbitral tribunal was seized of relevant material and facts which were placed before it by the Applicant. It considered all relevant material. It did not consider or act on wrong agreement as alleged. It inquired into the existence of the facts in the case and decided it has jurisdiction. It exercised jurisdiction properly. Thus, there is no misconduct on the part of the arbitrator. See **OWNERS OF THE MOTOR VESSEL "LILIAN S" v CALTEX OIL (KENYA) LTD [1989] KLR.**

[50] The upshot is that I reject the objections raised by the Respondent. Consequently, the application dated 3rd April, 2014 is allowed. The award dated 3rd June, 2013 is hereby recognized and adopted as the order of this court; it shall be enforced as such order. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 3rd day of July, 2014

F. GIKONYO

JUDGE