IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO 259 OF 2018

BETWEEN

KENYA BUREAU OF STANDARDS.....APPELLANT

AND

GEO CHEM MIDDLE EAST.....RESPONDENT

(Being an Appeal against the entire joint Ruling and Order of the High Court of Kenya at Nairobi (Hon. Justice F. Ochieng) dated and delivered on 30th May 2018

in

H.C Misc. Cause No. 455 & 501 of 2016)

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JUDGMENT OF THE COURT

1. This is an appeal from the Ruling of the High Court, **(F. Ochieng, J.)** dated 30th May, 2017 and delivered on even date. In the said ruling the High Court dismissed the appellant's application seeking to set aside an arbitral award and allowed the respondent's application for the adoption of the aforementioned award as a judgment of the Court allowing for its execution.

2. A brief history of this appeal is that the respondent herein participated in an International Tender for the provision of petroleum inspection services sought by the appellant. The respondent, having emerged the best evaluated bidder, was vide a letter dated 4th June, 2009 invited by the appellant for a meeting scheduled for the 5th June, 2009 with a view to signing the contract. The said meeting was held in the appellant's boardroom where both parties duly executed the said contract on the same date. The contract was for a period of 3 years with effect from 6th July, 2009 set to expire on 6th July, 2012 with an option of extension for a further three years.

3. Pursuant to the said contract, the respondent established a petroleum inspection facility at the Port of Mombasa, which was officially launched by the Minister for Industrialization on 27th August, 2009; the respondent commenced actual inspection operations on 8th September, 2009. Under **Clause F** of the agreement, payments to the contractor (respondent) were to be paid directly by the person or entity that required the inspection or testing services. Such fees would include the fees payable to the appellant which was equivalent to 0.2 % out of the 0.6 % of the assessed Cost Insurance and Freight (CIF) value of the products to be inspected or tested.

4. In the course of operations, the respondent met challenges when collecting fees from the oil marketers for the petroleum inspection services rendered and sought the appellant's intervention. Sometime in February 2010, the appellant, in an act of good faith pursuant to **Clause G** requested the Kenya Revenue Authority (KRA) to collect the amounts owed to the respondent from the oil marketers as it collected the taxes owed to it. Consequently, the inspection fees owed to the respondent were remitted to KRA together with the relevant taxes due to KRA. In spite of this arrangement, collection of the fees did not go on as anticipated.

5. A dispute arose between the parties on the 29th March, 2010 following a letter dated 26th March, 2010 in which the appellant informed the respondent that the Government had decided to "suspend" the contract and that the respondent was to immediately suspend its contractual duties "until further notice." At the time of such "suspension" the contract had only run for 7 months and the respondent had not been paid for the services rendered over such period. As at the 30th April, 2010 the inspection fees raised by the appellant from the inspection exercise were totaling to Kshs. 344,473,854.36 or USD 4,100,879.22, at the then prevailing rate of Kshs. 84/- to 1 USD, inclusive of 16% VAT.

6. The contract had an arbitration clause for resolution and settlement of disputes being **Clause I** which salient sub clauses provide as

follows:

> **"2. Any disputes between the parties on matters arising pursuant to this contract that cannot be settled amicably within thirty (30) days after receipt by one party of the other party's request for such amicable settlement the dispute may be referred by either party to arbitration in accordance with the Laws of Kenya;**
>
> **3. The Arbitral Tribunal shall be constituted by three arbitrators. Each party shall appoint one arbitrator and the third arbitrator shall be appointed by the two arbitrators."**

7. Eventually, on 24th June, 2015 the parties appointed Collins Namachanja, Njeri Kariuki and John Ohaga as the arbitrators.

8. The respondent filed a claim before the Arbitral tribunal claiming the sum of US $ 2,487,784.24 being unpaid invoices for work done; US $ 468,629.12 being sums incurred in equipping the laboratory; US$ 1,207,150.91 being expenses incurred in setting-up operations in Mombasa; payment of US$ 16,989,356.76 being lost income as a result of suspension of the contract; costs and interest on each of the aforementioned claims at Commercial Bank Rates from 1st April, 2010, until payment in full.

9. The appellant in opposition filed a defence and counterclaim and also raised a Preliminary Objection. In its defence, the appellant denied the averments in the statement of claim and deponed inter alia that: the contract was lawfully terminated at the option of the appellant; the claim fails to evince a reasonable and/or justiciable cause of action; the contract indisputably remained unperformed and was rendered impossible to lawfully perform on account of the suspension of **Legal Notice 142 of 2009** (The Standards (Quality Inspection of Imports) Regulations 2009 followed by lawful termination on 26th May, 2009 under **Clause C.7 7.2(xi)** as read with **Clause C.6 (6.1) & (6.4)** of the contract). In the Preliminary Objection, the appellant raised the following issues: that the claim is fatally and incurably defective and is for striking out in *limine*; the tribunal does not have jurisdiction to determine the claim, the same having been lodged out of time, is therefore time-barred and is bad in law. The appellant also counter-claimed for Kshs. 947,640,169.87 being the sum in unremitted Royalties plus interest thereon at the rate of 5% per month as follows: unremitted royalties in the sum of Kshs. 699,365,439.02; penalty/default interest in the sum of Kshs. 248,274,730.85; interest of the counter-claim at Commercial Bank Rates from the date it fell due to payment in full and; costs.

10. The respondent's defence to the counter-claim was that the same was entirely unfounded and ought to be dismissed with costs.

11. Upon the preliminary hearing of the arbitration proceedings and the parties having failed to formulate the issues, the tribunal formulated the same under seven heads as follows: whether the claim and counter-claim were lodged out of time; whether the termination or suspension of the contract by the appellant was unlawful; whether the contract was varied with respect to collection of inspection fees, and if so by whom; whether the claim established a plausible cause of action against the appellant; which of the parties was in breach of the contract; whether the parties were entitled to the reliefs sought and; who was to bear the costs of the arbitration proceedings.

12. The tribunal's findings on the above issues were that: the claim and counterclaim were properly before it; the purported termination of the contract by the appellant was without justifiable basis and was in breach of the contract; there was no variation of the contract with regard to collection of inspection fees; the claim established a plausible cause of action and; the appellant acted in breach of the contract.

13. On the issue of reliefs sought and costs of the arbitration proceedings the tribunal found: that in the exercise of its discretion by virtue of **section 32B** of the **Arbitration Act,** the costs of the award would be shared equally between the parties while the appellant would pay the respondent the costs of the reference; that the respondent's claim on unpaid invoices succeeds at the proposed rate inclusive of the 16% VAT; that the claim with respect to the setting-up and shipment of the laboratory and initial set-up costs fails and that the respondent was entitled to interest.

14. Ultimately, the tribunal awarded the reliefs as follows: On the claim: a total sum of USD 3,687,437.213 inclusive of interest and VAT for the unpaid invoices and; a total sum of USD 11,714,067.504 inclusive of interest and VAT for loss of income. On the counter-claim: an award only to the extent of the sum of Kshs. 87,988,213.15.

15. The Arbitral tribunal ordered that the amounts awarded to the respondent be paid less the amount awarded under the counter-claim within 45 days, failing which it would attract compounded interest at 5% per annum.

16. On one hand, being dissatisfied with the Arbitral Award as made on 29th July, 2016, the appellant on 3rd October, 2016 filed an application and affidavit in support both dated 30th September, 2016 before the High Court seeking to set aside the arbitral award under **section 35** of the Arbitration Act, 1995. The application was premised on grounds, *inter alia*, that: the tribunal determined a dispute and made a decision on matters falling outside the terms of the reference to arbitration, which matters it did not have jurisdiction to determine; the arbitral award is in conflict with the public policy of Kenya; the award violates the requisite rules of procedure and; it is in the interest of justice that the arbitral award be set aside in as far as it is inconsistent with written law and against public policy. The respondent opposed the application vide a replying affidavit sworn by one Santhilal Govindan, its General Manager dated 17th October, 2015 in which he averred that the grounds raised by the appellant to set aside the Arbitral award are not within the ambit of the grounds enumerated under **Section 35** of the Arbitration Act.

17. On the other hand, the respondent vide an application and affidavit in support both dated 17th October, 2016 and filed on 7th November 2016 sought to have the arbitral award adopted as a judgment of the court so as to enable it execute the said award on grounds as appears on the face of the application. The appellant opposed the application vide its replying affidavit sworn by one Brian Kimanyano M'Mbwanga, a legal counsel in the appellant's employment, dated the 6th of December, 2016 on grounds similar to those raised by the appellant in respect of its motion seeking to set aside the arbitral award.

18. It was agreed that both applications be heard together as it was clear that determination of one would automatically dispense of the other;

the court's ultimate determination would therefore be in respect of both applications.

19. Upon hearing the applications, the learned Judge pronounced himself as follows :-

> **"54. Regrettably, this court does not have authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the Arbitration Act.**
>
> **55. Any other intervention by the Court is expressly prohibited by Section 10 of the Act; and I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal.**
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> **56. In the final analysis, I find no grounds to warrant the setting aside of the arbitral award dated 29th July 2016.**
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> **57. And because there is no reason for setting aside the award, I now recognize it as a judgment of the court, and order that it be so registered."**

20. Dissatisfied with the above ruling and the resultant orders, the appellant moved this Court vide a memorandum of appeal dated 30th July, 2018. The appeal was premised on 13 grounds which can be condensed as follows; that the learned Judge erred in law in failing to set aside the award made by a tribunal without jurisdiction; that exceeded the terms of reference to arbitration; that conflicted with public policy and; that violated principles of justice and morality, and that is inimical to the interests of Kenya.

21. This appeal was canvassed by way of the written submissions filed by the parties through their respective counsel pursuant to directions given by the Court at the case management conference held on 27th November, 2018 with not so brief oral highlights by learned counsel during the plenary hearing on 10th July, 2019. Mr. J.O. Arwa appeared for the appellants while Mr. Fredrick Ngatia appeared for the respondent.

22. Urging the Court to allow the appeal, Mr. Arwa relied on the appellant's submissions filed on the 17th May, 2019, its reply filed on 5th July, 2019 and its list of authorities filed on 20th May, 2019. He submitted that the four (4) broad issues emerging from the grounds of appeal are that the learned Judge erred in law in failing to set aside the award: made by a tribunal without jurisdiction; that exceeded the terms of reference to arbitration; that conflicted with public policy and; that violated principles of justice and morality, and that is inimical to the interests of Kenya.

23. On the first issue counsel for the appellant relying on the twin arbitration principles of party autonomy and freedom to contract and the case of **National Bank of Kenya v. Pipeplastic Samkolit & Anor. (2001) KLR 112 at 118, Fina Bank Limited v. Spares & Industries Limited, Civil Appeal No. 51 of 2000** and **Kenya Oil Company Ltd & Anor. v. Kenya Pipeline Company, Civil Appeal No. 102 of 2012 (2014) eKLR** submitted that it is trite that parties are bound by their contracts and that a court of law or Arbitral tribunal cannot rewrite a contract or allow a party to escape from a bad bargain voluntarily entered into unless fraud, coercion or undue influence is pleaded and proved.

24. He contended that the dispute between the parties was sparked off by the appellant's letter dated 15th July, 2013 communicating to the respondent that the contract had been lawfully terminated by a *force majeure event* arising from prolonged suspension of petroleum testing beyond sixty (60) days as contemplated by clauses 7.2(vii) and the appellant's letter dated 26th March, 2010 communicating the Government's decision to suspend inspection for an indefinite period.

25. He submitted that the tribunal lacked jurisdiction to interrogate the matter, being a *force majeure* termination, as the respondent had failed to refer the matter to arbitration within 21 days from the appellant's letter of 15th July, 2013 communicating the *force majeure* termination contrary to the provision of Clause C.10 of the contract.

26. He submitted faulting the arbitral tribunal's determination of the appellant's preliminary objection and failing to find that the respondent's claim was time-barred and hence it lacked jurisdiction; that the tribunal's lack of jurisdiction rendered the whole arbitral proceeding and resultant award incompetent. Citing the case of **Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd (1989) KLR 1**, **Samuel Kamau Macharia & Anor. v. Kenya Commercial Bank Limited & 2 Others (2012) eKLR** and **Macfoy v. United Africa Co. Ltd (1961) 3 All ER 1169** he maintained that such award ought to have been set aside by the High Court for the aforementioned reasons.

27. On the second issue citing the case of **Kenya Tea Development Agency Ltd & Others v. Savings Tea Brokers Ltd (2015) eKLR**, which cited **Mustill and Boyd pg. 118-119, Commercial Arbitration** he argued that the court cannot force parties to arbitrate a dispute altogether without their mutual concurrence or to arbitrate a dispute which their arbitration agreement did not deem 'arbitrable' before a given tribunal, or to arbitrate a dispute that is contractually time-barred. He maintained that reference occurs at contracting and not in the pleadings placed before arbitrators. He submitted that the award disregarded the jurisdictional bounds and confines of the arbitration agreement and of the parent contract; that it was outside the terms of reference to arbitration because: the dispute was referred to arbitration outside the stipulated time in Clause C.10 and was referred to a 3-member arbitral tribunal as opposed to the mandated single member arbitral tribunal and; the contract did not contemplate a payment dispute therefore the respondent's unilateral reference of a payment dispute to arbitration lacked contractual grounding and that the award grossly exceeded terms of reference to arbitration.

28. On the third issue, Mr. Arwa relying on the cases of **Printing and Numerical Registering Company v. Sampson 1875 LR FS 462**, **Rwama Farmers Cooperative Society Limited v. Thika Coffee Mills Limited (2012) eKLR** and **Lalji Karsan Rabadia 2 Others v. Commercial Bank of Africa Limited, Civil Appeal No. NAI 63 of 2013** submitted that the primary duty of an arbitral tribunal and a Court of law is to construe and enforce the contract and any terms implied in it. Therefore, a decision that defeats contractual intention of parties offends public policy. He contended that in the instant case the arbitral award conflicted with public policy for purporting to: defeat the

express contractual intention of parties; rewrite the contract to claim jurisdiction for a tribunal appointed contrary to the parties' contractual intention and; rewrite the contract to alter the respondent's contractual obligation to collect payment directly from oil marketers and unlawfully shifting the same to the appellant.

29. On the fourth issue citing the case of **National Oil Company (1987) 2 All ER 769** (**Deustche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co. & Anor. (1987) 2 Ell ER 769)** counsel submitted that the appellant being a State Corporation runs on public funds allocated from the National Treasury; that it discharges its mandate for public benefit. Therefore, it would be illegal and injurious for the public good for this Court to allow the enforcement of an irregular and unlawful award made without jurisdiction and in contravention of parties' expressed contractual intention. He maintained that there was no express obligation on the appellant to settle the invoices raised by the respondent; that an obligation to pay must be clear and unambiguous whether within a contract or otherwise. He argued that the award was therefore repugnant to justice and fairness for ordering the appellant to settle the respondent's invoices and attendant costs without contractual and legal justification.

30. In conclusion, he submitted that having satisfied the circumstances for setting aside an award as defined under **Section 35(2)** of the Arbitration Act, the appellant had demonstrated that the High Court erred in failing to set aside the award. He urged the Court to allow the appeal and set aside the impugned arbitral award.

31. In a bid to demonstrate why this appeal should be dismissed counsel for the respondent contended identifying the three issues for determination as: whether the appellant has a right to appeal in respect to a decision made by the High Court on an application made under **Section 35** of the Arbitration Act; whether the appellant is indebted to the respondent and; whether the respondent is entitled to the losses incurred as determined by the arbitral tribunal.

32. On the first issue, counsel submitted that an understanding of **Section 35** of the Arbitration Act it is vital in order to appreciate the minimalist intervention permissible by the Act as envisaged in the provisions of **Section 10** of the Arbitration Act and **Article 5 of the UNICITRAL Model Law on International Commercial Arbitration, 1985.** He argued that it is quite clear that the Court's intervention can only be as expressly provided in the Act; that **Section 35** of the Arbitration Act has no provision permitting a right of appeal to the Court of Appeal. In support of the foregoing he cited this Court's case of **Abdulshakoor Khandwalla v. East African Building Society (2008) eKLR**, Supreme Court case of **Gatirau Peter Munya v. Dickson Kithinji & 2 Others (2014) eKLR.**

33. He further submitted that it is irrefutable that the realms of the Court's intervention under **Section 36** and **39** of the Arbitration Act are mutually exclusive. That under **Section 39** "prior agreement by the parties" is a fundamental condition and in the absence of such agreement as contemplated in sub-section (1) thereof, the provisions of sub-section (3) cannot be invoked. He maintained that the reliance on **Section 39(3)** of the Act by the appellant to obtain leave of this Court to appeal is an acknowledgment that no such avenue exists under **Section 35** upon which the dispute to the High Court was argued and determined.

34. Counsel also cited the case of **National Cereals & Produce Board v. Erad Suppliers & General Contracts Limited (2014) eKLR** where the Court concluded that setting aside which is a "narrow avenue for challenging an award than an appeal" is equally restricted by the outlining of the specific grounds upon which such challenge can be mounted. Further, that the merit of the award is not one such ground.

35. Relying on **Article 50(1)** of the Constitution and the case of **Kenya Oil Company Limited & Anor. v. Kenya Pipeline Company (2014) eKLR** he submitted that where parties expressly exclude the intervention of courts in their arbitration agreement, they are estopped from claiming that such provision is unconstitutional whenever that position suits its convenience. He maintained citing the case of **Midroc Water Drilling Co. Ltd v. National Water Conservation & Pipeline Corporation (2015) eKLR** that it is for this reason that **Article 159(2)(c)** of the Constitution elevates alternative dispute resolution mechanisms as one of the guiding principles for exercise of judicial authority.

36. On the public interest aspect, counsel stressed on the finality of arbitral awards and the importance of bringing an end to litigation citing the case of **Anne Mumbi Hinga v. Victoria Njoki Gathara (2009) eKLR** and the United States Supreme Court case of **Hall Street Associates LLC v. Mattel Inc. 552 U.S 2008.**

37. He maintained that the parties herein voluntarily submitted themselves to arbitration therefore they should not be allowed to cherry-pick the resultant award to be content with. He urged that this Court lacks jurisdiction to entertain the appeal and must down its tools at the threshold.

38. On the second issue Mr. Ngatia submitted that it is common ground that: the respondent rendered petroleum inspection services in accordance with the procedure set out in its bid document, in accordance with the acceptable international best practice and more specifically as set out in Clause D.2 of the contract; that based on the findings from the aforesaid inspection and testing, the respondent would thereafter issue compliance or non-compliance certificates in respect to vessels inspected bearing emblems by both the respondent and the appellant; that the fact that the respondent rendered the aforesaid services to the satisfaction of the appellant for the seven (7) months prior to termination of the contract is beyond argument - it is on this basis that the appellant filed a counterclaim and the royalty fees alleged therein could not exist in absence of fees for the inspection services rendered by the respondent and; that vide a letter dated 24th February, 2010 it was evident that KRA upon the appellant's request made an undertaking to collect and remit inspection fees on behalf of the appellant; that the appellant in its letter dated 23rd March, 2012 admitted that KRA had in its possession inspection fees amounting to USD 4,100,879.22 collected on the appellant's behalf which amount the appellant directed should be remitted to itself.

39. He submitted further that the amounts due to the respondent were specifically pleaded in the respondent's statement of claim and proved before the arbitral tribunal. He maintained that the tribunal observed that since KRA collected the inspection fees on the appellant's behalf upon its own request it was only just that the appellant remit the same to the respondent less royalties; that the respondent was clearly not party to the agreed terms of business between KRA and the appellant.

40. Relying on the **Kenya Oil case** (supra) he argued that the arbitral tribunal made its award based on the aforesaid irrefutable factual basis.

That the appellant's invocation of both Court's intervention to replace such factual findings with that of the Courts' own was not permissible in law. He maintained cautioning the Court's interference with an arbitral award as was held by Lord Justice Steyn in the case of **Geogas S.A v. Trammo Gas Ltd (The Baleares).**

41. On the third issue he submitted that being that the contract was to run for a period of 36 months i.e. from 6th July, 2009 to 5th July 2012, the purported suspension of the same by the appellant on the 26th March, 2010 was premature, unlawful and in violation of the contract. He argued that the contract could only be terminated by either party as provided under **Clause 7.1 to 7.3** of the Contract upon a six (6) months' notice; that a notice of termination due to a *force majeure* event was also to be given in accordance to **Clause 6.6** but such notice was never issued to the respondent.

42. He further argued that the 'suspension' was an alien concept to the contract and the appellant's contention of the same being the reason for termination of the contract was contrary to the factual findings of the tribunal; that the 'suspension' did not qualify as an event of *force majeure* under clause 6.6 of the contract.

43. He submitted that the tribunal correctly found that the respondent was entitled to damages for loss of income limited to only the unexpired contract period of 29 months since by the time the arbitral award was published on the 29th July, 2016 the contractual period had already lapsed hence damages were the only available remedy.

44. He contended that the tribunal was constituted by consent of both parties who thereafter identified the issues to be determined including a counter-claim by the appellant for unremitted royalties; that the appellant could not then seek refuge behind the veil of public interest to evade lawful contractual obligations in which it had sought to benefit from. He cited the case of **Republic v. County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya (2014) eKLR** where it was held that:-

> **"There can never be public interest in breach of the law…public interest must accord to the constitution and the law as the rule of law is one of the national values of the constitution under Article 10 of the Constitution."**

45. He urged the Court to dismiss the appeal and adopt the award as a judgment of the Court allowing its execution.

46. This being a first appeal, the duty of the Court is as was prescribed in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** where this Court stated as follows: -

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.** See also **Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212"**

47. Having carefully perused the record of appeal, parties' submissions and the law particularly as espoused in the authorities cited to us, it is evident that the legal issues falling for our determination are:

> **i. Whether or not an appeal lies to this Court from the impugned ruling of the High Court;**
>
> **ii. Whether the Arbitral tribunal had jurisdiction;**
>
> **iii. Whether the Award was against public policy, and was therefore for setting aside.**

48. On the first issue, it is evident from the record that the appellant herein sought leave of this Court vide **Nairobi Civil Application No. 132 of 2017** in which the Court granted leave to the appellant to lodge the present appeal. Whether the Court was right or wrong in granting the said leave, the same has not been set aside and is therefore still valid. In view of the foregoing, the issue of whether this Court has jurisdiction to entertain the instant appeal or not does not lie for our determination. The determination of that issue lies elsewhere. We acknowledge that it is an issue that has been pending before the Supreme Court for a while but we say no more.

49. On the issue of whether the tribunal had jurisdiction the appellant contended that the tribunal lacked jurisdiction because: the dispute superseded the jurisdictional bounds and confines of the arbitration agreement and of the parent contract; that the tribunal lacked jurisdiction to interrogate the matter, being a *force majeure* termination and as the respondent had failed to refer the matter to arbitration within 21 days, the claim was time barred.

50. A careful perusal of the record indicates that the directive to suspend operations was communicated to the respondent vide the appellant's letter dated 26th March, 2010, in which the appellant stated that the Government of the Republic of Kenya had suspended until further notice the petroleum inspection and testing exercise. According to the appellant, it was just communicating the Government's decision.

51. It was not until the respondent sent to the appellant a demand letter dated 25th June, 2013, that the appellant vide a letter dated 15th July, 2013 stated that the contract had been terminated in accordance with Clauses C.6 and C. 7.2(vii). In the appellant's letter, it stated that:-

> **"As communicated in our letter dated 26th March 2010, the government of the Republic of Kenya suspended petroleum testing. The suspension continued for a period of more than sixty days. In the circumstances and in accordance with the provisions of C.6 and 7.2(vii) the contract was effectively terminated;"**

52. The salient provisions of Clause C.6 provide that ***"6.6 A party* affected by an event of Force Majeure shall notify the other party of such event as soon as possible and in any event not later than fourteen (14) days following the occurrence of such event providing**

evidence of the nature and cause of such event and shall similarly give notice of the restoration of normal conditions as possible;". Clause 7.2(vii) on the other hand provides that "Notwithstanding anything to the contrary contained in this Contract, this contract shall at the option of the client terminate:

> **"ii) If, as a result of Force Majeure, the Contractor is unable to perform a material portion of the Services for a period of not less than sixty (60) days."**

53. The crux of this appeal lies in the above clauses and the interpretation given to them by the parties herein. We understand the appellant to be saying that the act of the Government to suspend the contract was an act of *force majeure* which the appellant had no control over. The learned Judge made a finding that the parties in their dealings had anticipated the possibility of a *force majeure* event as the contract itself at clause C.6 extensively provides for the parties' obligations in such an event. We further agree with the learned Judge in his findings that under the same clause, the definition of what constitutes a *force majeure* includes *" any other action by government agencies"* that may render the satisfaction of a contractual obligation impossible. The Government having suspended Legal Notice No 142 of 2009, the appellant could not do anything in furtherance of the contract in question.

54. According to the appellant, having informed the respondent of the said Government decision, which in its interpretation was an act of *force majeure*, the contract stood terminated pursuant to clause 7.2 vii) of the contract which provided that if as a result of *force majeure*, the contractor was unable to perform a material part of the services for a period of not less than 60 days, the contract would terminate.

55. In the event this happened, **Clause 10** would then kick in. Under the clause, the party disputing termination was required to declare a dispute and refer the matter to arbitration within 21 days. According to the appellant, pursuant to **clause 7.2 (vii)** the contract stood terminated 60 days after the Government suspended the exercise, at the latest 60 days after it communicated that decision to the respondent. The respondent should therefore have declared a dispute by latest end of June 2010; i.e the contract stood terminated as at 26th May, 2009, and so the dispute should have been referred to the tribunal 21 days thereafter. Based on that argument, the declaration of the dispute and appointment of the tribunal in 2013 was clearly time barred, and further that a dispute under **clause C.10** was supposed to be heard by a single arbitrator and not 3 arbitrators. That is how the appellant's challenge on the jurisdiction of the tribunal came about.

56. The jurisdictional question was raised before the tribunal but the tribunal rendered its decision on the same in the Final Award and dismissed it after making a finding to the effect that the claim was not time barred. It was again raised before the learned Judge and it suffered the same fate. The issue forms ground 2 in the appellant's memorandum of appeal dated 25th July, 2018.

57. In response to this issue, the respondent maintained that the Contract did not provide for "*suspension"* of the Contract and the only way the Contract could be ended was by "*termination"* as envisaged in clauses **7.1 to 7.3** where the party initiating the termination was bound to give the other party six months' notice. On the other hand, if the Contract was to be terminated on account of '*force majeure'* the appellant was obligated to notify the respondent within 14 days' of the occurrence of the event causing the *force majeure* and its nature. According to the respondent, there was no proper termination of the Contract and so the tribunal was right in its finding that the respondent was entitled to damages.

58. The respondent also maintained that the tribunal had jurisdiction to determine the issue and it was not time barred as claimed by the appellant and further that contrary to the appellant's submission, the dispute in question was within the tribunal's remit.

59. The other principal ground of appeal raised by the appellant is that the learned Judge of the High Court failed and/or omitted to determine whether the award was in conflict with public policy of Kenya. The learned Judge did consider the public policy issue but found that what was against public policy is failure by the court "to give finality to Arbitral Awards" and not the award itself as claimed.

60. We have carefully considered the written submissions by learned counsel as well as the oral highlights which were very comprehensive and of great assistance to us in arriving at our decision in this matter. We have considered the same along with the grounds of appeal, the entire record and the law. We reiterate that the merits of the arbitral award are not subject to interrogation by this Court. We shall therefore steer clear from delving into any aspects touching on the merits of the findings of the tribunal.

61.The applications seeking to set aside Arbitral award was premised on **Section 35(2)** of the Arbitration Act which provides as follows:

> ***"35. Application for setting aside arbitral award***
>
> ***(2) An arbitral award may be set aside by the High Court only if—***
>
> ***(a) the party making the application furnishes proof—***
>
> ***(i) that 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, the laws of Kenya; or***
>
> ***(iii) the party making the application 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 contains decisions on matters beyond the scope of the reference to arbitration, provided that if the***

decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) 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) <u>the award is in conflict with the public policy of Kenya</u>. *(Emphasis added)*

The appellant cited and relied on the provisions we have underlined above in its application for setting aside the award. The appellant also raised the issue of illegality saying that the Tribunal should not have ordered enforcement of a contract which the Government had prohibited.

62. Having considered all the above, we now come to our determination of the three issues we identified earlier. First is the issue of the tribunal's jurisdiction, second is the issue as to whether the tribunal dealt with a matter that was outside the arbitration agreement and finally the question as to whether the Award was contrary to public policy.

63. On the issue of jurisdiction, it is a truism that jurisdiction is everything and if a court or tribunal finds that it lacks jurisdiction to deal with a matter, then it must down its tools. This is why it makes sense for the court or arbitrator to determine the question of jurisdiction *in limine*, where jurisdiction is challenged. See **Owners of Motor Vessel Lillian S versus Caltex Oil (Kenya) Ltd** (1989) KLR 1, and the Supreme Court decision in **Samuel Kamau Macharia& Another vs Kenya Commercial Bank Limited & 2 others,** Sup Appl. 2 of 2011, [2012] e KLR. The learned Judge at page 8 of his Ruling stated that none of the parties had raised the issue of jurisdiction. On the contrary, we note from the award itself that the appellant (respondent in the arbitral proceedings) had raised a Preliminary Objection before the tribunal on grounds that the claim was lodged out of time and was therefore bad in law for being time barred.

64. In order to determine if the tribunal's appointment/empanelment was time barred, we need to have a close look at the relevant clauses in the Contract. As stated earlier, under the agreement there was a requirement of a 14 days' notification of the occurrence of an event of *force majeure* which would prevent the performance of the Contract. In this case, following the Government suspension of the performance of the Contract, the appellant wrote to the respondent on 26th March, 2010 and informed it of the said decision. There is no dispute that the suspension by the Government was unforeseeable and beyond the appellant's power to remedy. It was an event of *force majeure.* The appellant argues that pursuant to **Clause 7.2 (vii)** the contract stood terminated after 60 days of notification of the occurrence of the suspension of the contract by the Government.

65. That would actually appear to be the position but for one small problem; i.e that the letter in question had said that the suspension was *"until further notice"*. We do not therefore agree that the Contract stood terminated by 26th June, 2009. In our view time was not running against the respondent until it was informed of the termination vide the letter dated 15th July, 2013. From the said date, the respondent, who was disputing termination had to declare a dispute and refer the matter to arbitration within 21 days pursuant to clause 10 of the Contract. This of course did not happen and the dispute was declared and the matter referred to the tribunal almost two years later. We have no hesitation in finding that the reference and appointment of the tribunal was done outside the time limits prescribed in the Contract. Our finding therefore is that the reference was actually time barred, and the tribunal had no jurisdiction to entertain it.

65. This finding can resolve this appeal. We nonetheless find it necessary to determine the other two issues we have identified earlier. Did the tribunal deal with issues that were outside the terms of the Contract? We appreciate that in Arbitration agreements, party autonomy must be revered and just like in any other contract, the court has no business rewriting the terms of the agreement for the parties. Without going into the details of the Contract, parties in their submissions confirmed to the Court that the fees levied on inspection was to be paid directly by the importers to the respondent which would in turn remit 0.2% of the fees so collected to the appellant. There was no clause in the Contract placing any obligation on the appellant to collect the fees and pay the same to the respondent.

67. In other words, the Contract did not impose any obligation on the appellant to make good any default in payment. Could the tribunal determine the question of liability to pay on the part of the appellant when no such liability was provided for in the contract? This was in our view a matter outside the scope of the tribunal and falling under **Section 35(2) iv** of the Arbitration Act.

67. Lastly, an award that imposes liability on a state corporation to pay from public funds over 1 billion Kenya shillings without proof of liability to pay is clearly against public policy. We need not say more. For the foregoing reasons, we find that the learned Judge should have allowed the Notice of Motion dated 30th September, 2016 and set aside the application dated 29th July,2016. We allow this appeal but as neither party seems to have benefitted from the Contract in question, we order that each party bears its own costs both here and in the High Court.

Dated and delivered at Nairobi this 22nd day of November, 2019.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

……...…….

JUDGE OF APPEAL

J. MOHAMMED

…….……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR