Case Number:	Miscellaneous Application 67 of 2013
Date Delivered:	05 Oct 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Francis Tuiyott
Citation:	Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex [2018] eKLR
Advocates:	Mutua for Applicant Kalove for Respondent
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ADMIRALTY & COMMERCIAL DIVISION

MISC. APPLICATION NO. 67 OF 2013

KENYA AIRPORTS AUTHORITY..... APPLICANT

VERSUS

WORLD DUTY FREE COMPANY LIMITED T/A

KENYA DUTY FREE COMPLEX.....RESPONDENT

RULING

1. The Dispute involving the Kenya Duty Free Complex does not go away easily. In this episode, Kenya Airports Authority (KAA) seeks the setting aside, in its entirety of the Award of Hon. Justice (Rtd) E. Torgbor, as an Arbitrator, dated 5th December 2012 and delivered on 21st January 2013. The Award was in favour of World Duty Free Company Limited t/a Kenya Duty Free Complex (hereinafter World Duty Free).

2. Prior to the incorporation of KAA, Kenyan's Public Aerodromes were controlled and managed by the Department of Aerodromes. KAA was established through Section 3 of The Kenya Airports Authority Act which came into operation on 31st May 1991.

3. On 27th April 1989, a period prior to the existence of KAA, the Government of Kenya entered into an agreement with an entity known as House of Perfume. A major feature of that Agreement was that the Government would lease space to the House of Perfume measuring 3000m at Jomo Kenyatta International Airport in Nairobi and 2000m at Moi Airport in Mombasa. That agreement was amended on 11th May 1990 to substitute "*World Duty Free Company Ltd*" for "House of Perfume". In this Decision the two Agreements are jointly referred to as the 1989 Agreements.

4. Pursuant to the 1989 Agreement, KAA entered into three (3) Lease Agreements with World Duty Free:-

(a) The Lease Agreement of 25th August 1990 for the Lease of certain premises being portions of terminal buildings at Jomo Kenyatta and Moi International Airports.

(b) The Lease made on 29th January 2003 for certain premises at Jomo Kenyatta International Airport.

(c) Another Lease made on the same day (29th January 2003) in respect to premises at Moi International Airport.

In respect to the two Lease Agreements of 29th January 2003, World Duty Free insists that they were made not just pursuant to the 1989 Agreements but also a Decree of Court given on 10th July 2003 by the High Court of Kenya at Nairobi in HCC No. 192 of 1999 and 464 of 2000. Some arguments made by World Duty Free against the Motion before Court are founded on this insistence.

5. The relationship between World Duty Free on the one hand and The Government of Kenya and its Corporation KAA on the other hand, hit a tempestuous stretch and World Duty Free took a view that the Government of Kenya had breached terms of the 1989 Agreements. Under clause 9 of that Agreement the parties submitted the Dispute to the Jurisdiction of The International Centre for Settlement of Investment Disputes pursuant to the convention on Settlement of Investment Disputes between States and Nationals of

other States (The ICSID). It was in respect of all Disputes arising out of the Agreement or relating to any Investment made under the Agreement.

6. Kenya signed into the ICSID on 24th May 1966, deposited the ratification on 3rd January 1967 and the convention came into force on 2nd February 1967. It has to be remembered that World Duty Free was incorporated in the isle of man and is therefore not a National of Kenya and hence the suitability of the Convention for resolution of any dispute between it and the Government of Kenya rising out of the Agreement.

7. Upon a request for institution of Arbitration proceedings made by World Duty Free, a Tribunal was set up under the provisions of the convention to hear and determined the Dispute. The Tribunal which constituted H.E. Judge Gilbert Guillaume, Hon. Andrew Rogers QC and V.V Veeder QC dismissed the claim advanced by World Duty Free. In doing so the Tribunal concluded:-

1) The Respondent, Kenya, was legally entitled to avoid and did avoid legally by its Counter-Memorial dated 18 April 2003 the "House of Perfume Contract", namely the Agreement of 27 April 1989 as amended on 11 May 1990, under its applicable laws, the laws of England and Kenya'

2) The Respondent, Kenya, did not lose its right to avoid the said contract by affirmation or otherwise before 18 April 2003 under these applicable laws; and

3) The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter *of ordre public international* and public policy under the contract's applicable laws.

8. But matters did not end there. World Duty Free asserting that its Leases of 28th January 2003 were valid, subsisting and inforce until 10th July 2012 saw breaches thereto and had another dispute referred to Arbitration. The Chief Justice on 22nd September 2008 appointed Hon. Mr. Justice (Rtd) E. Torgbor as the sole Arbitrator to the dispute. These Proceedings relate to that Dispute. The Amended Statement of Claim filed before the sole Arbitrator sets out the grievances. This need not be paraphrased and are :-

a) The Respondent has purported to award and/or grant advertising rights at Jomo Kenyatta Airport and Moi International Airport among other Airports to third parties; examples of such third parties granted by the Respondent advertising rights at Jomo Kenyatta International Airport and Moi International Airport are OGILVY (EAST AFRICA) LIMITED and MEDIA INTIATIVE (EAST AFRICA) LIMITED.

b) The Respondent has granted concessions to Third Parties to construct, develop, furnish and commercially operate duty free shops at Jomo Kenyatta International Airport, Moi International Airport and other Airports of the Respondents without the written consent of the Claimant or at all; examples of such third parties granted by the Respondent rights to carry out duty free operations at the Jomo Kenyatta International Airport and Moi International Airport include MAYA DUTY FREE LIMITED AND SAFARI DUTY FREE LIMITED among many others.

c) On or about 17th August 2007 the Respondent advertised in the national press inviting expressions of interest under a Tender Notice for the management, construction or operation of Duty Free shops namely, Shops "A", "B" and "C" at Moi International Airport, Mombasa and sought to award concessions to interested parties until it, (the Respondent) was restrained by way of an injunction obtained by the Claimant in HCCC Number 413 of 2008.

d) The Respondent has written to all existing and potential advertising clients who include the present ad potential advertising customers of the Claimant in an unlawful bid to encourage the said clients to breach their existing advertising contracts with the Claimant and requiring the said clients to enter into advertising contracts with other entities which had been unlawfully awarded advertising contracts at the Jomo Kenyatta International Airport.

e) In addition to the foregoing and without prejudice thereto, by separate letters written by the Respondent to all the existing advertising customers of the Claimant, the Respondent threatened them that unless they renewed or replaced their advertising contracts with those given advertising within 5 days of receipt of the said letters, the Respondent would consider the respective sites as vacated and available for rental to other customers. The actions of the Respondent as aforesaid actually forced the Claimant's to breach the Contracts they had earlier entered into with the Claimant.

9. That amended pleading further captured some incidents that are said to have happened after the presentation of Arbitration and during its pendency. That on Saturday 4th December 2010 and Sunday 5th December 2010, KAA sent a squad of about 150 workers who demolished Duty Free shops belonging to World Duty Free at Jomo Kenyatta International Airport. It is alleged by World Duty Free that the squad also pilfered and carted away various of its items.

10. Ultimately, World Duty Free sought the following multiple prayers:-

(i) A declaration that the duty free shops and advertising concessions granted by the Respondent to Third Parties are in breach of the provisions of the GoK Agreement and the Second Lease and are null and void.

(ii) An Order that the Respondent do specifically perform the provisions of the GoK Agreement and the Second Lease with regard to the granting to the Claimant the sole and exclusive right to run and operate Duty Free Shops at Jomo Kenyatta International Airport, the Moi International Airport and all Airports of the Respondent namely the provisions contained in Clause 3(A) of the GoK Agreement that "the Company shall have the sole and exclusive right (the "Agency") within the area presently designated or which may in the future be designated as the Airports (including any airport terminals which may in the future be constructed at the Airports by the Government);

(i) To construct, develop and furnish the Complexes and

(ii) To operate the Complexes commercially for its own benefit freely and with restraint.

No other person or individual whatsoever shall be entitled to the same without the prior written consent of the Company.

And the provisions contained in Clause 3(b) of the Second Lease that "the Lessor has pursuant to Clause 3(A) of the original agreement agreed to grant to the Lessee the sole and exclusive right within the area presently designated or which may in future be designated as an airport (including any airport terminus" to carry out Duty Free operations and to;

(iii) Construct, develop and furnish the Complex; and

(iv) Maintain and freely and commercially operate the Complex.

PROVIDED that the Lessor shall not grant to any other person a right to construct or operate a similar facility without the prior written consent (which shall not unreasonably be withheld) of the Lessee.

(v) An ORDER that the Respondent do specifically perform the provisions of the GoK Agreement and the Second Lease with regard to the granting to the Claimant of the sole and exclusive right to carry out advertising activities at the Jomo Kenyatta International Airport, the Moi International Airport and all Airports of the Respondent namely the provisions contained in Clause 3(H) of the GoK Agreement that "The Government hereby grants to the Company the sole and exclusive rights to advertise, or to arrange for other persons to advertise Sales products within the International Airport Terminals".

(vi) An Order that the Respondent do pay to the Claimant all losses incurred by way of loss of profit and unearned revenue occasioned by the grant by the Respondent to third parties of rights to run Duty free shops at the Jomo Kenyatta International Airport, the Moi International Airport and any other Airports of the Respondent.

(vii) Special Damages against the Respondent assessed at the Revenue collected by the Respondent from the advertising concessions granted to Third Parties.

(viii) Special Damages against the Respondent assessed at the revenue by way of concession fees earned by the Respondent from its grant to third parties of rights to carry out duty free activities at the Jomo Kenyatta International Airport, the Moi International Airport and any other Airports of the Respondent.

(ix) General damages and aggravated damages for breach of contract

i. Interest on (vi), (vi and (viii) at the prevailing bank rates from the date of the award till payment in full.

ii. The Arbitrator's costs.

iii. Costs of and incidental to these Arbitral Proceedings.

11. The response by KAA was contained in the Amended Statement of Defence dated 30th June 2011. Abridged, the Defences raised are:-

(a) World Duty Free could not draw any benefit from the 1989 Agreement as it was not party thereof.

(b) Related, it was the Government of Kenya that was party to the 1989 Agreement and KAA entity could not be sued under the terms thereof.

(c) The 1989 Agreement attempted to create a Monopoly contrary to the explicit provisions of the Common Law, the Restrictive Trade Practices, Monopolies and Price Control Act and was therefore against Public Policy.

(d) The 1989 Agreement offended the provisions of the Public Procurement and Disposal Act which requires that a Public Body procures services, uses its assets and equipment in a manner that will achieve maximum efficiency and ensure value for money for the Public.

(e) World Duty Free had surrendered its Lease in respect to space leased to it at Jomo Kenyatta International Airport in favour of Diplomatic Duty Free Limited and thereby extinguished its rights.

12. Although framed prior to the Amendments, the parties presented 7 issues for the Arbitrator to determine. These are:-

1. Is the Agreement between the Government of Kenya and House of Perfume dated 27th April 1989 ("the GoK Agreement") and amended on 11th May 1990 was valid and binding as between the Government of Kenya and World Duty Free Company Ltd"

2. Is the "GoK Agreement" enforceable as between Kenya Airports Authority and World Free Company Ltd"

3. Did World Duty Free Company Ltd contractually acquire from the Government of Kenya and the Kenya Airports Authority the exclusive rights to operate Duty Free Shops and advertise at all national airports under the management, control and operation of Kenya Airports Authority"

4. Did World Duty Free Company Limited surrender the said exclusive rights"

5. Did the Respondent, Kenya Airports Authority, commit breaches of the GoK Agreement and the related Leases by which GoK and the Respondent granted the exclusive rights aforesaid to the Claimant, World Duty Free Ltd"

6. Is the Claimant, World Duty Free Company ltd, entitled to damages and the reliefs sought in the statement of Claim for the alleged breaches of contract committed by the Respondent Kenya Airports Authority"

7. Who is to pay the costs of the arbitral proceedings"

13. The Arbitration proceedings were not without incident. On 19th June 2012, a date scheduled for the conclusion of the Claimant's evidence and commencement of KAA's case, Counsel for KAA and its representative walked out of the proceedings. The consequence of which KAA did not fully present its case. The parties hereto give conflicting accounts as to the circumstances of the

walk out and is one of the grounds upon which the Motion for setting aside is founded.

14. The Arbitrator made and rendered a 44 page Award on 5th December 2012, in which he found in favour of World Duty Free against KAA as follows:-

(i) KAA was in breach of the 1989 Agreement and the Leases of 29th January 2003.

(ii) KAA did not adhere and specifically perform the contractual provisions of clause 3(A) and 3(H) of the 1989 Agreement and clause 3(b) of the second Lease.

(iii) KAA do pay the following to World Duty Free;

a. US$ 27,959,264 being lost and unearned revenue incurred by Kenya Duty Free.

b. Special Damages of US$ 3,199,192 being revenue collected by KAA from advertising concessions unlawfully granted to third parties.

c. General Damages of US$ 10,000,000.

d. US$ 2,979,995 as Revenue collected by the Respondent for the period 2005 to 2011 form advertising concession granted to third parties.

e. US$ 58,108 being lost revenue from Rental Income for the year 2011.

f. Aggravated Damages of US$. 5,600,000.

g. Costs.

This is the Award that infuriates KAA and is the reason for the Motion before Court.

15. The Motion is mainly anchored under the Provisions of Section 35 of The Arbitration Act 1995 which provides:-

“(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(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) the award is in conflict with the public policy of Kenya.

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

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

16. The Motion raises challenges to the Award which can be conveniently discussed under three Headlines:-

a) The substratum of the Award being the Agreement of 27th April 1989, was procured by bribery and corruption and the Award is therefore in conflict with Public Policy.

b) The Arbitral Award is founded upon and upholds a contract that is contrary to Public Policy and Morals.

c) The Arbitral proceedings were conducted in a manner that denied the Applicant a fair and reasonable opportunity to present its case.

17. Pivotal to the case by KAA is that the ICSID Tribunal having made a finding that the 1989 Agreement was procured through corruption and bribery, then an Award founded on it is inimical to Public Policy. The damning findings, as correctly pointed out by Counsel for the KAA are to be found in paragraphs 135,136,137, 157 and 179 of the ICSID Award which I am obliged, for their importance, to reproduce:-

135. In the present case, Mr. Ali asked Mr. Sajjad for advice on arranging the necessary licences and authorizations for the establishment of duty-free complexes in Kenya. Mr. Sajjad informed Mr. Ali that he would arrange meetings with the relevant officials for him. The first meeting was to be with President Moi. Before that audience, Mr. Sajjad informed Mr. Ali that a "persona donation" of US$2 million in cash should be made to the President, and Mr. Ali understood that 'this was payment for doing business with the Government of Kenya". This sum was transferred by Mr. Ali to Mr. Sajjad's account in London in February 1989. Mr. Ali then visited with the President at his residence in Kabarak, and on this occasion US$500,000 in cash was "left in a brown briefcase by the wall". After the meeting, Mr. Ali 'saw that the money had been replaced with fresh corn". Mr. Ali says that he was "uncomfortable with the idea of handling over this "personal donation" which appeared to him to be a bribe". But he adds that he did not have a choice if he wanted the investment contract, and that he paid "the money on behalf of House of Perfume, treating it as part of the consideration for the agreement and documented if fully.

136. Under these circumstances, such as described by Mr. Ali himself, the Tribunal has no doubt that the concealed payments made by Mr. Ali on behalf of the House of Perfume to President Moi and Mr. Sajjad could not be considered as a personal donation for

public purposes. Those payments were made not only in order to obtain an audience with President Moi (as submitted by the Claimant), but above all to obtain during that audience the agreement of the President on the contemplated investment. The Tribunal considers that those payments must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement.

The consequences of the Bribe

137. Kenya submits that as a matter of international public policy, as well as Kenyan and English Law, the 1989 Agreement thus obtained "does not have force of law" and that World Duty Free's claims must therefore be dismissed.

157. In light of Domestic Laws and International Conventional relating to Corruption, and in light of the Decisions taken in this matter by Courts and Arbitral Tribunals, this Tribunal is convinced that bribery is contrary to the International Public Policy of most, if not all, States or, to use another formula, to Transnational Public Policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.

179. In conclusion, as regards Public Policy both under English Law and Kenyan Law (being materially identical) and on the specific facts of this case, the Tribunal concludes that the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of ex turpi causa non oritur actio. These Claims all sound or depend upon the Agreement of 27 April 1989 (as amended); and no other claim is pleaded, including any non-contractual proprietary or restitutionary claim.

18. From these findings the Tribunal drew the following far reaching conclusions:-

1) The Respondent, Kenya, was legally entitled to avoid and did avoid legally by its Counter-Memorial dated 18 April 2003 the "House of Perfume Contract", namely the Agreement of 27 April, 1989 as amended on 11 May 1990, under its applicable laws, the laws of England and Kenya.

2) The Respondent, Kenya, did not lose its right to avoid the said contract by affirmation or otherwise before 18 April 2003 under these applicable laws; and

3) The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract's applicable laws.

19. World Duty Free approaches this argument from four fronts. It is submitted that the case of World Duty Free before the Domestic Tribunal was more than just the 1989 Agreement and that even without that Agreement, the claim would still stand. Secondly, that the Arbitral proceedings at the ICSID were prosecuted by one Nasir Ibrahim Ali, without the Authority of a Duly appointed Receiver of World Duty Free who had taken over the conduct of the affairs and management of the Company since 24th February 1988 when the Court placed the Company under Receivership. Thirdly, the ICSID Judgement was neither pleaded by KAA as part of its Defence before the Domestic Tribunal nor was evidence relating to the Award and the Award itself adduced before the Torgbor Tribunal. Lastly, the ICSID Award is not a foreign judgement in terms of the provisions of Section 3 of The Foreign Judgements (Reciprocal Enforcement Act Cap 43 Laws of Kenya) and was neither recognized nor binding on the Courts in Kenya nor on the Arbitrator and that the Arbitrator reached a correct conclusion in this regard.

20. So what was the place of the 1989 Agreement in the Dispute before the Torgbor Tribunal" Looking at the pleadings alone, the entire claim by World Duty Free revolves around the alleged breach of two sets of Agreements namely, 1989 Agreement and the Lease Agreements of 29th January 2003 (the second Leases). Yet the argument by Mr. Kalove appearing for World Duty Free is that the second leases are independent of the 1989 Contract and in enforcement of Court Decrees.

21. So as to fully appreciate the place of the Decrees in this Dispute, I requested Counsel to avail to this Court copies thereof, Counsel Kalove was kind enough to do so in a Supplementary affidavit sworn on 19th September 2018, and filed a day after on 20th September 2018.

22. The relevant portion of the Decree of 10th July 2002 in Civil Suit No. 192 of 1999 and 464 of 2000 is reproduced below:-

IT IS HEREBY ORDERED BY CONSENT:-

1. THAT Judgement be and is hereby entered against Kenya Duty Free Complex in the sum of US$ 876,970.94 being the agreed unpaid rent(upto November 2001) for the premises leased under the Lease Agreement dated 25th August 1995 and in a further sum of Kshs.1,863,197/- being the unpaid Red (upto November 2001) for the additional space allocated to Kenya Duty Free Complex.

2. THAT the said sum of US$ 876,970.94 shall be paid by monthly instalments of US$ 37,500.00 each commencing from 30th September 2002 until payment in full.

3. THAT the sum Kshs.1,863,197/- shall be settled by monthly instalments of Khs.465,799.25 each commencing from 30th September 2002 until the same is fully liquidated.

4. THAT Kenya Duty Free Complex shall pay future rent monthly in arrears as and when it is due and in default thereof, Kenya Airports Authority shall be at liberty to exercise its rights of re-entry and forfeiture.

5. THAT the lease dated 25th August 1995 be and is hereby renewed in respect of the unsurrendered space as per the terms of the Original contract dated 27th April 1989 between the Government of Kenya and House of Perfume and on terms to be mutually agreed upon the recording of the Consent Order hereof provided that, such terms shall relate only to the rentals as per the renewal clause in the old lease.

6. THAT the additional space already allocated to Kenya Duty Free Complex as per the Consent Order made on 15th August 2000 by Hon. Mr. Justice Hewett shall be governed by a new and separate Lease Agreement.

7. THAT H.C.C.C No. 192 of 1999 and H.C.C.C No. 464 of 2000 be and are hereby marked as settled with no Order as to costs.

23. As is evident Order No. 5 is the relevant Order. It bears repeating and reads;-

5. THAT the lease dated 25th August 1995 be and is hereby renewed in respect of the unsurrendered space as per the terms of the Original contract dated 27th April 1989 between the Government of Kenya and House of Perfume and on terms to be mutually agreed upon the recording of the Consent Order hereof provided that, such terms shall relate only to the rentals as per the renewal clause in the old lease.

There are two limbs to this Order:-

(i) That the lease of 25th August 1995 be renewed in respect to the unsurrendered space as per the terms of the original contract of 27th April 1989.

(ii) That the only terms to be varied were in respect to rentals.

It is therefore not possible to separate the Consent order with the 1989 Agreement which was the foundational Contract.

24. Yet there is also Order No. 6 which reads:-

“6. THAT the additional space already allocated to Kenya Duty Free Complex as per the Consent Order made on 15th August 2000 by Hon. Mr. Justice Hewett shall be governed by a new and separate Lease Agreement.”

Contemplated by this Order is that there would be anew and separate Agreement, distinct from the renewal effected by Order No. 5.

25. However, looking at the Pleadings and Decision of the Torgbor Tribunal, this new Agreement (if unrelated to the Lease of 25th August 1995) was not the subject of the Dispute before it. In the preamble portion of his Decision Torgbor J set out the factual

Summary of the Claim. In paragraph 6 he states:-

"The "First Lease" was renewed by three Lease Agreements all made on 29th January 2003 between "KAA" and "WDF", Claimant and Respondent respectively, for a further term of ten years from 10th January 2002 in respect of "JKIA" and the third to "MIA". These renewal Lease (hereafter collectively referred to as "the Second Leases") were all declared as made pursuant to the GoK Agreement of 27th April 1989 and two Nairobi High Court Decrees Nos.192 of 1999 and 464 of 2000".

The first Lease is the Lease dated 25th August 1995 made pursuant to the 1989 Agreement. The basis of the Claim by Kenya Duty Free were what the Torgbor Tribunal referred to as the second Leases which that Tribunal found as a fact were an extension of the Lease of 25th August 1995. These second Leases are the Leases that the Torgbor Tribunal found to have been breached by KAA (see issue No.5 of The Award).

26. The inescapable conclusion to be reached is that the Dispute before the Torgbor Tribunal revolved around Contracts or Agreements whose foundation was the 1989 Agreement. It is this 1989 Agreement that the ICSID Judgement, whose excerpts I have produced earlier, held to have been obtained through audacious and high level corruption and so the Government of Kenya was legally entitled to void it.

27. How is such an ICSID Award to be recognized and enforced" The answer is to be found in Articles 53 and 54 of The Convention which provides:-

"Article 53,

(1) The Award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50,51 or 52.

Article 54.

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a Court in that State. A Contracting State with a federal constitution may enforce such an Award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgement of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent Court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent Court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the Laws concerning the execution of judgements in force in the State in whose territories such execution is sought.

28. Being a contracting Party, Kenya legislated the Investment Disputes Convention Act (Chapter 522) which declares itself to be a statute to give legal Sanction to the Provisions of the Convention on Settlement of Investment Disputes between States and Nationals of other States. It is an old Statute which commenced on 22nd November 1966. On recognition and enforcement of Awards made under that Convention Section 4 provides:-

"An Award rendered pursuant to the Convention and not stayed pursuant to the relative provisions of the Convention, shall be binding in Kenya, and the pecuniary obligations imposed by the Award may be enforced in Kenya as if it were a final Decree of the High Court".

This can be contrasted with the Statutes from other jurisdictions. For example the Nigerian provides as follows:-

“Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for Settlement of Investment Disputes, a copy of the award duly certified by the Secretary General of the Centre aforesaid, if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final Judgement of the Supreme Court, and the award shall be enforceable accordingly”.

29. Unlike in Nigeria, where a copy of the Award duly certified by the Secretary –General of the Center has to be filed in the Supreme Court for the Award to be recognized for enforcement, the Kenyan Statute does not seem to require any formality for the Award to be recognized. That said it would be inevitable that some formal steps be taken for such an Award to be enforced in Kenya as a final Decree of the High Court. But in respect to recognition the Provisions of Section 4 are plain that an Award rendered pursuant to the Convention and not stayed pursuant to the Provisions of the Convention shall be binding in Kenya. The existence of the Award is sufficient. In arriving at this conclusion I have reflected on the distinction between a “recognition” and “enforcement” of an award. Often used as though they are inseparable, the two have different meanings and purpose. Recognition is the legal acknowdgement of the binding nature and finality of an Award .On the other hand, Enforcement is the process of compelling the losing Party to abide by the Award. This would in some instances be through the coercive process of Execution. Enforcement will invariably require the taking of a formal step. This may not be the case for Recognition where, like in the Kenyan Statute, the ICSID Award is Recognized when it is Rendered (and has not been stayed under the Rules of the Convention).

30. But let me, for a moment, accept the argument of Kenya Duty Free that the ICSID Decision has not been formally recognized as required by Articles 53 and 54,would that take away the efficacy of the findings made therein" Thankfully this Court need not strain looking for the answer because this is a debate that has arisen elsewhere. This Court is contented to identify itself with the following finding of the Supreme Court of India in the Decision of Satish Kumar & others vs. Surinder Kumar & others [1970] AIR 833:-

“The true legal position in regard to the effect of an Award is not in dispute. It is well settled that as a general rule, all claims which are the subject –matter of a reference to Arbitration merge in the award which is pronounced in the proceedings before the Arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject matter of the reference. As has been observed by Mookerjee, J, in the case of Bhajahari Saha Banikya v. Behary Lal Basaka (2) ‘the award is, in fact, a final adjudication of a Court of the ‘parties’ own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an Award, which is on the fact of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive… in reality, an Award possesses all the elements of vitality, even though it has not been formally enforced, and it may be relied upon in a litigation between the parties relating to the same subject matter”. This conclusion, according to the Learned Judge, is based upon the elementary principle that, as between the parties and their privies, an Award is entitled to that respect which is due to the judgement of a Court of last resort”.

31. The Award is a final adjudication of the matters submitted to the Tribunal and is conclusive of the merits of the controversy that is submitted for determination unless impeached or set aside. Whilst formal Recognition of an ICSID Award enables a Party to enforce the Award as a Decree of the Court of the Member State, the mere fact that the formal step has not been undertaken does not take away the force of the pronouncement made by the Tribunal on the rights of the parties. The conclusion I draw is that even if it had not been formally recognized, the ICSID Award was a final pronouncement in respect to the illegal nature of the 1989 Agreement and a determination that the Kenya Government was entitled to avoid it.

32. It is now apt to discuss a Special feature of an ICSID Award which would have a bearing on its relationship with the Proceedings before the Torgbor Tribunal. Under Article 53 the Convention declares that an ICSID Award is binding on the parties and is not subject to any appeal or remedy except those provided in the Convention. Article 54 enjoins the Member States to recognize such an Award as binding and if involving a pecuniary obligation for it to be enforced as if it were a final Judgment of a Court in that State. Such an Award can only be revised or annulled under the limited grounds set out in Articles 51 and 52 respectively and whose discussion would be beyond the scope of this decision. The point to be underscored ,given its superior hierarchical status, is that the ICSID Award is binding not only on any Tribunal in Kenya but on all Courts in respect to the matters it pronounces itself on.

33. An argument had been put forward that the proceedings before the ICSID Tribunal were unlawfully prosecuted by Mr. Ali

without the Authority of the duly appointed Receiver of World Duty Free as the Company was under Receivership. Now, the Receivership has since been lifted but we are not told of any effort by either the Receiver or the Company to have the ICSID Award set aside. Article 51 gives a right to party to seek revision of an Award in the following terms:-

"(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request."

For now I have to find that the Award has not been impeached and was binding on the Torgbor Tribunal.

34. It is no doubt true that KAA did not plead the ICSID Award as a Defence. That said the existence of the ICSID Award was brought to the attention of the Torgbor Tribunal and the Tribunal dedicated at least two paragraphs of its Decision to the International Award in the following manner:-

"(4) The ICSID Judgement.

Respondent Counsel on record hinted, during the hearing of a previous jurisdictional application, at his intention to produce in the arbitration what he termed "an ICSID Judgement". A foreign judgement or award is not automatically binding or effective in Kenya. In the absence of a local authoritative precedent, a Kenyan tribunal or Court may be persuaded to consider or urged to accept a foreign precedent. Such resort, primarily to a Commonwealth or analogous jurisdiction, is always dependent on relevance to the issue between the parties and the persuasive force of the precedent.

"ICSID" abbreviates the International Convention for the Settlement of Investment Disputes. I find that there is no mention of or reference to an "ICSID Judgement" in the list of agreed issues to be determined by the Arbitral Tribunal; that no issue relating to an "ICSID Judgement" had been pleaded in the Defence Statement, and that there was no statement of the relevance of an "ICSID" Judgement" in this arbitration. A foreign Judgement or award, whatever this purports to be, has to be registered for recognition and enforcement in Kenya. There is no evidence of this or of compliance with the legal and formal requirements for the authentication, recognition and enforcement of a foreign award of judgement in Kenya for purposes of this arbitration. There is therefore no basis of foundation in pleading, evidence or agreement for this Arbitral Tribunal to take cognizance of an "ICSID Judgment" or an unlisted ICSID issue. Subject to the cautionary caveat occasioned by the Respondent's withdrawal from the arbitral proceedings an Arbitral Tribunal does not normally roam around to find and determine issues the parties have not themselves raised for determination, usually by agreement.

In looking closely over all at the Respondent's averments in the material before the Tribunal the conclusion is irresistible that they are more in the nature of afterthoughts, improperly founded or simply misconceived. The agreement and leases concerned were drafted, executed and implemented over many years by both the Government of Kenya and the Kenya Airports Authority. What "GoK" and the "KAA" contemplated were and are expressed in the recitals to these contractual instruments and it is simply inconceivable that "GoK' and "KAA" and the several Government Ministries and the Technical and Professional Advisers involved were all outwitted in this exercise or that the Claimant obtained sole and exclusive rights from the GoK and the Respondent without consideration. Consider, for example, recitals A and B of the GoK Agreement already quoted with regard to the enhancement of Kenya's International reputation and the promotion of tourism generally and the Government's desire to construct, maintain and operate to the highest International Standards Duty Free Complexes at "JKIA" and "MIA", and the furtherance of the friendly relations existing between the Republic of Kenya and Dubai, United Arab Emirates."

35. While the ICSID Award was unpleaded, the same was brought to and caught the attention of the Arbitrator. Whilst arguing that the ICSID Award was not placed as formal evidence before the Torgbor Tribunal, Counsel for Kenya Duty Free nevertheless concedes that it was to be found in at least three bundles of Documents placed before the Tribunal. The language used by the Arbitral Tribunal does not suggest that it did not see and read the Award or at any rate was unaware of it.

36. Under Section 35 of the Arbitration Act, an Arbitral Award will be set aside if it is in conflict with Public Policy of Kenya. In similar vein the High Court will refuse recognition or enforcement of an Award if its recognition and enforcement is contrary to Public Policy (Section 36).

37. Not too long ago Onguto J. added his voice on what Public Policy entails. The Judge in Open Joint Stock Company Zambeznstony Technology vs. Gibb Africa Limited [2001] held;-

"*I may perhaps add that Public Policy, in my view, generally refers to the set of Socio-cultural, Legal Political and Economic values, Norms and Principles that are deemed so essential that no departure therefrom can be entertained. Public Policy acts as a shield for safeguarding the Public good, upholding Justice and Morality and preserving the deep rooted interest of a given Society*."

This description even if not exhaustive captures the essence of what Public Policy entails.

38. The very fact that Sections 35 and 36 of The Arbitration Act frowns upon an Award that is contrary to Public Policy is in my view a prescription to Arbitral Tribunals that however much their Awards should enjoy autonomy, they will not be tolerated as long as they are inimical to Public Policy. Whilst contracting Parties are free to choose Arbitration as the forum for Dispute Resolution, they cannot be permitted to accept Awards that afflict Public Policy. I have to find that it is for this reason that once it is brought to the attention of an Arbitral Tribunal (even if not pleaded) that it is about to make a pronouncement that runs against Public Policy, then the Tribunal ought to pause and interrogate the allegation so as not to cross the Red line.

39. Had the Torgbor Tribunal done so then it would have been obvious that to allow the claim in the manner it did was to approve a claim whose very foundation had been declared to have been obtained through Bribery and Corruption by a Tribunal whose Decisions are taken to have the binding force of a final Judgment of a Court in Kenya. As for the Claimant it must be some act of boldness to press such a Claim when an International Tribunal had pronounced itself as to its legality.

40. This Court takes the view that the Award cannot stand and must be set aside on this singular ground. It would be needless to consider the matter any further.

41. The Application dated 3rd April, 2017 is allowed with costs to the Applicant.

Dated, Signed and Delivered in Court at Nairobi this 5th day of October, 2018.

F. TUIYOTT

JUDGE

PRESENT;

Mutua for Applicant

Kalove for Respondent

Nixon - Court Assistant