REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CAUSE NO. 482 OF 2014

CHANIA GARDENS LIMITED ……APPLICANT

Versus

GILBI CONSTRUCTION COMPANY LIMITED……1ST RESPONDENT

FESTUS M. LITIKU ……2ND RESPONDENT

RULING

Removal of arbitrator or challenge of jurisdiction

[1] The application dated 2nd October, 2014 is a bifurcation of request of removal of the arbitrator and challenge of arbitrator's jurisdiction. It also seeks for stay of the arbitral proceedings. These are important matters of law and which I will address fully later. Meanwhile, the grounds advanced for the application are; a) that the arbitrator lacks jurisdiction; he arrogated himself jurisdiction he does not have when he rejected the Applicant's application for expansion of his jurisdiction; b) that the arbitrator is guilty of misconduct and should be removed. It appears to me that all complaints brought to this court emanates from the arbitrator's ruling delivered on 10th September 2014 in which he dismissed the Applicant's Application for expansion of the Arbitrator's jurisdiction to receive, hear and determine the 1st Respondent's Claim as well as the Applicant's Counter-claim. According to the Applicant, some of the points of contention in the said ruling are *inter alia* the following holdings, that:-

1. ***The objection to the Arbitrator's jurisdiction over the Claimant's claim fails;***

2. The Tribunal has jurisdiction to receive and consider the Claimant's claim;

3. The Applicant's application and submissions for the Tribunal to hear and dispose of its Counterclaim is dismissed as this can be covered under ambit of item 2 above.

The Applicant is convinced that the Arbitrator did not have jurisdiction after his ruling, thus, the fixing of a date for directions on the hearing of the dispute between the Applicant and the 1st Respondent just added insults to injury.

[2] The Applicant made length and elaborate submissions in support of its case. The Respondent similarly made elaborate submissions. All these submissions are part of record and I have considered them carefully. The Affidavit of Christopher Gacheru sworn on 2nd October, 2014 expansively sets out facts which the Applicant believes led to the dispute herein. The Applicant also provided important dates and events which took place before the dispute was referred to arbitration. Ultimately, the Applicant laments that, despite all efforts by the Applicant to settle the dispute over certificates numbers 12 and 13, the 1st Respondent wrote to the Applicant, a letter dated 17th October, 2012 claiming immediate payment of Kshs. 37, 773,338.00 on account of Certificates Nos. 12 and 13, in default whereof legal action would be taken. The Applicant saw this to be in breach of Clause 45.3 of the Agreement which requires that a notice of dispute be served first before any steps are taken to resolve the dispute. To the Applicant the reference of the dispute to arbitration had not, therefore, accrued and so the arbitrator has assumed jurisdiction on matters outside the referred dispute. Articles 45.3, 45.4 and 45.5 of the Agreement provide as follows;-

45.3 – Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to dispute.

45.4- Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without assistance of third parties

45.5- In any event, no arbitration shall commence earlier than ninety days after the service of notice of a dispute or difference*.*

[3] And since the Arbitrator rejected the application to extend his jurisdiction, he can only act on the matters before him without jurisdiction. The Applicant cited the decision by Platt JA in the case of **Nyangau vs. Nyakwara [1986] KLR 712 at page 720** to support the argument that an arbitral tribunal can only draw its jurisdiction from the terms of reference or by agreement of parties in enlarging his scope. They also cited the decision of Ringera J (as he then was) in the case of **Express Kenya Limited vs. Peter Titus Kanyango, Civil App. No. 963 of 2002**, on an Award that was outside the scope of the arbitration agreement and where the arbitrator had exceeded or gone outside the scope of the reference. They quoted literary works on the subject; page 30 of ***Arbitration Law and Practice in Kenya*****, Mohammed Nyaoga** that:-

"*Jurisdiction can also be determined on the basis of the subject matter of the dispute. The jurisdiction of arbitral tribunal is limited to the dispute referred to the tribunal*."

And at page 52 **of *Arbitration Law & practice in Kenya*, Steve Gatembu Kairu,** that;-

"***The existence of a dispute is a prerequisite to invoking the arbitration agreement. A dispute has been defined as a difference of opinion. Whether or not there is a dispute for reference to arbitration can itself invite, and be a source of, controversy***."

The Applicant, therefore, concluded that jurisdiction is everything, and without it the arbitral proceedings herein were invalid. They were of the view that jurisdiction could be raised at any time. They stated that they even raised it before the arbitral tribunal. Hereunder, see a plethora of judicial authorities relied upon by the Applicant:-

(a) **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1986-1989] 1 EA 305**

CAK , Nyarangi, JA stated:

*" **I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, the court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence**."*

" ***By jurisdiction it is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means, if no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the fact exists. Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"***

(b) **In the Matter of Advisory Opinions of the Court under Article 163 of the Constitution (Constitutional Application No. 2 of 2011 at para. 30)**, the Supreme Court stated:

"...a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavors to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity."

(c) In **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 Others, Supreme Court Civil Appeal (Application) No. 2 of 2011,** the Supreme Court rendered itself as follows regarding a Court's jurisdiction:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

[4] The Applicant did not stop there. It submitted that by refusing to admit the Applicant's Counter-claim for Arbitration, the arbitrator acted contrary to the Chartered Institute of Arbitrators, CIArb (Kenya Branch) Arbitration Rules. Rule 2(2) provides as follows:-

"***Failure to send a Response shall not prelude the Respondent from denying the claim nor from setting out a counter-claim in its statement of Defence***"

Rule 7(2) (3) & (4) of said CIArb (Kenya Branch) Arbitration Rules states;-

"Within 21 days of the receipt of the statement of claim, the other party or parties if there is more than one(" the Respondent"), shall send to the Arbitral Tribunal a statement of defence

stating in sufficient detail which of facts and contentions of law in the statement of case he admits or denies, on what grounds, and on what other facts and contentions of law(if any) he relies. If he has a counterclaim, or asserts a set off, he shall set it out in his statement of defense as if it were a statement of case."

"Within 14 days of receipt of the statement of defence, the Claimant shall send to the Arbitral Tribunal a statement of reply.

"Where there is a counterclaim, the claimant shall send to the Arbitral Tribunal a statement of defence within 14 days of its receipt"

The Applicant is of the view that its counterclaim cannot be treated as a mere response to the 1st Respondent's claim.

[5] On misconduct they cited the case of **Josephat Murage Miano & Another vs. Samuel Mwangi Miano & Another [1997] eKLR** where the court held that;-

"***It would appear to us therefore that failure by the arbitrators to adjudicate the real dispute before them amounted to misconduct in the hearing of the matter they had to decide and that entitled the appellants to have the arbitration set aside."***

They continued; that at paragraph 15 of the ruling made on 10th September, 2014, the Arbitrator has concluded that the Applicant is liable to pay the amounts claimed under certificates numbers 12 and 13 less amounts in doubt. This statement was made without hearing the parties. Yet, the conclusion amounts to making a final order at an interlocutory stage. The Arbitrator further comments on the Applicant's quantity surveyor at paragraph 15 of the ruling that;- ***"I also notice that the Quantity Surveyor hired by the Respondent did not advise him (the Respondent) to partially honour the certificates for the works that were not in doubt. An independent quantity surveyor ought to have offered such an advice as a sign of good faith."*** These comments are unsuited given the stage of the matter, are unwarranted and amounts to misconduct of the Arbitrator. The issue for determination before the Arbitrator was jurisdiction and not judgment on admission or the credibility of a witness. This comment robs the Arbitrator of his jurisdiction to determine the actual dispute before him. There is no point of parties canvassing the matter before the Arbitrator who has made conclusions on the main dispute before him and even the credibility of witnesses. They relied on the decision of the Court of Appeal in **Nyang'au vs. Omosa Nyakwara[1986] KLR 712** that**:**

"***Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, 'misconduct' in the hearing of the matter which he has to decide, and misconduct which entitles the persons against whom the award is made to have it set aside"***

[6] The Applicant sought support in the literary work by On existence **Steve Gatembu** at page 54 of ***Arbitration Law and Practice in Kenya*** that;

"*The test whether a person is in position to act judicially and without any bias has been suggested to be:-*

" do there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine…(the dispute)…on the basis of

***the evidence and arguments to be adduced before him*"**

[7] Eventually, the Applicant stated that the principles for the removing of arbitrator for misconduct were set out in **Bremer vs Ets Soules[1985]1 Llyod's L.R.160,** where Mustill J held;

"There are three material situations in which the High Court has power to remove an arbitrator for 'misconduct' under section 23 of the Arbitration Act, 1950.

(1) where it is proved that the arbitrator suffers from what may be called 'actual bias'. In this situation, the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavorably towards him, for reasons peculiar to that party, or to a group or of which he is a member. Proof of actual bias entails proof that the arbitrator is in fact incapable of approaching the issues with the impartiality which his office demands.

(2) where the relationship between the arbitrator and the parties, or between the arbitrator and the subject-matter of the dispute, is such as to create an evident risk that the arbitrator has been, or will in the future be, incapable of acting impartially. To establish a case of misconduct in this category, proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in circumstances where there is manifest risk of partiality. This may be called a case of 'imputed bias'

(3) where the conduct of the arbitrator is such as to show that, questions of partiality aside, he is, through lack of talent, experience or diligence, incapable of conducting the reference in a manner which the parties are entitled to expect.

[8] According to the Applicant, it is clear that the Arbitrator has already made a decision on the dispute. This is evident in the ruling made on 10th September, 2014 and his conduct is prejudicial to the interest of the Applicant who has since lost confidence in just determination of the Arbitral proceedings before the 2nd Respondent.

[9] The Applicant did not end without submitting of the objection which has been raised on its application, which it stated was a matter of form and Procedure and should not defeat the application. It posits that under Section 17(6) of the Arbitration Act this court has the jurisdiction to entertain the appeal.

"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."

Rule 3(1) of the Arbitration Rules, 1997 provides that;

Applications under section 12,15,17,18,28 and 39 of the Act shall be made by originating summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date.

This form and procedure is fortressed by the provision of Order 37 of the Civil Procedure Rules, 2010. The Applicant admitted that commencement of these proceedings by way of Notice of Motion was by error on part of the counsel and should be excused as "undue technicality"; does not go to the root or substance of the dispute before the Court. The error is of form can be corrected by way of amendment by replacing the title Notice of Motion with Originating Motion. The Applicant appealed to the discretion of

the court to overlook the error; for this, seethe case of **Shah vs. Mbogo [1967] E.A 116** at 123, Harris J.; **Patrtel vs. E.A. Cargo Handling Services Limited [1974] E.A. 75** at 76, Duffus P. stated as follows;

"*There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just.*

The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

[10] The Applicant dismissed the Preliminary objection raised by the 1st Respondent as unsustainable and not a true Preliminary Objection in terms of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** which set the threshold as follows that;-

"*A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact to be ascertained or what is sought is the exercise of judicial discretion"*

The objection should be dismissed. By way of passing, the Applicant stated that the Arbitrator has not opposed this application or clarified the ruling made on 10th September, 2014. The Applicant seems to suggest that the law has developed beyond the decision by Justice Ringera (as he was then) in **Telcom (K) Ltd vs. Kamconsult Ltd [2001] 2 EA 574** where he held that it is not the role of the court to terminate the arbitral proceedings. The enactment of sections 1A and 1B of the Civil procedure Act, places a duty on this honorable court to provide equitable, expeditious and proportionate justice. According to Section 17(6) of the Arbitration Act, the decision of this honorable court is final. Once it is established that the arbitral tribunal lacks jurisdiction, there is nothing to stop this honorable court from issuing directions as sought in the Motion dated 2nd October, 2014.

The 1st Respondent opposed the application

[11] The 1st Respondent has filed a Notice of Preliminary Objection and a Replying Affidavit both dated the 10th day of October, 2014. The 1st Respondent argued that the Preliminary Objection and replying affidavit raise five fundamental points of law, namely:-

i. **THAT the Notice of Motion is incompetent, irregular and improperly before Court, the same not being predicated in any way on a suit contrary to Rule 3 and 11 of the Arbitration Rules, 1997 and Order 3(1) and 37 of the Civil Procedure Rules 2010.**

ii. **THAT the Notice of Motion is an abuse of the process of Court for being *res judicata* an earlier application having been dismissed by the Arbitrator on 8th March 2013 and there being no appeal therefrom and by dint of Section 17(6) of the Arbitration Act, 1995 the same is spent and cannot be revisited.**

iii. **THAT the Application is incompetent in so far as it seeks to terminate the mandate of the Arbitrator yet the Arbitrator's ruling sought to be impugned did not seek such orders. An application for termination of the Arbitrators mandate under sections 13, 14 and 15 of the Arbitration Act, 1995 must first be heard by the Arbitrator.**

iv. **THAT the orders of stay of proceeding sought by the Applicant are contrary to the express provisions of Sections 14(8), 17(8) of the Arbitration Act, 1995 and hence this Court lacks**

the jurisdiction to grant the same.

v. **THAT whereas the Application is couched as though it is one for challenge of an Arbitrator, under Sections 13, 14 and 15 of the Arbitration Act, 1995, this Court lacks jurisdiction to entertain such application which should in the first instance be made before the Arbitrator.**

vi. **THAT the Applicant has come to Court with unclean hands having failed to candidly and frankly disclose all material matters to court and is therefore underserving of the Court's equitable intervention or indulgence, and is otherwise without merit.**

[12] The 1sst Respondent stated that the Motion herein is incompetent, irregular and improperly before this Honourable Court, the same not being predicated in any way upon a suit contrary to rule 3 and 11 of the Arbitration Rules, 1997 and Order 3(1) and 37 of the civil Procedure Rules, 2010. The Arbitration Rules 1997 were promulgated pursuant to Section 40 of the Arbitration Act by the Honourable Chief Justice to govern the manner in which parties may seek Court intervention in Arbitration. Rule 3 reads:-

"(1) Application under Section 12,15,17,18, 28 and 39 of the act shall be made by Originating Summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date

(2) Another Application arising from the application made under Sub-rule (1) shall be made by summons in the same cause and shall be served on all parties at least seven days before the hearing date" (emphasis supplied).

The wording of rule 3 is mandatory in nature and prescribes an originating summons to commence suit in which applications including one under Section 17 of the Act (on the jurisdiction of the Arbitrator) should be brought. In essence a party aggrieved by an interlocutory ruling of an Arbitrator on an objection to his jurisdiction, such as the one here, the Applicant must come to Court under Section 17(6) of the Act only through Originating Summons.

[13] Rule 11 of the Arbitration Rules, 1997 complements Rule 3 , thus:-

"So far as is appropriate, the civil procedure Rules shall apply to all proceedings under these Rules".

These Rules do not contemplate commencement of suit by way of a Notice of Motion for a complaint under Section 17 of the Arbitration Act. The mode prescribed by law is by way of originating summons. And Order 37 of the Civil Procedure Act, (originating Summons) will by dint of Rule 11 of the Arbitration Rules, 1997. The application is, therefore, incompetent and should be struck out in *limine.*There is an increasing tendency to attempt to explain away substantive failures and incompetence as mere technical slips. However, the Court of Appeal in the case of **M.S J.V.S.N.K (2010) eKLR**, (Githinji, Onyango-Otieno and Nyamu JJA) delivered themselves thus:-

"While the enactment of the "double O principle" is a reflection of the central importance the court must attach to case management in the administration of justice we wholly endorse the holding in the Australian case of Puruse Pty limited v Council of the City of Sydney [2007] NSWLEC 163 where the Court underscored that the Court in exercising the power to give effect to the principle, it must do so judicially and which proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going

to be panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained" (emphasis original).

Also in the case of **Hunker Trading Company Limited v Elf Oil Kenya Limited 2010** eKLR, the Court stated that:-

"Under Section 1A(3) the applicant has a duty to obey all Court processes and orders. In our opinion, coming to us having abused the process in the superior Court violates the overriding objective (which in another case has been baptized the (double "O" principle) and in this case, we have chosen to call it (the 0_2 or the oxygen principle") because it is intended to re-energize the process of the courts and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this Court's resources (time) and also an abuse of its process. …In conclusion, we wish to observe that the "0_2 principle" which of necessity turns on the facts of each case is a double faced and for litigants to thrive under its shadow they must place themselves on the "right side". In the circumstances of this matter, the applicant is clearly on the "wrong side" and for this reason the principle must work against it … if improperly invoked, the "0_2 principle" could easily become an "unruly horse".

The 1st Respondent, therefore, submitted that the Applicant cannot benefit from the overriding objective of the Court since it is clearly on the wrong side of the 0_2 principle. More so, because; the Applicant has admitted in its written submissions that this suit is incompetent as it was initiated by a notice of motion rather than an originating summons. They cited the decision by Majanja J, in the case of **Francis Gitau Parsimei & 2 Others v National Alliance Party & 4 other (2012) eKLR;** the decision of the Court of Appeal in its decision in **Board of Governors, Nairobi School v Jackson Ireri Geta (1999) KLR** quoted in Kasango J's decision delivered as recently as 3rd April, 2014 in **Fidelity Bank Limited v John Joel Kanyali (2014) eKLR** that:

"The use of the term "summons" in the definition of the term "pleadings" must be read to mean "originating summons" as that is a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and Rules made thereunder. Similarly, as stated by the Court of Appeal, I say notice of motion is not a manner prescribed for instituting a suit. It cannot be a pleadings as defined in Cap 21 and its Rules. Accordingly there is no suit before Court which shit can sustain the notice of Motion. I do therefore uphold the objections raised by the Respondent"

On that basis, the 1st Respondent urged the Court to strike out the suit.

[15] The 1st Respondent argued that the issues being raised in the application are *res judicata* as similar application was made on 4th February, 2013 challenging the Arbitrator's jurisdiction on the very same grounds. Mr. Ezekiel Wanjama the Applicant's advocate prosecuted the objection on jurisdiction and a ruling was delivered by the Arbitrator on the 8th day of March, 2013. Proceedings of 4th February, 2013 are captured and produced herein as annexure "HGV 1" to the Affidavit in reply by **Harish Gopal Vekaria** and the resultant ruling is annexed thereto in which the Applicant's objections were dismissed. There was no appeal or challenge preferred by the applicant against the said ruling. Litigation must come to an end. In the absence of an appeal or review application, a decision is deemed final and accepted. It constitutes an abuse of the process of Court or a tribunal to vex a party more than once over the same cause of action. They cited the decision of Havelock J in **Ridgeways Holding Co. Ltd v Madison Insurance Co. of Kenya ltd (2014) eKLR,** and the Court of Appeal in the case of

Hunker **Trading (supra)** and the case of **Hunker (supra).** In the latter case, the Court of Appeal stated that;

"The violation (of the overriding objective) arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this Court's recourses (time) and also an abuse of its process… perhaps it is important for us to observe that litigants and their advocates should note that in "O_2 principle" they have a powerful ally where they are advancing it aim and a powerful adversary where they are bent on subverting its aims".

[16] The 1st Respondent raised a pertinent issue; that the application before the court is an entirely different application from the one before the Arbitrator. Court's jurisdiction as donated by section 17(6) of the Arbitration Act, 1995 appellate or to review a ruling of an Arbitrator on a challenge to his jurisdiction. The first port of call to challenge the jurisdiction of an Arbitrator is the Arbitral tribunal in line with the principle that is commonly referred to in arbitration parlance in the german phrase, *Kompetenz Kompentenz.* Therefore the jurisdiction of this Court on matters of challenge of an Arbitrator is not original in nature. The High Court is expected to hear appeal or review application of arbitral tribunal's decisions on challenge. It behooves the party moving the High Court under section 17(6) of the Arbitration Act, 1995 to present the very same application for the High Court's consideration, and the High Court may affirm or set aside the Arbitrator's findings. How else can a Court either fault or agree the tribunal's decision when the appeal placed before it does not accord with or substantially departs from the matters which were considered by the tribunal" Creative innovation or departure from one's original application therefore renders such an appeal incompetent. A party cannot introduce new matters at this stage. The Applicant purports to now seek the removal of the Arbitrator. See prayer no 3 of the motion. This prayer was not presented before the Arbitrator. Under Section 14 of the Arbitration Act, 1995 a challenge on an Arbitrator seeking his removal must first be heard by the Arbitrator. It is not open for a party to go directly to the High Court least of all in the guise of an appeal from an entirely different application on jurisdiction. The logic of reserving the High Court's jurisdiction to appeal or review is so as not to deny a party the benefit of the right of appeal, for its decision is final according to sections 14(6) and 17(7). Prayer number 4 of the motion equally fails this test. It was never before the Arbitrator. The motion before your lordship is an entirely different one from that urged before the Arbitral tribunal. Strike out Prayers no. 3 and 4 of the motion for being improperly before this Court.

[17] The request for stay did not escape the scrutiny of the 1st Defendant. It argued that the prayer for stay pending the determination of the motion is spent. It is also apparent from a reading of the enabling statute, Sections 14(8) and 17(8) of the Arbitration Act 1995 that no orders of stay of the Arbitral proceedings can issue while an appeal on interlocutory matters is pending before the High Court. What the Applicant is asking the Court to do through a stay application runs afoul the express wording of statute and cannot therefore be countenanced.

[18] Again, the 1st Respondent argued, that the Applicant had acknowledged and indeed still acknowledges herein that the Arbitral tribunal lacks jurisdiction to entertain its counterclaim but still insist that the tribunal should expand its jurisdiction on the counterclaim contrary to the very basic and elementary principles of law that jurisdiction is conferred by law or with consent of the parties. The Arbitrator cannot confer upon himself jurisdiction or otherwise "expand" his jurisdiction. Jurisdiction is conferred by the Constitution, statute or law and in private arbitration, by agreement and cannot be expanded by the tribunal *suo moto*. They fortified this position by citing the Supreme Court in its decision in the dictum in **Advisory opinion of the Supreme Court under Article 163 of the Constitution (Applications 2 of 2011),** as follows:-

… a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of parliament, where the legislation is clear and there is no ambiguity"

[19] In sum, the 1st Respondent is convinced that the Applicant is engaged in forum shopping by seeking to terminate the mandate of the Arbitral tribunal merely because the tribunal has ruled against them. The conduct of the Applicant throughout the Arbitral proceedings is important to consider. The Applicant has been raising objection after another and filing frivolous applications with the single intention of disrupting, diverting attention, scuttling and ultimately delaying the timeous and expeditious determination of the matter before the tribunal. It is clear that the Applicant is not ready to have the matter before the Arbitrator heard on its merits, or at all. The applicant has made at least four unmerited and frivolous Applications before the Arbitral tribunal whose intention has always been to delay the conclusion of the Arbitration. The Arbitration cause was commenced in January, 2013 and is yet to be set down for hearing because of the Applicant's consistent frivolous applications. This is contrary to Rule 33 of the Chartered Institute of Arbitrators, **CIArb Arbitration Rules 2012** which enjoins the parties to ensure and do all they can to aid an expeditious and costs effective disposal of the Arbitration cause. Expeditious determination of the disputes is an attribute that attracted the parties to arbitration in the first place.

[20] According to the 1st Respondent, the Applicant should simply seek clarification of the 10th September 2014 if it thinks it is not clear. Section 34 of the Arbitration Act 1995 provides for the right of any party to apply to the Arbitral tribunal for clarification or correction of an award (including rulings which are interim awards). This right is also provided for under **Rule 21 of the Chartered Institute of Arbitrators, CIArb Arbitration Rules 2012** which apply to the Arbitration cause the subject hereof. No such application or clarification was ever sought by the applicant from the Arbitrator. But the 1st Respondent thinks that the ruling was crystal clear that whereas the Arbitrator declined to "expand" his jurisdiction (because he has no such power) he would entertain the matters raised in the counter-claim as rebuttal or controverting the allegations in the claim. See finding No. 3 and 2 of the Arbitrator's Ruling contemporaneously with and within the context of his powers to re-open and re-evaluate the certificates of payment. The request for the reopening of payment certificates No. 12 and penultimate certificate no. 13 are live issues before the Arbitrator.

[21] They concluded by examining Article 45 of the Joint Building Contract (JBS) 1999 edition; the subject of the Arbitral proceedings forming the basis of this case, provides for Arbitration as the elected dispute resolution mechanism thereunder and the manner in which arbitral proceedings shall originate. They asserted that the Applicant's interpretation of Article 45 of the JBC contract is misleading in all material respects. The 1st Respondent fully complied with the said provisions, issued the requisite notices, attempted amicable settlement and ultimately commenced the Arbitration cause. The Applicant has not only acknowledged the existence of the said notice but also that the Arbitral tribunal has since found the same to properly confer jurisdiction upon him to hear and determined the Claimant's claim. Several attempts to resolve the matter amicably including Meetings at Silver Springs Hotel Nairobi were unsuccessful, hence, the matter was referred to arbitration after due notice had been given. All issues being raised here can only be resolved through evidence in the tribunal.

[22] The 1st Respondent refuted all claims on misconduct and contended that alleged bias was answered by the Arbitrator's self-evident ruling and record filed together with the replying Affidavit. They also relied on the decision of Gikonyo J in **Central Bank v Zadok Furniture Systems (2014) eKLR** where the court stated that there must be proof of "actual" and not "perceived" bias. The allegation of basis against the Arbitrator Mr. Festus Litiku has no basis or merit and should be dismissed. They concluded by submitting that this application is a diversionary tactic, a red herring, and a miscalculated

attempt at diverting attention from the real issues before the Arbitral tribunal, particularly that the applicant is in multiple breach of the contract and has failed or adamantly refused to pay sums valued by its own project Quantity Surveyor and certified by its own project Architect under certificates number 12 and 13, and persists in such refusal. The Applicant's supporting Affidavit largely recites matters which are disputed and currently before the tribunal for determination. They are not and cannot be the subject of the application before this court which has no jurisdiction to determine the merits or otherwise of the claims in the pending Arbitration cause. The court should dismiss the application with costs to the 1st Respondent.

THE DETERMINATION

Issues

[23] I stated at the beginning that the prayers sought and the arguments put forth by the Applicant exemplify a bifurcation of an application for removal of the arbitrator and a challenge of jurisdiction of the Arbitrator. The twinning of the two requests, therefore, means I should determine the legal implications of such bifurcation, and eventually whether I should determine the merits thereof; removal and lack of jurisdiction on the arbitrator. The objections by the 1st Respondent, thus, makes a lot of sense here and I will determine each of the points raised. These are the issues I see which require determination.

[24] But there are some issues which will need immediate decision. The Applicant stated that the Arbitrator despite being served with the application did not file any response. The court dealt with this subject in the case of **Central Bank v Zadok Furniture Systems (2014) eKLR** and I am content to cite the relevant parts of the decision as hereunder:-

> ***Arbitrator's entitlement under s. 14(4)***
>
> ***[25] Section 14(4) provides as follows:***
>
> ***(4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.***
>
> ***[26] This subsection has been subject of much debate even in this application. It appears two schools of thought have emerged. On the one hand, the 1st Claimant submitted that the subsection uses the word ''shall'' thereby making it mandatory that an application under section 14(3) of the Arbitration Act cannot be determined before the arbitrator has been heard. On the other hand, the arbitrator argued in his letter to the Deputy Registrar dated 15th May, 2014 that his entitlement to appear and be heard is not mandatory but optional. He may or may not exercise it. Therefore, as an arbitrator, he is not under compulsion to file a response or within any time limit. And I presume following the arbitrator's thread of argument, he is not under compulsion to be heard. Based on his interpretation of section 14(4) of the Arbitration Act, he found fault with the order of this court issued on 6th May, 2014 requiring him to file a response and to appear to be heard by the Court. According to him, the word ''shall'' in the order might be mistaken for contradicting the express provisions of the Act which puts the legality, correctness and effect of the said order in issue before the court.***
>
> ***[27] I take the following view on the matter. The word ''shall'' in the context of section 14(4) of the Arbitration Act refers to the right of the arbitrator to appear and be heard, and is a statutory expression of a much a higher constitutional principle of justice; that no party should be condemned unheard. The mandatoriness in the word ''shall'' as used in the subsection, is to***

ensure that the Court gives the arbitrator the opportunity to be heard. When the entire subsection is read, it becomes clear that there is a misconception in the submissions by the 1st Claimant in relating the word ''shall'' to the disposal of the application rather than to the arbitrator's entitlement. In that thinking, the word ''shall'' in the subsection, does not make the exercise of the entitlement to appear and be heard, mandatory. The arbitrator may or may not exercise it. However, the decision by the arbitrator not to invoke his right to be heard will not prevent the court from determining the application. The converse is; where the Court does not call upon the arbitrator to be heard or refuses him to be heard, the decision of the Court will lend itself to be set aside ex debito justitiae for being irregular and against rules of natural justice. Of course, the rationale underpinning the subsection-to give the arbitrator an opportunity to be heard- is because the matters constituting the challenge impinge on his integrity, health (mental and or physical), qualification, competence, character and conduct in general.

[28] In the premises, the Court issued the order of 6th May, 2014 in the discharge of its mandatory obligation to call upon the arbitrator to appear and be heard on the challenge. It was, then, upon the arbitrator to make the decision on whether he will or will not exercise his entitlement, and how he will exercise the entitlement. The exercise of the entitlement may be by written memorandum or a letter or pleading or viva voce evidence. Calling upon the arbitrator to file a response does not mean he must file one. The arbitrator confirmed in his letter dated 15th May, 2014 that he does not wish to attend and that the Court should determine the application on the documents which were produced before him, the findings in and merits of his ruling on the challenge. He also made certain rejoinders in his said letter, which will be considered and accorded appropriate importance in this decision. Thus, the said letter by the arbitrator is sufficient exercise of his entitlement to be heard under section 14(4) of the Arbitration Act and all the arguments therein will be considered in this decision. Accordingly, the order of 6th May, 2014 is not a command; it is not tinctured by any illegality or incorrectness as claimed by the arbitrator.

[24] In accordance with the above rendition, the fact that the arbitrator did not file a response will not prejudice the outcome of the application as it will be heard on merits and not on the fact of absence of a response by the arbitrator. Such applications under the Arbitration Act are never considered unopposed given the nature of arbitration as a consensual process in the resolution of disputes.

Appellate and original jurisdiction in s.17 (6)

[25] Section 17(6) & (7) of the Arbitration Act provides that:-

(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.

Therefore, an application under section 17(6) is on appeal upon or for review of the decision of the arbitral tribunal on a preliminary question on jurisdiction. The Court does not have any original jurisdiction over an application under that section. I, therefore, agree with the submissions by the 1st Respondent that any application which seeks the court to invoke its original jurisdiction is wholly incompetent. The arbitral tribunal dismissed the request by the Applicant to extend its jurisdiction to cover matters the Applicant was filing as a counter-claim. He instead directed that those averments in the counter-claim would be treated as responses to the claim. The Applicant admits that the Arbitrator

would not have jurisdiction over its counter-claim, and that is why it applied for extension of jurisdiction. In law, the Arbitrator would not arrogate to himself any jurisdiction which is not given under the reference or the law or by agreement of parties. There was no agreement of the parties on the matter. It is, therefore, practical irony for the Applicant to come to this court and accuse the arbitrator of having arrogated jurisdiction to self, when in fact the Arbitrator resisted the overtures made by the Applicant for him to act illegally. The Arbitrator cannot be accused in the circumstances of this case for having misconducted himself for rejecting the said application. The Arbitrator has not set out to and has not decided on matters outside the reference herein. But I will look at the allegation of misconduct and bias together in a more resounding manner later. I have carefully examined all the arguments being presented before me and they are way different from what the Arbitrator decided on jurisdiction. Completely new matters on misconduct and alleged causes of action by the Applicant are being floated now. This offends section 17(6) of the Arbitration Act and would fail on that premises.

The procedure: Notice of Motion vs. Originating Motion

[26] The other issue which is related to the one immediately foregoing is on the mode of commencement of proceedings under section 17 of the Arbitration Act. The Arbitration Rules 1997 provides the procedure for applying under section 17 of the Act. The relevant provision is Rule 3 which reads:-

"(1) Application under Section 12,15,17,18, 28 and 39 of the act shall be made by Originating Summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date

(2) Another Application arising from the application made under Sub-rule (1) shall be made by summons in the same cause and shall be served on all parties at least seven days before the hearing date" (emphasis supplied).

The law provides for Originating Summons as the way to commence proceedings under Section 17 of the Act on the jurisdiction of the Arbitrator. And the tenor, contents, form and process upon an Originating Summons shall be governed by Order 37 of the Civil Procedure Rules as adopted by Rule 11 of the Arbitration Rules, 1997 which provides, thus:-

"So far as is appropriate, the civil procedure Rules shall apply to all proceedings under these Rules".

It would, therefore, be contrary to the stipulated procedural rectitude to commence proceedings under section 17 of the Arbitration Act by way of a Notice of Motion. And, in the presence of such clear provisions of the law, parties should resist the temptation of committing deliberate lapses, commissions or omissions, in the hope that article 159(2) (d) of the Constitution will save them. If such practice, especially where legal counsels are engaged, is encouraged will bring its holocaust upon the very elegant provisions of Article 159 of the Constitution. Nonetheless, even though I may excuse the application from this procedural lapse, will it survive the other lapses"

Challenge and or removal of arbitrator

[27] As I have stated the application before me is a mongrel with several faces. Although it does not cite sections 14 and or 15 of the Arbitration Act, it is basically one challenging the arbitrator and for his removal. Section 14 provides as follows:

Challenge procedure

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 the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the 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 unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.***
4. ***On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.***
5. ***The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.***
6. ***The decision of the High Court on such an application shall be final and shall not be subject to appeal.***

Undoubtedly, the challenge has to be decided first by the arbitrator before the party challenging the arbitrator applies to the High Court for removal of the arbitrator. The application before me offends all these gallant provisions which are aimed at protecting the arbitral proceedings, and therefore, serves irreplaceable purpose in adjudication of arbitrations. It would certainly fail on that front. But will it fit the bill when placed on the scales of merit"

Misconduct

[28] Again the allegations for misconduct of arbitrator which are initiated directly in the High Court must satisfy the threshold of law. This is because of very high possibility that removal of an arbitrator by the court may be abused by parties whose intent is on disrupting the arbitral process. Thus, the law has set out a stringent test for removal of an arbitrator which is the same as that which applies in disqualification of a judicial officer from presiding over a case. The grounds for removal of arbitrator are set out in section 13(3) of the Arbitration Act, but the one which is relevant to this application is…***only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence...*** The words ‘’only if’’ and ‘’justifiable doubts’’ are important in a decision under section 13(3) of the Arbitration Act. The words suggest the test is stringent and objective in two respects: a) the Court must find that circumstances exist, and those circumstances are not merely believed to exist; and b) those circumstances are justifiable; this goes beyond saying that a party has lost confidence in the arbitrator’s impartiality into more cogent proof of actual bias or prejudice. The test for bias or prejudice must be that there is real danger that the arbitrator is biased, and in deciding whether bias has been established, the Court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there was real likelihood of bias. But, of course, justifiable doubts as to the impartiality and independence of the arbitrator do not include peripheral or imagined or fanciful issues or mere belief by the applicant. I will apply the stringent test above, and ask; are grounds urged by the Applicant circumstances which raise justifiable doubts as to the impartiality and independence of the arbitrator"

[29] The Applicant made allegations of misconduct and cited the case of **Josephat Murage Miano &**

Another vs. Samuel Mwangi Miano & Another [1997] eKLR where the court held that;-

"***It would appear to us therefore that failure by the arbitrators to adjudicate the real dispute before them amounted to misconduct in the hearing of the matter they had to decide and that entitled the appellants to have the arbitration set aside."***

From the facts of this case, the Arbitrator has not failed to determine the real dispute before him. He rejected the application to expand his jurisdiction to cover matters which were outside the reference. That was perfect because there was no consent of the parties to extend the reference to cover matters which were being raise by the Applicant. The Applicant admitted the arbitrator did not have jurisdiction over matters in the counter-claim and that is why he had applied for extension of arbitrator's jurisdiction. Therefore, by rejecting the overtures to expand his jurisdiction in the circumstances of the case, the arbitrator cannot be said to have rejected evidence which, if he had rightly appreciated it would have been seen by him to be vital, so as to bring his action within the meaning of 'misconduct'. The arbitration is yet to be heard and we can only speculate what will happen. Accordingly, a court of law properly applying its mind will see that the Arbitrator is not guilty of misconduct in the sense postulated in the case of **Josephat Murage Miano (ibid)**. Let me consider the other allegations of misconduct including bias.

[30] The Applicant stated that; at paragraph 15 of the ruling made on 10th September, 2014, the Arbitrator has concluded that the Applicant is liable to pay the amounts claimed under certificates numbers 12 and 13 less amounts in doubt. This statement was made without hearing the parties. Yet, the conclusion amounts to making a final order at an interlocutory stage. The Applicant complained further that, the Arbitrator made further comments on the Applicant's quantity surveyor at paragraph 15 of the ruling that;- ***"I also notice that the Quantity Surveyor hired by the Respondent did not advise him (the Respondent) to partially honour the certificates for the works that were not in doubt. An independent quantity surveyor ought to have offered such an advice as a sign of good faith."*** According to the Applicant, these comments are unsuited given the stage of the matter, are unwarranted and amounts to misconduct of the Arbitrator. The Applicant argued that the issue for determination before the Arbitrator was jurisdiction and not judgment on admission or the credibility of a witness. Therefore, the Applicant opines that this comment robs the Arbitrator of his jurisdiction to determine the actual dispute before him. And that there is no point of parties canvassing the matter before the Arbitrator who has made conclusions on the main dispute before him and even the credibility of witnesses. They relied on the decision of the Court of Appeal in **Nyang'au vs. Omosa Nyakwara[1986] KLR 712.**

[31] The work of Mustill J in **Bremer vs Ets Soules[1985]1 Llyod's L.R.160,** is apt on this subject of misconduct of an arbitrator. He stated that;

"There are three material situations in which the High Court has power to remove an arbitrator for 'misconduct' under section 23 of the Arbitration Act, 1950.

(1) where it is proved that the arbitrator suffers from what may be called 'actual bias'. In this situation, the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavorably towards him, for reasons peculiar to that party, or to a group or of which he is a member. Proof of actual bias entails proof that the arbitrator is in fact incapable of approaching the issues with the impartiality which his office demands.

(2) where the relationship between the arbitrator and the parties, or between the arbitrator and the subject-matter of the dispute, is such as to create an evident risk that the arbitrator has been,

or will in the future be, incapable of acting impartially. To establish a case of misconduct in this category, proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in circumstances where there is manifest risk of partiality. This may be called a case of 'imputed bias'

(3) where the conduct of the arbitrator is such as to show that, questions of partiality aside, he is, through lack of talent, experience or diligence, incapable of conducting the reference in a manner which the parties are entitled to expect.

[32] The above arguments fall in category two in the listing by Mustil J:

where the relationship between the arbitrator and the parties, or between the arbitrator and the subject-matter of the dispute, is such as to create an evident risk that the arbitrator has been, or will in the future be, incapable of acting impartially. To establish a case of misconduct in this category, proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in circumstances where there is manifest risk of partiality. This may be called a case of 'imputed bias'

In this kind of misconduct, it is not enough to merely state that the arbitrator is incapable of acting impartially in the arbitration. Cogent evidence is required to proof the misconduct, and invariably, the specific instances or matter constituting the misconduct must be tabled before court. This will show the distinction between misconduct and mere perception. It should be noted that perception is different from imputed bias. Imputed bias involves ascribing to the arbitrator of conduct or something which is undesirable of law, but based on a set of cogent facts if it is to amount to ''misconduct'' in law, as opposed to mere perception or supposed bias or fanciful wishes or apprehensions of a party. The rule is aimed at preventing removal of an arbitrator at the whims of a dissatisfied party or what is commonly known as ''forum shopping'' by parties. See a work of court on recusal of a judge which is relevant here in the case of **Bgm Hc Constitutional Petition No 3 of 2012 [2013] eKLR** that:

It bears restating that the stringent test is more in accord with the constitutional desire to attain the independence of the judiciary as an indispensable facet of the right to fair hearing and access to justice. As parties submit themselves to the court, they do so to [an] independent, thoroughly fearless and impartial judicial officers. What must be avoided therefore is a practice that may encourage parties to 'shop' for the judges who will hear their cases in the belief that those judges will be favourable to their causes. If 'shopping' for judges was to be allowed ... such will be the darkest day in the administration of justice. The values, objects and purposes of the Constitution and specifically as enshrined in Articles 10, 50, 159(2) (a), 160 and 259 of the Constitution of Kenya, 2010 will be lost, and that shall surely be the death knell of the entire justice system in any civilized society.

The Court went further to state that:

''That law subserves legitimate interests of a litigant as opposed to individual desires that a certain judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases''.

Perception of bias, as is the case here, without proof will not amount to misconduct for purposes of removal of the arbitrator. The comments complained of were not made without basis. The parties made elaborate submissions and submitted documents on the issues which he addressed in the ruling including the matters on the Quantity Surveyor. The content of paragraph 15 of the ruling is not a

determination at all of the issue at hand. It was merely a necessary writing flowing from the issues and arguments presented by parties and they do not make the arbitrator incapable of acting impartially in the future on the subject of arbitration, which is payments due on the certificates No 12 and 13. The arbitrator is still capable of determining the real issues in controversy on, and he is possessed of necessary competence to appreciate the evidence which will be produced by the parties. There was nothing conclusive of the rights of the parties in the ruling which would amount to misconduct on the part of the Arbitrator in the sense of Mustil J's formulation. The facts presented do not meet the ultimate test as per the literary work by **Steve Gatembu** at page 54 of ***Arbitration Law and Practice in Kenya*** that;

"*The test whether a person is in position to act judicially and without any bias has been suggested to be:-*

***"do there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine…(the dispute)…on the basis of the evidence and arguments to be adduced before him*"**

From the facts of this case, no grounds from which a reasonable person would think that there is a real likelihood that the arbitrator could not or would not fairly determine the dispute on the basis of the evidence and arguments to be adduced before him. The ruling addressed preliminary matters and confined itself thus. The ground of misconduct fails.

Stay and or termination of proceedings

[33] Before I give my final verdict, I will determine two other issues; the request for stay of proceedings, and the submission by the Applicant on what he calls development in law on termination of proceedings. The Respondent submitted that on the question of stay of arbitral proceedings that under section 14(8) of the Arbitration Act the court has no jurisdiction to order stay of proceedings. Section 14(8) of the Arbitration Act provides as follows:

(8) While an application under subsection (3) is pending before the High Court, the parties may commence and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application id decided, and such an award shall be void if the application is successful.

[34] Whereas section 14(8) of the Arbitration Act does not deny this Court jurisdiction to order stay of proceedings, the spirit of the Constitution in Article 159 and the entire corpus of the Arbitration Act is that arbitration as an alternative mechanism of dispute resolution should not be impeded by the Courts. Section 10 of the Arbitration Act is clear on that. I would, therefore, advocate that Courts should be very wary to issue a stay of arbitral proceedings unless there are compelling reasons to do so. I should also state here my personal approach; that, while an application under section 14(3) is pending before the High Court, the arbitral proceedings should continue unless otherwise ordered by the Court. And to avoid a possibility of divergent interpretation of section 14(8) of the Arbitration Act Parliament should just amend the section an perhaps follow after, if not better than, section 24(3) of Arbitration Act, 1996 of the UK which vests in the arbitral tribunal the discretion to continue with the arbitral proceedings while an application for removal of the arbitrator by court is pending. Section 24(3) of Arbitration Act, 1996 of the UK provides as follows:

24(3) The tribunal may continue the arbitral proceedings and make an award while an application to the Court under this section is pending.

I reckon this is necessary towards the molding of an efficacious Arbitration Act for Kenya. Similarly, it is not far-fetched that even now, the power of the court to remove an arbitrator is prone to abuse by parties who intent on disrupting the arbitral process, hence the need to provide for discretion on the arbitral tribunal to continue with the arbitral proceedings while an application for removal of the arbitrator is pending but with a caveat that the arbitrator will not make an award until the challenge is concluded. This approach ensures the attainment of Overriding Objective to dispose of disputes in an expeditious, proportionate and just manner. By the proposed provision, the belligerent parties are put at bay; they cannot impede the arbitral proceedings through offensive antics: the innocent party is sure the proceeding will be concluded without undue delay.

[35] Accordingly, there are no grounds of staying the arbitration herein. It should be noted that the Court received a perpetual command from article 159 of the Constitution to promote arbitration and other alternative forms of dispute resolutions, and it should be extremely wary to hamper those mechanisms or issue orders which will interfere with the process of arbitration. No wonder section 10 of the Arbitration Act provides that the Court should only intervene as far as the law permits. The word used is ''intervene'', which connotes justifiable intervention in law. I will not issue any stay of the arbitration. See eminent literary work of Dr. Kariuki Muigai FCI Arb, Phd and current Chairman of the Chartered Institute of Arbitrators, Kenya Branch in his book, ***Settling Dispute through Arbitration in Kenya*** **(2012) 2nd Ed. Glenwood** at page 91 states:-

"The fundamental principle, embodied in the Arbitration Act, 1995 (the Act), is that where there is a valid arbitration clause, 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".

[36] Flowing from the above, what Ringera J (as he was then) in **Telcom (K) Ltd vs. Kamconsult Ltd [2001] 2 EA 574** stated that it is not the role of the court to terminate the arbitral proceedings, remains the law. Contrary to the submissions by the Applicant, enactment of article 159 of the Constitution, sections 1A and 1B of the Civil Procedure Act reinforce the need to accord arbitral process due deference as mechanism of dispute resolution by intervening only as is necessary for the sake of justice. Not otherwise. The type of intervention sought here is not supported in law. The upshot is that I dismiss the application dated2nd October, 2014 with costs to the Respondent.

Dated, signed and delivered in court at Nairobi this 5th day of March 2015

F. GIKONYO

JUDGE