REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC/E093/2020

TECHNOSERVICE LIMITED..PLAINTIFF

VERSUS

NOKIA CORPORATION..1st DEFENDANT

RISTO SIILASMAA...2ndDEFENDANT

STEPHEN ELOP...3rd DEFENDANT

NOKIA INTERNATIONAL OY..4th DEFENDANT

RULING

1. By a Notice of Motion dated **9th** October 2020 the **1st** and **4th** defendants pray for the following orders: -

a) Spent.

*b) Pending the hearing and determination of this application, this court be pleased to suspend the time within which the **1 st** and **4th** defendants are to enter appearance and file statements of defence in response to this suit commenced by the Plaint dated 6th April 2020.*

c) These proceedings be stayed in relation to all defendants and the dispute between the parties be referred to arbitration.

d) In the alternative to prayer 3 above, the Plaint dated 6th April 2020 be struck out for being in abuse of the court process.

*e) The costs of this Application be awarded to the 1st and **4th** defendants.*

2. The core grounds in support of the application are that the parties executed a Frame Repair Service Agreement (FRSA) for the provision of after-sales services to the **1st** defendant's end customers in Kenya on a non-exclusive basis and a Nokia Original Accessory Partner Agreement (NOAPA) between them by which the Plaintiff was appointed as a nonexclusive distributor of Nokia Original Accessories in Kenya. The applicants state Clauses **22.2** and **22.3** of the FRSA, and Clauses **25.2** and **25.3** of the NOAPA provided for arbitration as the mode of resolving all disputes, controversies or claims arising out of or relating to the Agreements.

3. They state that it was their intention that the forum for resolution of any dispute between them would be arbitration, and, in order to resolve some claims under the said Agreements, the Plaintiff initiated arbitration against the **1st** defendant at the International Court of Arbitration of the International Chamber of Commerce ("ICC") on **26th** March 2018, being ICC Arbitration

Case No. 23513/FS, thus recognizing and submitting to the arbitration clauses. They state that the arbitration seat was in Helsinki, Finland, but, in February 2020, the Plaintiff's claims were deemed withdrawn on account of the Plaintiff's failure to pay its share of the costs and arbitral fees and an award of costs was issued against the Plaintiff on **5th** June 2020 in accordance with Article **38(6)** of the ICC Arbitration Rules.

4. Additionally, they state that it is fair, equitable and just that this suit be referred to arbitration, and that the Plaintiff will not suffer prejudice if this application is allowed. They also state that the Plaintiff recognized and submitted to the arbitration clauses by initiating arbitration proceedings against the **1st** defendant at the ICC. Further, the Plaintiff has also filed High Court Commercial Case No. E103 of 2020, Techno service Limited v Nokia Corporation which is similar to the instant case, hence, this suit ought to be struck out.

The Plaintiff's Replying affidavit

5. The Plaintiff's reply to the application is contained in the Replying affidavit of Bulent Gulbahar, its director dated **1st** February 2021. The substance of the Plaintiffs opposition to the application is that the applicant's supporting affidavit is incurably defective, bad in law and, thus, ought to be dismissed and/or struck out *in limine* with costs because it refers to the original Plaint which has since been amended.

6. In addition, the Plaintiff states that the Supporting Affidavit of Aapo Saarikivi is incurably defective because: - (i) it contains a false declaration since it alleges to have been sworn in Helsinki, Finland on an unknown date, yet the purported stamp of the Notary Public shows that the Supporting Affidavit was signed (not sworn) in Espoo, Finland. (ii) that it was allegedly signed on **8th** October 2020 in support of a non-existent application, yet the application is dated **9th** October 2020; (iii) it offends Section **88** of the Evidence Act;[1] (iv) the deponent, Mr. Aapo Saarikivi is not an officer or employee of either the **1st** defendant or the **4th** defendant; (v) that the affidavit is defective for want of a notarized, attested and legalized Board of Directors Resolution of the **1st** and **4th** defendant; (vi) that the purported Letter of Authority dated **1st** October 2020/ issued on behalf of the **1st** defendant and the **4th** defendant is incurably defective and bad in law.

7. Other grounds cited are that the partnership under the quasi-contractual Agreements were separate and distinct, and, that the **1st** defendant deliberately and knowingly kept the partnership and joint venture and investment outside the written Agreements with the sole intention of limiting the Plaintiffs contractual rights, should a dispute arise. Further, that the **1st** defendant by its conduct in the arbitration proceedings in ICC Case 23513.FS waived its right to arbitrate by refusing to unequivocally concede to the jurisdiction of the arbitral Tribunal and, thus, it is estopped from demanding the dispute to be referred to Arbitration.

8. In addition, the Plaintiff states that the Arbitration clauses are unconstitutional/inoperable and incapable of being performed. Also, upon amending the Plaint, the application has been overtaken by events, and, by seeking to strike out the entire Plaint, which includes other defendants not represented by the applicant's advocates, the prayers are incapable of being granted. Further, that the supporting affidavit is defective for being un-commissioned, not legalized and for want of authority since the deponent is not an employee of the **1st** or **4th** defendants.

9. The Plaintiff also states that the **1st** defendant while preparing the agreements deliberately excluded the joint ventures and investments between the Plaintiff and the **4th** defendant which would have altered the nature of the FRSA. As a result, the Plaintiff had two separate and distinct relationships/partnership with the **1st** and **4th** defendants which are two distinct and separate legal entities. Further, the **1st** defendant unilaterally illegally sold the rights and benefits arising from the written Agreements and non-contractual Partnership to Microsoft. The Plaintiff also states that **1st**, **2nd** and **3rd** defendants breached the Plaintiffs express and implied rights under the non-contractual partnership to obtain an unjust enrichment and denied the Plaintiff its legitimate rights of its fair share of the sale of the business. Further, that an Arbitration Clause must be in writing and cannot be imputed.

10. The Plaintiff also states that the dispute between the Plaintiff and the **1st** defendant arising from the two written Agreements is the subject of a separate suit being HCC COMM E103 of 2020, but, that this case is distinct as it arises from a quasi and unwritten contractual relationship. Also, in the course of arbitration between the Plaintiff and the **1st** defendant arising from the two agreements, the Plaintiff in good faith reached out to the **1st** defendant and attempted to resolve the dispute on the quasicontractual claims. Further, in so far as ICC Case 23513.FS is concerned, the Plaintiff and **1st** defendant agreed to determine the Plaintiff's non-contractual claims through the arbitration proceedings and the issues to be determined by the Tribunal shall be those resulting from the Parties' past and possible future submissions, as may be relevant to the adjudication of the Parties' claims and defenses.

11. The Plaintiff also states that even if the court was to find that the quasi-contractual claim is governed by the said agreements, the Arbitration Clauses are pathological, incapable of being performed and inoperative because it has been proved that the ICC and its alleged autonomous body the International Court of Arbitration and its Arbitration Rules, structure, ranks and processes is inherently biased, corrupted, prohibitively expensive, slow and unconstitutional. Additionally, a substantial part of the dispute between the Plaintiff and the defendants relates to rights and liabilities which arises out of criminal offences that are not arbitrable. Additionally, the ICC is conflicted against the Plaintiff on account of live litigation in Kenya and abroad where the Plaintiff and the ICC are adversaries. (These are Milimani CMCC 9449 of 2019-TechnoService v Georges Affaki & ICC Nairobi HCCA E223 of 2020 ICC v Techno Service and Civil Suit in France Criminal Complaint in Austria No IIST 306/192).

12. It also states that the arbitration clauses in the two agreements are pathological, unconscionable, inoperable and is incapable of being performed without breaching the Plaintiff's fundamental and non-derogable constitutional rights. Additionally, the said agreements were presented to the Plaintiff as standard contracts unilaterally prepared and imposed upon the Plaintiff by Nokia, and, that the Plaintiff was never given an option to negotiate or participate in the drafting of the Agreements. Also, Nokia was a financially contributing member of the International Chamber of Commerce and had this been disclosed, the Plaintiff would not have agreed to the Arbitration Clause referring any dispute to the International Chamber of Commerce.

13. Further, the Plaintiff states that it was incorporated in Kenya, that the Agreements were made and performed in Kenya and the parties acknowledged the applicability of the laws of Kenya as demonstrated by Clause **23.10.1** of the FRSA. Also, the following arbitration clauses are either incomplete, unclear, and defective, which make them pathological and unenforceable in law: -

a) Clause 22 of the FRSA required the arbitration to be conducted in accordance with non-existent rules described as "Rules of the International Chamber of Commerce."

b) Both Arbitration Clauses (Clause 22 of the FRSA and Clause 25 of the NOAP) do not identify or indicate the arbitration institution.

c) Clause 25 of the NOAP does not identify the Place of Arbitration.

d) Clause 25 of the NOAP does not identify the procedural law to govern the arbitration process.

e) Clause 22.1 of the FRSA is inconsistent with Clause 23.10.1 of the FRSA on the applicable law

14. The Plaintiff contends that the ICC Court purports to be an autonomous body from ICC, yet it does not have a separate bank account, instead payment are made to the ICC bank account and in the course of proceedings in ICC Case 23513/FS, the ICC and ICC Court failed to meet the parties expectations occasioning loss and gross miscarriage of justice to the Plaintiff a confirmation that the Arbitration Clauses in the Agreements to the extent that they are to be administered under the auspices of the ICC are inoperable, unfeasible, incapable of being performed and unconstitutional under the laws of Kenya and therefore pathological.

15. Further, that the Plaintiff states that it has never been a member of the ICC nor has it ever used any of the other services provided by the ICC and, therefore at the time of signing the Agreements and at the time of referring the dispute to the ICC, it was a stranger to its services, as opposed to the **1st** defendant which has been a member of the ICC. It also states that the **1st** defendant and its Counsel Roschier Attorneys hold high-ranking positions within the ICC organization.

16. The applicants state that by inviting a third-party the ICC Austria National Committee and its Nomination Commission to assist in the nomination of the President to the Arbitral Tribunal, the ICC acted against its own implied and express commitments to carry out its functions independently from the ICC as stipulated under Article **1 (1)** and Appendix I Article **1 (2)** of the ICC Arbitration Rules. Additionally, the Plaintiff states that it did not consent to the decision to invite the ICC Austria National Committee to assist in the President's nomination to the Arbitral Tribunal, but, as soon as it became aware of the circumstances, it objected to the defendant's breach.

17. Also, it states that the Agreements between the Plaintiff and the **1st** defendant contained a confidentiality clause, hence, the ICC and ICC Court, by accepting to organize/administer the dispute between the parties, it was bound by the confidentiality clause, and, that, the ICC flagrantly breached the confidentiality clause inviting a third-party the ICC Austria National Committee to participate in the nomination of the President to the Tribunal, and the subsequent correspondence between the ICC and the third party leading

to the nomination of the President to the Arbitral Tribunal.

18. The Plaintiff also states that the ICC and ICC Court, under its current management, is utterly conflicted and therefore incapable of providing independent and impartial dispute resolution services in which the Plaintiff is a party, and, that, the Chairperson of the Steering Committee of the ICC, the ICC Court, Ms. Carita Wallgren-Lindholm, who is from Finland is a former partner in the law firm Roschier Attorneys with very close ties to the **1st**defendant. Furthermore, the Vice-Chair of the Steering Committee of the ICC Court, Ms. Jenni Lukander, is a member of **1st** defendant's leadership team, and that he was also a co-signatory in the Power of Attorney issued on behalf of the **1st** defendant authorizing Roschier Attorney's to represent it in the ICC arbitration.

19. Additionally, the Plaintiff states that the co-signatory of the Power of Attorney authorizing Roschier attorney to represent the **1st** defendant in the ICC arbitration proceedings was at the material time the Country Director of the ICC Finland, while Ms. Maria Varsellona, a member of the Governing Body for Dispute Resolution Services of the ICC Court was at material time the **1st** defendant's Chief Legal Officer. Further, that the said conflict of interest was unknown to the Plaintiff nor did the Plaintiff have knowledge of its dispute services at the time of signing the agreements. Also, it states that the ICC had a duty to disclose to the Plaintiff any conflict of interest. Further, the Plaintiff on three occasions did complain to the ICC about the aforesaid breach of its duties, but the ICC never addressed the concerns raised and the said concerns may persist in the event this court refers the matter to the ICC. Lastly, the Plaintiff states that the arbitration proceedings by the ICC Court are inherently susceptible to corruption and is opaque.

The affidavit of Koki Muia

20. The Plaintiff also filed an affidavit sworn by a one Koki Muia. The highlights of the affidavit are:- (i) she is a former employee of the **4th** defendant, between September 2009 and December 2010, as the Head of Care of East & Southern Sub-Saharan Region; (ii) she personally participated on behalf of the **4th** defendant in discussions and negotiations with the Plaintiff regarding joint-investments in various after-sales service centers between September 2009 and December 2010; (iii) she is aware that the **4th** defendant and the Plaintiff agreed to jointly invest in the after-sales service centers in Nairobi, Kisumu, and Mombasa; (iv) she was aware that there was a written Agreement between the **1st**defendant and the Plaintiff, and that the joint investments of the **4th** defendant and the Plaintiff in the after-sales service centers were not part of the aforesaid FRSA; (iv) that the engagement under each arrangement was separate from the other; (vi) she never heard or met the said Aapo Saarikivi nor did he participate in any of the discussions or negotiations between the **4th** defendant and the Plaintiff.

Applicant's supplementary affidavit

21. Aapo Saarikivi, swore the supplementary affidavit dated **9th** February 2021. The nub of the affidavit is that his replying affidavit was signed within the greater part of Helsinki Metropolitan in the presence of a Notary Public as the law of the land requires. Further, that a court may receive an affidavit notwithstanding the defect and in any event Article **159 (2) (d)** of the Constitution enjoins courts to administer matters without undue regard to technicalities of procedures. Further, that he swore Relying affidavit prior to the amendment of the plaint; that there is nothing unconstitutional, inoperative or incapable of being performed in the arbitration clauses; that he was duly authorized to swear the supporting affidavit; and that the issues raised in this case fall with the scope of the Arbitration clause and that the governing law is finish law.

22. Further, the arbitration clauses are not pathological, that Clause **22** of the FRSA provides that all dispute are to be resolved by way of arbitration; that the agreement expressly provides that Finish law is the applicable law; that failure to provide the place of arbitration does not render the clause inoperative. Additionally, that procedural steps taken in the arbitration proceedings in ICC Arb No. 23513/ FS are irrelevant in determining the stay sought nor do difficulties, expenses or inconvenience render the agreement inoperative. Lastly, the allegations of corruption or conflict of interests are unsubstantiated and the Plaintiff may raise any issues at the arbitral tribunal.

The applicant's advocates submissions

23. The applicant's counsel submitted that the Supporting Affidavit was properly notarized as required by the law and it is therefore admissible. He submitted that there is no requirement under the law for the authority to swear an affidavit to be filed in court, and that its absence is not fatal. He relied on *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumia Sugar Company Limited*.[2] In addition, he submitted that failure to state the place where an affidavit was sworn in the jurat does not render the affidavit fatally defective. To buttress his argument, he cited *Microsoft Corporation v Mitsumi Computer Garage Ltd &*

Another Nairobi.[3] Additionally, counsel submitted that the Plaintiff's objections to the affidavit are in the nature of technical objections which may not defeat the substantive parts of the Supporting Affidavit. He urged the court to be guided by the saving provision of Order **19** rule **7** of the Civil Procedure Rules and dismiss the objections.

24. Counsel cited *Adrec Limited v Nation Media Group Limited*[4] and section **6** **(1)** of the Arbitration Act and urged this court to refer the dispute to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. He referred to Clauses **22.2** and **22.3** of the FRSA and **25.2** and **25.3** of the NOAPA and submitted that the arbitration clauses cover claims "arising out of or in connection with" the Agreements. Further, that the scope of the FRSA is very broad and open-ended, and the general obligations of the Plaintiff are defined broadly. He submitted that the Plaintiff's claims against the defendants arise out of or in connection with the Agreements. Additionally, he submitted that the Agreements and the arbitration clauses are governed by Finnish law.

25. Counsel submitted that the parties' intention is clearly discernable in the wording of the arbitration clauses. He argued that the Plaintiff lodged a claim against the **1**stdefendant at the International Court of Arbitration of the International Chamber of Commerce for the same dispute which is similar to that raised in this case, namely, whether the **1st** defendant validly transferred the FRSA and the NOAP Agreement to Microsoft and whether the attempts to transfer the Agreements without the Plaintiff's prior consent were unlawful and the possible legal consequences. He argued that in the arbitral proceedings, the **1st** defendant did not make any jurisdictional objections relating to the Plaintiff's claims, but instead the Plaintiff withdrew the case. As a consequence, counsel argued that the Plaintiff is estopped from asserting that the terms of the agreement are incomplete. (*Citing Serah Njeri Mwobi v John Kimani Njoroge***[5]**).

26. Additionally, he deposed that the ICC did not in any way interfere with the validity or applicability of the arbitration agreement, and that, the Plaintiff remains free to reinstitute fresh arbitration proceedings on the same issues before the ICC in accordance with the dispute resolution methods provided for in the Agreements. He submitted that the attempt to fashion the claim as quasi-contract does not change the scope of the arbitration clause. He cited the Court of Appeal in *East African Power Management Limited v Westmont Power (Kenya) Limited***[6]** in which the court underscored the need to adopt the widest possible construction of arbitration agreements in determining the nature of claims. He also cited *Heritage Consultants Ltd v Permanent Secretary, Ministry of Regional Development***[7]** in which the court stated that in interpreting the words of the arbitration agreement, the court has to interpret them in their normal, literal meaning in the first instance. Counsel submitted that the arbitration agreements are neither inoperative nor incapable of being performed nor does the Plaintiff's refusal/failure to pay its portion of advances toward the arbitral tribunal's fees render the arbitration agreements inoperative or otherwise incapable of being performed.

27. He submitted that it is not the function of the court to rewrite the contract between the parties but rather to enforce it. He cited *National Bank of Kenya v Pipelastic Samkolit (K) Ltd & Another*[8] and argued this court would be rewriting the agreements executed between the parties if it were to refuse the application rather than enforcing the parties' contractual undertaking to refer their disputes to arbitration at the ICC.

28. He submitted that the Plaintiff's allegations that it did not understand the terms of the Agreements at the time of their execution does not align with judicial precedent. He argued that one of the core functions of a signature is to indicate that the parties whose signatures are appended to the document have read, understood and agreed to the terms of the agreement. For this proposition he relied on *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan].***[9]** He also argued that the Plaintiff is free to raise any concerns it has against the arbitrator at the arbitration proceedings.

29. Additionally, he submitted that the claims raised in the Plaint against the defendants among them damages for breach of contract and for the defendants' unjust enrichment as set out in the Amended Plaint fall within the scope of the disputes contemplated under the arbitration clauses. Further, he submitted that the Plaintiff should not to be allowed to evade, through legal craft or otherwise, a dispute resolution process which it committed to and relied on *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others.***[10]** To further buttress his argument, counsel submitted that according to Article **2(3)** of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, to which Kenya is a signatory, the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, shall, at the request of one of the parties, refer the parties to arbitration. He submitted that this court is obligated to enforce the agreement between the parties and it should refer the dispute arising from or out of the Agreements to arbitration. In addition, he submitted that this Court is obligated to encourage alternative dispute resolution mechanisms under article **159** **(2)** **(c)** of the Constitution including arbitration.

30. Further, counsel submitted that this suit is an abuse of court process because the Plaintiff has filed a similar claim against the **1 st** defendant being Milimani High Court Commercial Case No. E103 of 2020 Technoservice Limited v Nokia Corporation seeking identical prayers in addition to other similar suits. He submitted that filing multiple suits constitutes abuse of court process and cited *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others.***[11]**

The Plaintiff's advocates submissions

31. The Plaintiff's counsel submitted that the orders sought are not capable of being granted since the Plaint dated **6th** April 2020 ceased to exist upon being amended on **10th**November 2020. He cited *James Muniu Muchere v National Bank of Kenya Limited*[12] which on appeal, the Court of Appeal faulted the lower court for striking out a Plaint which had since been amended following *Mutuku and 3 others v United Insurance Co. Ltd.*[13]

32. He also submitted that the Replying affidavits of Aapo Sarakivi are defective. (Citing *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited,*[14] *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another Nairobi*[15] and section **88** of the Evidence Act[16]). Additionally, he *cited Pastificio Lucio Garofalo SPA v Security & Fire Equipment Co & another*[17] in support of the proposition that where the set procedure is not complied with, the affidavit ought to be rejected. He argued that the **4th** defendant was a party in HCCC **118** of 2019 in which the court expressed the need to legalize affidavits taken outside the Commonwealth. He urged the court to be guided by the principle of *stare decisis* and cited *Re the Matter of The Estate of George M'Mboroki (Deceased).*[18] Further, he argued that to the extent that the affidavit is unclear as to the place it was sworn the same is defective. (Citing *C.M.C Motors Group Limited v Bengeria Arap Korir Trading as Marben School & another*[19]*).*

33. Counsel challenged the validity of the applicants' affidavit on grounds that the deponent was not authorized by a resolution by Board of Directors citing *Affordable Homes Africa Limited v Ian Henderson & 2 Others.*[20] He also cited section **2 (2)** of the Evidence Act,[21] Order **19** Rule **3** of the Civil Procedure Rules and *Gerphas Alphonse Odhiambo v Felix Adiego*[22] and submitted that the rules against hearsay are applicable to affidavits. To fortify his argument, he cited *Kenya Horticultural Exporters [1977] Ltd v Pape (trading as Osirua Estate)*[23] which held that an affidavit must be sworn by someone who is able to prove the facts on his own knowledge.

34. As to whether the dispute falls within the scope of the arbitration clause, counsel referred to paragraph **8** of the Amended Plaint whereof it is pleaded that the Plaintiffs claim relates to breach of quasi-contract arising from the partnership by conduct between the Plaintiff and the defendants that commenced in the year 2006 and that ended abruptly on **25th** April 2014. He also relied on the affidavit of Koki Muia. He argued that the instant dispute arises from verbal agreements and submitted that the courts power does not extend to referring a verbal dispute to arbitration. To fortify his argument, he relied on section **4** of the Arbitration Act which provides that an arbitration agreement must be in writing and cited *Justus Nyang'aya v Ivory Consult Limited*[24] which underscored the need for the arbitrator to determine the validity of an oral agreement.

35. He also relied on *Damaris Wanjiru Nganga v Loise Naisiae Leiyan & another*[25] where the Court declined to refer a matter to arbitration under Section **6** due to the fact that a third party (a bank) had been roped into the dispute and the arbitrator would not have jurisdiction over the bank. Additionally, he cited *Nyutu Agrovet Limited v Airtel Networks Limited*[26] in which the Court of Appeal held that arbitration as a dispute resolution mechanism is not imposed on parties. Also, he relied on *Martin Njuguna Ngugi v Ahmed Noor Sheikh and Another*[27] for the holding that a third party is not bound by an arbitration agreement and cannot be forced to proceed to arbitration.

36. Alternatively, counsel submitted that the arbitration clause is inoperative due to ambiguity and incompleteness. He submitted that the Arbitration Clauses in the FRSA and the NOAP are however so incomplete, unclear, and defective that if the court was to infer and direct that the parties should proceed to arbitration pursuant to the two clauses, the court would in effect be rewriting the parties' Agreement. He argued that the following defects exist in the arbitration clauses: -

a) Clause 22 of the FRSA required the arbitration to be conducted in accordance with non-existent rules described as "Rules of the International Chamber of Commerce."

b) Both Arbitration Clauses (Clause 22 of the FRSA and Clause 25 of the NOAP) do not identify or indicate the arbitration institution.

c) Clause 25 of the NOAP does not identify the Place of Arbitration.

d) Clause 25 of the NOAP does not identify the procedural law to govern the arbitration process.

37. Further, he argued that the clauses are excessively unclear on the procedural matters. He submitted that such incompleteness has the effect of invalidating an arbitration clause and relied on *Danki Ventures Ltd v Sinopec International Petroleum Services Ltd*[28] which found an arbitration clause to be incomplete. Additionally, he submitted that the two agreements have inconstancies on applicable laws which renders the entire dispute resolution provisions inoperative and relied on *Musimba Investments Ltd v Nokia Corporation.*[29] He submitted that the FRSA while purporting to subject dispute resolution to arbitration and interpretation of the Agreement in accordance with the laws of Finland, it also provides at Clause **23.10.** a contradictory close that "both Parties shall comply with all applicable laws and regulations of the Territory and of any other applicable country."

38. Also, he argued that to the extent that the arbitration clauses require the dispute to referred to the ICC, the same are inoperative because the dispute would not be capable of being resolved due to numerous unconstitutional and downright unlawful structures and rules of the ICC and its arbitration dispute resolution services on grounds of conflict of interest and susceptibility to corruption. He argued that ICC's handling of its core duties and functions of hearing and determining Challenges against Arbitrators is unconstitutional, unfair and totally unconscionable.

The applicants' advocates further submissions

39. The applicant's counsel submitted that the dispute arises out of, or in the very least, it is connected to contractual agreements which contained arbitration clauses governed by Finish law. He cited *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited*[30] which held that *"under section 17 of the Arbitration Act, the arbitrator is empowered to decide on the existence and validity of an arbitration agreement"* and submitted that the question of jurisdiction is a matter for the tribunal to decide. He also cited *Chitty on Contracts*[31] thus: - *unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."*

40. On the interpretation of the arbitration agreement, counsel cited Lord Hoffman in Premium *Nafta Products Limited and others v Fili Shipping Company Limited and others* [32]who stated that: - *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."* In addition, counsel cited *County Government of Kirinyaga v African Banking Corporation Ltd*[33] where in interpreting dispute resolution clause the court stated that:- *"the clear intention of the parties was that if any dispute arises, they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration…the court will therefore promote other forms of dispute resolution where the circumstance of the case so allows and the parties have agreed to an alternative mode of dispute resolution other than the court."*

41. He submitted that the arbitration clauses are neither ambiguous or incomplete, and that the Plaintiff's claims fall within the scope of the arbitration clauses. Further, that the Plaintiff instituted arbitration proceedings thus recognizing that its claims fall under the scope of the arbitration clauses, but he later withdrew the cases. He argued that the Plaintiff now seeks to ventilate the same issues in this case. He argued that the Plaintiff cannot institute arbitration proceedings on one hand and purport to deny the existence of the arbitration clauses in this case.

42. He cited *Bouhuys Johaned Eduard Cornelis v Obadiah Njora Mwangi*[34] which held that concern relating to costs did not bar the court from staying the proceedings. He submitted that the agreed dispute resolution mechanism cannot be defeated by either the cost or difficulty in prosecuting an arbitration claim before the ICC. Fortified by *Directline Assurance Co. Ltd & 4 others v Suninvest & 15 others*[35] which stayed proceedings even though some of the parties were not parties to the arbitration agreement, he argued that the addition of the **2nd** and **3rd** defendants cannot circumvent a valid and effective arbitration clause agreed between the parties. He also cited *Yaworski v Gowling Lafleur Henderson LLP*[36] which held that *"where third party claims are involved, courts have ordered that litigation with regard to matters within the Arbitration agreement and between principal parties be stayed pending Arbitration.*

43. In addition, he submitted that the inclusion of the **2nd** and **3rd** defendants who are former officials of the **1st** defendant is an

attempt to muddy the jurisdictional question. He distinguished *Damaris Wanjiru Nganga* and *Martin Njuguna Ngugi* relied upon by the Plaintiff in which third parties were sought to be compelled in arbitration processes to which they were not parties.

44. He argued that Clauses **22** is neither unenforceable nor pathological but the agreement is clear on the governing law. He argued that the Arbitration Act does not consider difficulty, expense or convenience as a valid objection against stay of proceedings nor can the alleged conflict between the Plaintiff and the ICC divest the arbitrator of his jurisdiction. He submitted that the prayer for stay is not affected by the amendment of the Plaint.

45. Regarding the competence of the affidavits of Aapo Saarikivi, he argued that the affidavits were properly attested. He relied on section **88** of the Evidence Act and cited *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumia Sugar Company Limited*[37] which held that the stamp of the Dubai Court Notary Public was sufficient to prove that a document had been authenticated. He relied on *Re Estate of George M'Mboroki (Deceased)*[38] in support of the proposition that a court is obliged to ensure that it does not follow precedent blindly but instead it is obligated to make its own assessment of the facts. (Citing *Republic v Kenya Urban Roads Authority & 3 others Ex Parte Cytonn Investments Management Limited*[39]*)*. He urged the court to be guided by *Kwik Fit Tyres & Autocare v Mohamed Salim Juma & 2 others*[40] in which the Court stated that Order **19** rule **7** of the Civil Procedure Rules gives the court the power to cure a defect which does not go to the substance of the affidavit. He submitted that an irregularity on the place an affidavit is sworn does not render it fatally defective and cited *Microsoft Corporation v Mitsumi Computer Garage Limited and another*[41] where it was determined that *"failure to state the place in which an affidavit was taken in the jurat thereof does not ipso facto make such an affidavit fatally defective and inadmissible."*

Determination

46. A classic starting point in shaping the issues at hand is to recall that Kenya is among **85** states and **118** jurisdictions globally where legislation based on the **UNCITRAL** Model Law on International Commercial Arbitration has been adopted. This position is buttressed by Article **159** of the Constitution which explicitly recognizes the need for courts and tribunals to encourage and promote alternative forms of dispute resolution, including arbitration.

47. Significantly, Kenya's Arbitration Act[42] is modelled on the **UNCITRA**L Model Law, and except for the limitations set out in the Act, it applies to both domestic and international arbitrations. The Act is augmented by the Arbitration Rules 1997; and the Nairobi Centre for International Arbitration Act.[43] Section **4(1)** of this Act establishes the Nairobi Centre for International Arbitration whose functions as set out in section **5** of the Act includes to— (a) promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; (b) administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; (c) ensure that arbitration is reserved as the dispute resolution process of choice.

48. The above legislations are supplemented by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which Kenya ratified in 1989. The New York Convention is part of domestic law of Kenya by virtue of Article **2(6)** of the Constitution which provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. In addition, section **36(2)** of the Arbitration Act complements the New York Convention by providing that an international arbitration award shall be recognized as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is a signatory.

49. Kenya has also ratified the International Centre for Settlement of Investment Disputes Convention (ICSID or the Centre), which is the legal framework applicable to dispute resolution and conciliation between international investors. Equally noteworthy is the fact that Kenya's arbitration legislation does not depart from the UNCITRAL Model Law in any significant way. Our arbitration laws reflect most of the UNCITRAL Model Law principles, including finality of arbitral awards, limited court intervention or interference, and principles such as separability and *Kompetenz-kompetenz.* It is correct to say that our arbitration law is not only consistent with, but also in full harmony with, prevailing international best practice in the field.

50. Under our law, court intervention in arbitration proceedings is limited only to circumstances expressly permitted by the Arbitration Act. In this regard, section **10** of the Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In absolute terms, the section limits the jurisdiction of the court to only such matters as are provided for by the Act. The section typifies the recognition of the policy of party's "autonomy" which underlie the arbitration generally and in particular the Act.

51. Section **10** enunciates the obligation to check the court's role in arbitration so as to give effect to that policy.[44] The principle of party autonomy is recognized as a critical precept for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

52. Section **10** permits two possibilities where the court can intrude in arbitration. *First,* is where the Act expressly provides for or permits the intervention of the court. *Second,* in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially. However, as the Supreme Court observed in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party),*[45] this judicial intervention can only be countenanced in exceptional instances. The Supreme Court stressed the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

53. The Apex Court emphasized that Section **10** of the Act was enacted to ensure predictability and certainty of arbitration proceedings by explicitly providing instances where a court may intrude. It follows that parties who recourse to arbitration must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction or in circumstances provided under section **6** (Stay of legal proceedings) & section **7** (Interim measures).

54. The objective of arbitration is to attain fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

55. The principal purpose of an arbitration clause is to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties are at liberty to contract and to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect. At this juncture, it is useful to reproduce the relevant arbitration clauses : -

Clause 22.2 of the Frame Repair Service Agreement which provides that:-

"Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof shall be finally settled by arbitration by three arbitrators in accordance with the Rules of the International Chamber of Commerce. The language used in arbitration, including the language of the proceedings, the language of the decision, and the reasons supporting it shall be in English. The arbitration shall be conducted in Helsinki, Finland."

Clause 22.3 of the above agreement provides: -

"The Parties agree to recognize the decision of the arbitrators as final, binding and executable. The arbitration shall be the sole and exclusive remedy of the Parties to the dispute regarding claims or counterclaims presented to the arbitrators."

Clause 25.2 of Nokia Original Accessory Partner Agreement provides: -

"All disputes arising out of or in connection with this Agreement with the exception of Article 19 shall be settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the said Rules. The Arbitration shall be held in the city of [add city] [add country]. The language used in arbitration including the language of the proceedings, the language of the decision, and the reasons supporting it shall be English.""

Clause 25.3 of the above agreement provides: -

"The Parties agree to recognize the decision of the arbitrators as final binding and executable. The arbitration shall be the sole and exclusive remedy of the Parties to the dispute regarding claims or counterclaims presented to the arbitrators."

56. Regarding the seat of arbitration, the Supreme Court of India in *BGS SGS Soma JV v. NHPC Ltd*[46] in a dispute which concerned an arbitration agreement stipulating that "*Arbitration Proceedings shall be held at New Delhi/Faridabad, India* prescribed the following bright-line test for determining whether a chosen venue could be treated as the seat of arbitration:-

a. If a named place is identified in the arbitration agreement as the "venue" of "arbitration proceedings," the use of the expression "arbitration proceedings" signifies that the entire arbitration proceedings (including the making of the award) is to be conducted at such place, as opposed to certain hearings. In such a case, the choice of venue is actually a choice of the seat of arbitration.

b. In contrast, if the arbitration agreement contains language such as "tribunals are to meet or have witnesses, experts or the parties" at a particular venue, this suggests that only hearings are to be conducted at such venue. In this case, with other factors remaining consistent, the chosen venue cannot be treated as the seat of arbitration.

c. If the arbitration agreement provides that arbitration proceedings "shall be held" at a particular venue, then that indicates arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration.

d. The above tests remain subject to there being no other "significant contrary indicia" which suggest that the named place would be merely the venue for certain proceedings and not the seat of arbitration.

e. In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue is actually the seat of arbitration. In the context of domestic arbitration, the choice of the Indian Arbitration and Conciliation Act, 1996 would provide such indication. (Emphasis supplied)

57. A reading of the above clauses and the above tests leave no doubt that the parties chose arbitration as the preferred mode of dispute resolution, they not only agreed on the place of arbitration, but they also elected the applicable law and rules.

58. The Plaintiff's assault on the arbitration agreement is founded on several fronts. It argues that the Arbitration clause is unconstitutional, inoperative, pathological, it is not in writing as required under the law, that it was a standard contract. It claims that conducting arbitration in the chosen venue would be expensive. It argues that the tribunal in conflicted and susceptible to corruption which makes the arbitration clause(s) inoperative. It claims that it was not brought to its attention that the tribunal is not impartial nor does the Tribunal have any rules of procedure. Simply put, the Plaintiff claims that the arbitration clause(s) are defective, and therefore inoperative.

59. Section **6** of the arbitration Act lays down the applicable tests in applications of this nature. The grounds in support of or against the application will stand or fall on the grounds laid down in the above section which provides as follows: -

6. Stay of legal proceedings

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

60. Paragraphs **(a)** & **(b)** above sets out the grounds upon which the court may refuse to grant an order of stay. In a fairly recent decision,[47] I had the opportunity to address a matter in which similar arguments were propounded. At the risk of replicating what I stated, I will usefully rehash some of my findings in the said case to the extend they are relevant to the issues at hand. I observed that unconscionability, consists of the two-pronged test that prevails in most jurisdictions today. One, procedural unconscionability

which hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print. Two, substantive unconscionability arises when a term is "overly-harsh" or "one-sided." But more importantly, unconscionability isolates terms to which parties do not assent in any meaningful way. Thus, when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. Modern unconscionability empowers courts to strike down provisions that "fall outside the 'circle of assent' which constitutes the actual agreement.[48]

61. If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term.[49] The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes. Enforcement of a contract is generally refused on grounds of unconscionability where the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.[50] An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied an opportunity for meaningful choice. The foregoing are the standards upon which the opposing contentions will be judged.

62. For starters, when a person signs a document, that signature should signify an intent to be bound by the terms and conditions embodied in the signed document. A three-fold inquiry is suggested as follows: -*Firstly*, was there a misrepresentation as to the one party's intention*; Secondly*, who made that representation; and *thirdly* was the other party misled thereby" The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled"

63. A recent decision by the Supreme Court of Canada is worth citing. In *Uber Technologies Inc. v Heller*[51] the Supreme Court of Canada addressed both unconscionability and those in vulnerable positions and its effect on bargaining power. The jurisprudence explicated in the said case is splendidly progressive, highly incisive and persuasive. The bulk of the decision is worth quoting, but the following excerpts will illuminate the issue at hand: -

a. Unconscionability was meant to protect those who were vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made. Although other doctrines could provide relief from specific types of oppressive contractual terms, unconscionability allowed courts to fill in gaps between the existing islands of intervention so that the clause that was not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve would fall under the general power, and anomalous distinctions would disappear.

b. The Canadian doctrine of unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In many cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.

c. A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed; unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances, for example, almost any agreement would be an improvement over the status quo. In those circumstances, the emphasis in assessing improvidence should be on whether the stronger party had been unduly enriched. That could occur where the price of goods or services departed significantly from the usual market price.

d. Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable adequately to protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they have equal bargaining power.

64. Inequality of bargaining power occurs when the terms and provisions of a contract are unfair, unjust and unreasonable. This happens when a term is exceedingly one sided or provides for a provision that is adverse to the other party or where one party is afforded greater protection while the other is defenseless. In determining the bargaining power of the parties, the factors considered by the courts are their educational standards, business/occupation and exposure only to mention but some. None of the foregoing has

been cited or proved in this case. The arbitration clauses are not one sided nor has it been shown they offer protection to the defendants. The test remains that of a reasonable person. The applicant wants the court to believe that it never noticed the implication of the arbitration clauses at the time of signing. The arbitration clauses are clearly worded in simple language. Using the test of a reasonable man, I find nothing to suggest the existence of imbalance of bargaining power. In fact, in cases involving sophisticated commercial agreements or where a contract is a product of prior negotiations or joint drafting the presumption is that parties are of comparable bargaining power. The argument that the contract was a "standard form document" collapses. The *contra proferentem* rule has not in any manner been shown to exist in this case nor was it manifested.

65. The Plaintiff argues that the cost of conducting arbitration in in Finland is prohibitive and this makes the contract inoperative. In my recent decision cited above I was emphatic that the cost of arbitration does not render the arbitration clause inoperative. For example, I cited clear directions issued by the Singapore International Arbitration Center to the effect that owing to COVID 19 challenges, arbitration can be conducted virtually. In the same parity of reasoning (and without attempting to dictate to the arbitrator on how to conduct proceedings), by way of orbiter, I can mention that there is nothing to bar the parties from adopting appropriate technology, if need be, without changing the seat of arbitration. This extinguishes the argument that the clause is unreasonable or inoperative on account of costs or inoperative. The reverse is true. Online hearing is cheap, convenient and effective.

66. More significant, the other reason upon which the applicant's argument fails is primarily a question of interpreting the arbitration clauses to get their real meaning and intention of the parties. Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. In *Arnold v Britton*,[52] Lord Neuberger explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in the light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.

67. In 2019, Professor A Burrows QC in *Federal Republic of Nigeria v JP Morgan Chase Bank NA*[53] usefully summarized the modern approach to contract interpretation in the following terms: -

"The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain."

68. In order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible. Courts adopt a broad test for establishing the admissible background. A recent ruling provided clarification that the 'background' to a contract includes 'knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating.'[54] Other important points to note regarding the courts' approach to contractual interpretation include: - (a) the courts will endeavor to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;[55] (b) the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and (c) where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the contra proferentem rule). This last principle has limited applicability in cases involving sophisticated commercial agreements where a contract has been jointly drafted by the parties or where the parties are of comparable bargaining power.[56] The Plaintiff did not demonstrate misrepresentation or fraud nor was it suggested that there were no prior negotiations culminating in the agreement. The applicant is simply inviting this court to either re-write a binding contract or to assist it to evade consequences of a legally binding agreement it voluntarily signed.

69. The other reason why I decline the Plaintiff's argument is the limited scope under which a court can intervene in matters governed by arbitration. The Supreme Court in the the *Nyutu case* underscored the need for courts to exercise deference while intervening in arbitration cases and to respect the parties' autonomy. The Arbitrator, and not the court has authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement including, but not limited to any claim that all or any part of the agreement is void or voidable. In *Rent-A-Center, West, Inc. v Jackson*[57] a 5-4 decision held that unconscionability challenge should go to the arbitrator. By the same parity of reasoning, the jurisdictional objections/challenges cited by the Plaintiff including alleged bias and or arbitrability of the dispute are matters which fall within the powers of the

arbitrator to determine. A reading of the agreement shows that the parties consented to the seat and place of arbitration, the applicable law and the scope of the dispute and the applicable rules. In absence of fraud or misrepresentation, the parties are bound by their choice. This court cannot re-write their preferred choice.

70. In *Roger Shashoua & 2 others v Sharma* [58] the court held that: -

"An agreement as to the seat of arbitration bring in the law of that country as to the curial law and is analogous to an exclusive jurisdiction clause. Not only is there an agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place of designated as the seat of arbitration."(Emphasis added)

71. In *Fili Shipping Co Ltd v Premium Nafta Products and Others [On appeal from Fiona Trust and Holding Corporation and others v Primalov and others,* [59] Lord Hoffmann, delivering the speech with which all their lordships concurred, said: -

"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction." (Emphasis added).

72. In *Fiona Trust* (supra), (which the House of Lords upheld in Fili Shipping), decided in the English Court of Appeal, Longmore LJ, delivering the court's unanimous judgment, said:

"As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all."

And

'One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen.'

And

'If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid, eg for illegality, misrepresentation or bribery, and the arbitration is merely part of that overall contract. In these circumstances it is not necessary to explore further the various options canvassed by Judge Humphrey Lloyd QC since we do not consider that the judge had the discretion which he thought he had."

73. The argument that the dispute cited in this case arises from quasi-contracts or the attempt to re-name or baptize the parties relationship by branding it a different name or purporting to introduce new parties does not alter the agreement between the parties nor does it change the pith and substance of the dispute. Simply put, the dispute falls within the arbitration clause. Judicial decisions have engraved the extent of court intervention in arbitration, a position best captured in *Ann Mumbi Hinga v Victoria Njoki Gathara* [60] which held that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Act or as previously agreed in advance by the parties.

74. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The arbitration agreement is the product of a consensual contract, so, this court must refrain from readily acceding to the invitation to "rectify the arbitration clause" by giving it an interpretation which was not contemplated by the parties. The applicant is inviting the court to venture into the forbidden sphere of re-writing contracts willfully signed by consenting parties.

75. The South African Supreme Court of Appeal in *Bredenkamp v Standard Bank of SA Ltd*[61] adopted the mantra that "abstract values of fairness and reasonableness" may not directly be relied upon by the courts in the control of private contracts through the instrument of public policy. A court will use its power to invalidate a contract or not enforce it, sparingly, and only in the clearest of cases in which the harm is substantially incontestable and proven. A court will decline to use the power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose. The party who attacks the contract or its enforcement bears the onus to establish the facts. These principles are derived from a long line of cases. There are, however, two principles which require further elucidation. The first is the principle that public policy demands that contracts freely and consciously entered into must be honored. In general, public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken.

76. The second principle requiring elucidation is that of "perceptive restraint." According to this principle a court must exercise "perceptive restraint" when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a "court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases." This principle follows from the notion that contracts, freely and voluntarily entered into, should be honored.

77. A reading of the agreements leaves no doubt that the party's intention was clear as expressed in the arbitration clause(s). In any event, as stated above, the arbitrator's jurisdiction or any objections or reservations including the procedures the Plaintiff is questioning can be challenged either by attacking the agreement's validity or the tribunal's jurisdiction over the subject matters, among other challenges. The foregoing is fortified by Section **17** of the Arbitration Act which provides for the doctrine of *kompetenz-kompetenz*, a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The doctrine of *kompetenz-kompetenz* is enshrined in the **UNCITRAL** Model Law on International Commercial Arbitration and Arbitration Rules.[62] Article **16(1)** of the Model Law and article **23(1)** of the Arbitration Rules both dictate that "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

78. The bulk of the Plaintiff's argument is that the arbitration clause is "inoperative." The term "inoperative" was considered by Hammerschlag J in *Broken Hill City Council v Unique Urban Built Pty Ltd.*[63] Urban brought a motion for the matter to be referred to arbitration. The Council resisted on the grounds that the arbitration agreement was inoperative. The issues for determination were, what was meant by the term inoperative and whether clause 42.3 rendered the arbitration agreement inoperative. His Honour referred to the case of *Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd*[64] in which the parties had agreed that arbitration would be in accordance with the rules of procedure of an association which did not exist. Kaplan J noted that the phrase 'inoperative or incapable of being performed' had been taken from the New York Convention of 1958 and endorsed the following commentary of academic commentators: -

"The word 'inoperative' can be deemed to cover those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons. One reason may be that the parties have implicitly or explicitly revoked the agreement to arbitrate. Another may be that the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of res judicata …).

…[A]s for instance where the award has been set aside or there is a stalemate in the voting of the arbitrators or the award has not been rendered within the prescribed time limit. Further, he suggests that a settlement reached before the commencement of arbitration may have the effect of rendering the arbitration agreement inoperative, although he notes an American decision which left this issue to the arbitrators.

As to the phrase 'incapable of being performed', Professor van den Berg is of the view that this would seem to apply to a case where the arbitration cannot be effectively set in motion. The clause may be too vague or perhaps other terms in the contract contradict the parties' intention to arbitrate. He suggests that if an arbitrator specifically named in the arbitration agreement refuses to act or if an appointing authority refuses to appoint, it might be concluded that the arbitration agreement is 'incapable of being performed'. However, that would only apply if the curial law of the state where the arbitration was taking place had no provision equivalent to ss 9 and 12 of the Arbitration Ordinance and art 11 of the Model Law."

79. The grounds cited by the Plaintiff cannot pass the above tests. I am reminded of the House of Lords decision in *Premium Nafta Products Limited n(20th defendant) and others (Respondents) v Fili Shipping Company Limited (14th Claimant) and others (appellants)*[65] which stated:-

"Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court" If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause…

In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked…: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

80. In *Dyna-Jet Pte Ltd v Wilson Pte Ltd*,[66] it was recognized that an arbitration agreement is inoperative, at the very least, when it ceases to have effect as a binding contract. That can occur as a consequence of various contractual doctrines, such as discharge by breach, by reason of waiver, estoppel, election or abandonment. More specifically, an arbitration agreement will be inoperative where a party has committed a repudiatory breach of that agreement and the repudiation has been accepted by the innocent counter party. Borrowing from the jurisprudence discussed above, it is my finding that the invitation to this court to find that the arbitration clauses are inoperative is legally infirm. The clauses clearly demonstrate the party's intention. There is nothing before me to show that the arbitration clause is inoperative, null or void.

81. The phrase 'incapable of being performed' was considered in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors.*[67] Fortuna brought a motion to stay court proceedings pending arbitration pursuant to the arbitration agreement contained in the contract. Bulkbuild resisted the motion, claiming that the arbitration agreement was incapable of being performed on the grounds that there would be a risk of different factual findings being reached if its claims against Fortuna were determined by arbitration but its claims against another party to the proceedings (the Superintendents) were determined by a court. It was argued that the claim against Fortuna arose out of similar factual matters as its claims against the Superintendents. The court, rejecting Bulkbuild's argument, held at that mere inconvenience, "such as might arise if the claims against the second and third defendants were permitted to be actively pursued in the court, at the same time as the arbitration of the claim against the first defendant," does not render the arbitration agreement incapable of being performed. The court considered the meaning of the phrase 'incapable of being performed' from which the following points can be taken: -

a. the term would relate to the capability or incapability of parties to perform an arbitration agreement; the expression would suggest "something more than mere difficulty or inconvenience or delay in performing the arbitration";

b. there has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement"; and

c. the focus in the practical examples canvassed by the court was on the administration of the arbitration itself rather than on the merits of what was to be referred to arbitration.

82. The phrase "incapable of being performed" has judicially been interpreted to mean a situation where a contingency prevents the arbitration from being set in motion, whether or not that contingency is foreseen and bargained for. The argument propounded by the Plaintiff cannot meet this test.

83. Another ground under section **6** which if present can bar a court from granting stay is if the agreement is "null and void." An arbitration agreement is 'null and void' if it does not have a legal effect due to the absence of consent. Furthermore, a lack of capacity, such as when a party does not have the authority or permission to enter into an arbitration agreement, may invalidate the clause. An arbitration agreement may also be null, where the clause's language is so vague or ambiguous, that the parties' intention cannot be decided. However, defective arbitration clauses, may nonetheless be interpreted by a court to give meaning to it, to save the parties' intention to arbitrate, as courts tend to interpret these clauses narrowly, to avoid giving a 'back door,' for a party wishing to escape the arbitration agreement. Thus, the 'null and void' language must be read narrowly given a presumption of enforceability of agreements to arbitrate.

84. I now turn to the other argument advanced by the Plaintiff, that is, the applicant's supporting affidavit is incurably defective because it was not properly attested/notarized, a that it's not clear the place it was sworn nor did the deponent authorized to swear it.

85. The above argument, attractive as it is, ignores the fact that the instant application will stand or fall on points of law as opposed to facts. Specifically, it is stand or fall on the grounds set out in section **6** of the arbitration act as opposed to the facts both parties deployed so much energy expounding. It will suffice to state that I have already set out the section and discussed the applicable grounds in detail, hence, it will add no value to rehash them here. I will instead address the grounds of attack directed at the applicants' supporting affidavit.

86. The Plaintiff laid great emphasis on alleged lack of clarity as to where the affidavit was notarized. The court in *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another*[68] considering a similar omission had this to say:-

"The parties cannot waive irregularities in the form of a jurat, but where the place of swearing is omitted, the Court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity, may be overlooked."

In short, the English Courts of Judicature may treat an omission to state the place where the affidavit is taken as an irregularity which the Court can overlook despite the apparently mandatory rendition of section 5 of the Commissioners of Oath Act of 1889. In my opinion if failure to state the place where an affidavit was taken in the jurat thereof does not ipso facto make such an affidavit fatally defective and inadmissible in an English Court despite the wording of the section of the law which I have just read, there is neither rhyme nor reason to hold that such an affidavit if filed in a Kenyan Court is fatally defective and inadmissible."

87. In *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited*[69] after analyzing decided cases, the court had this to say:-

11. I am in total agreement with the reasoning of Ringera J. (as he then was) and I do adopt the same herein. Indeed, Section 88 of the Evidence Act, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of Order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public.

88. My understanding of the above excerpt is that a party can prove by way of an affidavit where the affidavit was notarized. In this regard, the supplementary affidavit serves this salutary purpose.

89. The Plaintiff argued that the applicant's deponent lacked the authority to swear this affidavit. Addressing a similar challenge, the court in *Benel Development Limited v First Community Bank Limited*[70] analyzed decided cases and pronounced itself as follows: -

20) Likewise in the case of TRUST BANK LTD –VS- AMALO CO. LTD (2002) KLR 63 where the Applicant's documents were expunged from the record by the Court and the Appellant was denied the right to be heard in the application because of lack of diligence in the matter, the Court of Appeal while allowing the appeal held:- "The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right."

(21) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so. In the instant case, this Court would be reluctant to strike out a suit just because authority under seal has not been filed. This is because the Plaintiff can be allowed time within which the authority can be filed failing which the Court can then take that drastic action of striking out the pleadings.

90. *First*, I am not persuaded that the affidavit is incurably defective. The deponent explained in his supplementary affidavit that the place of swearing. *Second,* even if it had a defect, the same is curable and what was not clear was clarified by the supplementary affidavit. *Third*, this court is careful not to sacrifice justice by hoisting form over substance. *Fourth,* Article **159 (2) (d)** of the Constitutions obligates courts to determine disputes without undue regard to technicalities of procedure.

91. In conclusion, Section **6 (1)** of the Arbitration Act provides that a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds— (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

92. From my analysis of the facts of this case and the law, I find no bar, either legal, equitable or otherwise to stop the court from granting the prayers sought. None of the grounds specified in paragraphs **(a)** & **(b)** of section **6** of the Arbitration Act has been demonstrated. Accordingly, I allow the application dated **9th** October 2020 and order that these proceedings be and are hereby stayed pending referring the dispute to arbitration and hearing and determination of the arbitration proceedings. I make no orders as to costs.

Signed, dated and delivered via e-mail at **Nairobi** this **27th** day of **August** 2021

John M. Mativo

Judge

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[1] Cap 80, Laws of Kenya.

[2] {2016} e KLR

[3] {2001} KLR 470; {2001} 2 EA 460.

[4] {2017} e KLR.

[5] {2013} e KLR.

[6] Civil Appeal No. 55 of 2006.

[7] {2013} e KLR.

[8] {2001} KLR 112

[9] Civil Suit No. 571 of 2015 - [2017].

[10] {2015} e KLR.

[11] {2018} e KLR.

[12] {2010} e KLR.

[13] {2002} KLR 250.

[14] {2016} e KLR.

[15] {2001} KLR 470; [2001] 2 EA 460.

[16] Cap 80, Laws of Kenya.

[17] {2001} e KLR.

[18] {2008} e KLR.

[19] {2013} e KLR.

[20] HCCC No 524 of 2004.

[21] Cap n80, Laws of Kenya.

[22]{2006} e KLR.

[23] {1986} KLR 705.

[24] {2015} e KLR.

[25] {2015} e KLR.

[26] {2015} e KLR.

[27] {2018} e KLR.

[28]{2014} e KLR.

[29] {2019} e KLR.

[30] {2015} e KLR.

[31] 30th Edition, Vol II, Specific Contracts, at page 148.

[32] {2007} UKHL 40.

[33] {2020} e KLR.

[34] {2015} e KLR.

[35] {2019} e KLR.

[36] 2012 ABQB 424 (CanLII)

[37] {2016} e KLR.

[38] {2008} eKLR

[39] {2018} e KLR.

[40] {2010} e KLR

[41] {2001} e KLR.

[42] Act No. 4 of 1995.

[43]Act No. 26 of 2013.

[44] See Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[45] {2019} e KLR.

[46] 2019 SCC OnLine SC 1585.

[47] See HCCCOM E196 of 2021.

[48] Ibid.

[49] Ibid.

[50] Haun v. King, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (quoting In re Friedman, 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978)); see also Aquascene, Inc. v. Noritsu Am. Corp., 831 F. Supp. 602 (M.D. Tenn. 1993)

[51] **2020 SCC 16**

[52] Arnold v. Britton [2015] UKSC 36.

[53] Federal Republic of Nigeria v. JP Morgan Chase Bank NA [2019] EWHC 347 (Comm), paragraph 32, approved by the Court of Appeal in JP Morgan Chase Bank NA v. Federal Republic of Nigeria [2019] EWCA Civ 1641, paragraphs 29, 73 and 74.

[54] Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC [2019] EWCA Civ 526).

[55] Tillman v. Egon Zehnder Ltd [2019] UKSC 32.

[56] See Persimmon Homes v. Ove Arup [2017] EWCA Civ 373.

[57] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010).

[58] {2009} EWHC 957.

[59] [2007] UKHL 40; [2007] Bus LR.

[60] {2009} e KLR.

[61] {2010} ZASCA 75; 2010 (4) SA 468 (SCA).

[62] Bantekas, Ilias. An introduction to international arbitration. New York. p. 109. ISBN 9781316275696. OCLC 917009113; Croft, Clyde Elliott; Kee, Christopher; Waincymer, Jeff (2013). A guide to the UNCITRAL arbitration rules. Cambridge:

Cambridge University Press. p. 249. ISBN 9781107336209. OCLC 842929920.

[63] {2018} NSWSC 825.

[64] {1993} HKCFI 14.

[65] {2007}UKHL 4

[66] {2016} SGHC 238.

[67] {2019} QSC 173.

[68] Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460.

[69] {2016} e KLR.

[70] {2021} e KLR.

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