Directline Assurance Company & 4 others v Aliker & 8 others (Commercial Miscellaneous Application E250 of 2021) [2024] KEHC 13197 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL MISCELLANEOUS APPLICATION E250 OF 2021

MN MWANGI, J

OCTOBER 25, 2024

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF AN APPLICATION UNDER SECTIONS 14(3) & 15 OF THE ARBITRATION ACT CHALLENGE TO ARBITRATOR AND THE ARBITRATION

BETWEEN

DIRECTLINE ASSURANCE COMPANY ..... 1ST APPLICANT

ROYAL MEDIA SERVICES LIMITED ..... 2ND APPLICANT

ROYAL CREDIT LIMITED ..... 3RD APPLICANT

SAMUEL KAMAU MACHARIA ..... 4TH APPLICANT

PURITY GATHONI MACHARIA ..... 5TH APPLICANT

AND

MR PHILIP ALIKER ..... 1ST RESPONDENT

SUREINVEST COMPANY LIMITED ..... 2ND RESPONDENT

STENNY INVESTMENTS LIMITED ..... 3RD RESPONDENT

TRIAD NETWORKS LIMITED ..... 4TH RESPONDENT

AKM INVESTMENTS LIMITED ..... 5TH RESPONDENT

KEVIN DERMOT MCCOURT ..... 6TH RESPONDENT

JANUS LIMITED ..... 7TH RESPONDENT

GEOFFREY GORDON WERE RADIER ..... 8TH RESPONDENT

JAMES KABERERE GACHOKA ..... 9TH RESPONDENT

RULING

1. The applicants filed a Notice of Motion application dated 11th April 2024, pursuant to the provisions of Sections 7, 14(3), 15, 17(6) & 35 of the *Arbitration Act*, and Rule 3 of the Arbitration Rules 1997, seeking orders inter alia for leave to file a further affidavit for admission into evidence, a letter dated 5th March 2024 from the Insurance Regulatory Authority, to bring to the attention of this Honourable Court a fact which goes to the substratum of not only the Arbitral proceedings being supervised but also the jurisdiction of this Honourable Court to supervise Arbitral proceedings under Sections 17 & 35 of the *Arbitration Act*, leave to amend their amended amended amended Originating Notice of Motion dated 24th June 2022 to take account of the fact referred to above, corresponding leave to the respondents to respond to the said fact, leave to the parties herein to file supplementary submissions, for the supporting affidavit to be deemed as the applicants' further affidavit, and for the draft amended amended amended Originating Notice of Motion annexed to the supporting affidavit to be deemed as duly filed and served upon the respondents.

2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Mr. Samuel Kamau Macharia, the 4th applicant herein. He averred that a letter from the Insurance Regulatory Authority dated 5th March 2024 addressed to them has significant implications for the Arbitral Award they seek to set aside, and which the 2nd to 5th respondents are attempting to enforce. He stated that in the said Award, the 5th respondent holds 70.3336% of the 1st applicant's shares, and the 7th respondent holds 20%, making them the 1st applicant's majority shareholders. Mr. Macharia averred that the Regulator's letter dated 5th March 2024 confirms that the 2nd, 3rd, 4th, 5th & 7th respondents, who were claimants in the arbitration proceedings that led to the impugned Arbitral Award, are not shareholders in the 1st applicant. He referred to the provisions of Section 35(2)(ai) of the *Arbitration Act* and argued that the shareholding of the 1st applicant, as outlined in the letter dated 5th March 2024 differs from those indicated in the CR-12 as at 2nd September 2019, which was relied on by the claimants in the Arbitral proceedings that gave rise to the Arbitral Award the applicants are seeking to set aside.

3. He emphasized that the 2nd, 3rd, 4th, 5th & 7th respondents are not shareholders of the 1st applicant according to the letter dated 5th March 2024, thus they lacked the capacity to initiate the arbitration proceedings. Mr. Macharia contended that the introduction of an arbitration clause in the 1st applicant's Articles of Association was based on a mistaken belief about their shareholding, which he alleged was manipulated, as the said respondents incorrectly assumed they held 59% of the shares when they are not shareholders.The 4th applicant stated that the 2nd applicant, which is his family company, is also not a shareholder of the 1st applicant according to the Regulator's letter dated 5th March 2024. He stated that the dispute between the parties herein centers around the 1st applicant's shareholding, and asserted that if they had known the true details of the 1st applicant's shareholding, they would have highlighted that the arbitration between the parties herein was invalid from the start.

4. In opposition to the application, the 2nd, 4th, 6th & 9th respondents filed grounds of opposition dated 16th April 2024 raising the following issues-

    i. The Motion is an abuse of the Court process for reasons set out below;

ii. The application is intended to delay the hearing of this matter and is therefore frivolous and an abuse of Court process. It is a continuation of the applicants' improper attempts to stall the enforcement of the Arbitral Award and deny the respondents access to justice;

iii. The applicants have continued to strip the 1st applicant as set out in the affidavits filed by the 2nd to 9th respondents herein;

iv. The *Arbitration Act* (the Act) outlines the substantive and procedural aspects of Arbitral matters. The Court's intervention is allowed only under specific circumstances as stipulated under Section10 of the Act;

v. The application is an attempt to circumvent the provisions of Section 35 of the Act as the applicant has not made an application to set aside the Award. The applicant can only rely on Section 35 of the Act where there is a competent application brought under Section 35 the Act;

vi. The letter of 5th March 2024 relied on was not copied to the respondents who believe it was procured for the purpose of delaying the hearing of this matter;

vii. The applicants' amended amended Notice of Motion dated 24th June 2022 is brought under Sections 7, 14 and 17(6) of the Act. Any applications under Sections 17 of the Act ought to have been made by Originating Summons as provided for under Rule 3 of the Arbitration Rules, 1997;

viii. Rule 7 of the Arbitration Rules, 1997 only allows an applicant making an application under Section 35 of the Act to make an affidavit in support of the application. The applicant cannot rely on Rule 7 of the Arbitration Rules as no such application has been made under Section 35 of the Act;

ix. The applicant seeks to relitigate matters that have already been determined by the Arbitrator. The letter dated 5th March 2024 is a collateral attack on the Award and the 2nd, 4th, 6th & 9th respondents reserve their right to challenge its validity and effect at the appropriate fora;

x. No reasonable or any explanation has been offered for the delay of 37 days from 5th March 2024 for not making the application; and

xi. Other grounds and reasons in the affidavit of Kevin McCourt to be filed herein.

5. The 2nd, 4th, 6th & 9th respondents also filed a Notice of Preliminary Objection dated 16th April 2024 raising the following grounds –

i. There is no jurisdiction to make the orders sought under any of the provisions cited or at all;

ii. The Court can not only intervene in matters governed by the *Arbitration Act*. The matters raised in the Motion are not contemplated in the Act;

iii. The 2nd to 5th applicants have disregarded and continue to disregard an Award which is binding pursuant to Section 36 of the *Arbitration Act* in that they have refused and or failed to hand over the management of Directline Assurance Company Limited (the 1st applicant) to the representatives of the 2nd to 5th and 7th respondents; and

iv. The conduct referred in paragraph *3* above violates the rule of law which is one of the national values and principles that are binding on all persons.

6. The 2nd, 4th, 6th and 9th respondents also filed a replying affidavit sworn on 25th April 2024 by Kevin Dermot McCourt, the 6th respondent herein and a Director of the 2nd respondent. He stated that any

application to set aside an Arbitral Award must be made under Section 35 of the *Arbitration Act*, but in this case, no such application has been filed. He stated that the Business Registration Service (BRS) has already confirmed the legitimate shareholders of the 1st applicant. He also contended that the 4th applicant lacks the authority to represent the 1st applicant in the current application, as he has not been authorized by the company or its majority shareholders to do so. Mr. McCourt further contended that the *Arbitration Act* governs Arbitral matters, with Court intervention allowed only under Section 10, further the current application is an attempt by the applicants to bypass the requirements of Section 35 of the *Arbitration Act*.

7. Mr. McCourt stated that the letter dated 5th March 2024 from the Regulator indicates that two of the five claimants in the arbitration are shareholders of the 1st applicant. He however questioned the authenticity of the said letter, suggesting it might not be a genuine document from the Insurance Regulatory Authority (IRA). He also noted that a previous letter from the Commissioner of Insurance dated 4th September 2019 listed the 2nd to 5th and 7th respondents as shareholders, which contradicts the IRA's position in the March 2024 letter. He argued that the applicants have misinterpreted the March 2024 letter, as it considers the 1st applicant's shareholding as at 2005 to include the 5th and 7th respondents, who were also claimants in the arbitration, along with the 2nd and 4th respondents. He stated that the question of the 1st applicant's shareholding was settled by the Arbitral Award, hence the letter of 5th March 2024 in so far as it is inconsistent with the said Award is in contempt of Court.

8. The 3rd respondent in opposition to the instant application filed grounds of opposition dated 16th April 2024 raising the following issues –

   i. The plaintiff's application is perpetuated by malice and is an abuse of the Court Process;

   ii. The plaintiffs are intent on delaying the hearing and conclusion of the respondent's suit in HCCC E509 of 2022 which is being heard together with this matter;

   iii. The plaintiff's application is an attempt to bypass the Arbitral Award, the Court proceedings seeking the adoption of the Arbitral Award (sic);

   iv. The plaintiffs are yet again seeking to relitigate and even fraudulently intervene illegally and derail the matters outlined in paragraph *3* above, since the current situation where illegal minority shareholders are running the company down, favours them;

   v. The plaintiffs are seeking to use an unverified, illegal, fraudulently uttered letter that was not served on the respondents by the alleged author or the institution, to perpetrate open fraud and re-draw an Arbitral Award fairly arrived at after the hearing which they participated in and which document also seeks to alter the finding of the BRS which is the rightful Regulator to determine the shareholding of Directline Limited. Without authenticity the fraudulent letter becomes irrelevant to this or any other proceedings; and

   vi. The plaintiffs' application is egregious, misconceived, motivated by bad faith, and an abuse of the Court process and the same ought not interfere with the progress of the respondent's suit, HCCC E509 of 2022 already before the Court and has been pending before the Court since 2022 seeking to enforce the Arbitral Award determined after fair trial and fair hearing unlike the alleged letter from unknown and unverified sources.

9. The 3rd respondent also filed a Notice of Preliminary Objection dated 17th April 2024 raising the following grounds –

i. The plaintiff seeks to rely on a document that is not authenticated, not verified, not served on any of the respondents and specifically not served on the 3rd respondent, and the purported author's bonafides is not verified. Further the purported author and Insurance Regulatory Authority are not parties to the suit;

ii. This Court has no jurisdiction to make the orders sought under the provisions cited in the said application; and

iii. Any purported letter as the plaintiffs seek to rely upon is sub judice and seeks to subvert justice.

10. In opposition to the application dated 11th April, 2024, the 5th respondent filed a Notice of Preliminary Objection dated 17th April 2024 raising the following grounds –

i. That this Honourable Court lacks jurisdiction to hear and determine the application dated 11th April 2024 by dint of the provisions of the *Arbitration Act*; and

ii. That the application is frivolous, vexatious and an abuse of the due process and the same ought to be struck off.

11. The 5th respondent also fled a replying affidavit sworn on 3rd May 2024 by Lisa Anyango Amenya, the 5th respondent's Director. She averred that the letter dated 5th March 2024 cannot override the law, and it addresses issues that are not relevant to the current case or the *Arbitration Act*. She noted that the Insurance Appeals Tribunal stayed the effect of the letter dated 5th March 2024. She stated that the 5th respondent has approached the Regulator on numerous occasions with a proposal for it to be allowed to regulate the 1st applicant's shareholding, but the Regulator has all along been hostile and unresponsive. Additionally, she averred that the 5th respondent contended that the applicants' proposed amendment introduces a new, unrelated cause of action, which would be highly prejudicial to the 5th respondent if allowed.

12. The 7th respondent in opposition to the instant application filed a replying affidavit sworn on 30th April 2024 by Terry Wanjiku Wijenje, the 7th respondent's Director. She stated that vide an order dated 29th April 2024, the Insurance Appeals Tribunal stayed the effect of the letter sought to be now introduced. She stated that in any event, the said letter is irrelevant to the circumstances of this case as the only issue at hand is enforcement or setting aside of the Arbitral Award delivered by the 1st respondent.

13. In a rejoinder, the applicants filed a further affidavit sworn on 8th May 2024 by Samuel Kamau Macharia, the 4th applicant herein. He averred that the purpose of prayer No. 4 in the instant application is to invoke the Court's jurisdiction under Sections 14, 17 and 35 of the *Arbitration Act*, to supervise Arbitral proceedings. He confirmed that on 25th April 2024, the Insurance Appeals Tribunal issued an order staying the Regulator's decision contained in the letter dated 5th March 2024 and stated that the Insurance Appeals Tribunal has no power to determine a matter which is properly before this Court as the power to supervise Arbitral proceedings is vested in the High Court. He claimed that in the letter dated 5th March 2024, the Regulator did not recognize the 2nd, 3rd & 4th respondents as shareholders of the 1st applicant, neither did Mr. McCourt annex any proof of the Commissioner's approval to become the 1st applicant's shareholder.

14. Mr. Macharia deposed that the Regulator of the insurance industry is the Insurance Regulatory Authority, the custodian of all the documents of insurance companies including acquisition of shares by shareholders in insurance companies. He contended that the Director of the BRS is not in a position to tell which shareholder has complied with the provisions of the *Insurance Act*. He also contended that from the letter dated 5th March 2024, the 1st applicant has only three valid shareholders being the

3rd, 4th & 5th applicants, who have been given time by the Regulator to restructure the 1st applicant in accordance with the law.

15. The instant application was canvassed by way of written submissions. The applicants' submissions were filed on 10th May 2024 and 3rd June 2024 by the law firm of Kamau Kuria & Company Advocates, the 2nd, 4th, 6th, 8th & 9th respondents' submissions were filed by the law firm of Hamilton, Harrison & Mathews on 14th May 2024, the 3rd respondent's submissions were filed by the law firm of Kairu & McCourt Advocates on 14th May 2024, the 5th respondent's submissions were filed on 15th May 2024 by the law firm of W.G. Wambugu & Company Advocates, and the 7th respondent's submissions were filed on 14th May 2024 by the law firm of Archer &Wilcock Advocates.

16. Mr. Kamau Kuria (SC), learned Counsel for the applicants submitted that the Insurance Regulatory Authority confirmed in the letter dated 5th March 2024 that the 5th & 7th respondents are not shareholders in the 1st applicant as they sought to acquire more than 10% of shares without the approval of the Commissioner of Insurance. He cited the provisions of Section 3A of the *Insurance Act* and asserted that the letter dated 5th March 2024 was written in exercise of the Regulator's functions as provided for thereunder. He relied on the case of The County Government of Nyeri v Eustace Gakuhi Gitonga [2019] eKLR, and stated that the purported Arbitration Agreement is to be found in Article 82 of the 1st applicant's Memorandum and Articles of Association which came from a resolution passed at a General Meeting held on 22nd May 2017 by the 2nd to 5th & 7th respondents, in the absence and without a valid Notice to the 1st applicant's valid shareholders being the 2nd to 5th applicants.

17. He cited the Court of Appeal case of J.C. Patel v B.D. Joshi 19 EACA 42, and submitted that no prejudice will be suffered by the respondents if the applicants are allowed to amend the amended amended Notice of Motion dated 24th June 2022 and introduce the Insurance Regulatory Authority's letter dated 5th March 2024 into these proceedings as the respondents will be given an opportunity to respond to it by way of filing further affidavits. He argued that the probative value of the letter dated 5th March 2024 is not for determination at this stage, as the same will be considered by the Court along with other affidavits and documents on record. Counsel stated that by the time the applicants filed their submissions dated 28th October 2023, they had not received the letter dated 5th March 2024, which means that they did not have the said letter at the time they were making their affidavits between 9th April 2021 and September 2023, thus necessitating the instant application.

18. Mr. Kiragu Kimani (SC), learned Counsel for the 2nd, 4th, 6th, 8th & 9th respondents submitted that the 1st respondent published a partial Arbitral Award on 11th May 2022 and a Final Award on 27th September 2022 in favour of the respondents. He stated that to date, the applicants had not filed an application to set aside the said Award pursuant to the provisions of Section 35 of the *Arbitration Act*, but they had however filed an application challenging the jurisdiction and competence of the Arbitrator pursuant to the provisions of Sections 7, 14(3), 15 & 17(6) of the *Arbitration Act*, whereas the respondents have filed a suit seeking to enforce the said Award. He further submitted that on 4th July 2023, the parties recorded a consent to the effect that "the strike out Motion" and "the enforcement action" would be heard and determined concurrently. Counsel relied on the Supreme Court case of Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, where it was held that once an Arbitral Award has been issued, an aggrieved party can only approach the High Court under Section 35 of the *Arbitration Act* for setting aside of the Award.

19. He cited the provisions of Sections 10 & 32A of the *Arbitration Act* and argued that granting the orders sought in the instant application will be in contravention of the provisions thereunder. He

referred to the case of Samuel Kamau Muhindi v Blue Shield Insurance Company Ltd [2010] eKLR, and submitted that the issue of the 1st applicant's shareholding herein, was heard and determined by the Arbitrator after consideration of the evidence and submissions by the parties, thus entertaining such a dispute at this juncture after the Arbitrator published his Award, would amount to hearing an appeal against the Arbitrator's decision. He cited the Court of Appeal decisions in Hirani v Kassam [1952] 19 EACA 131, Brooke Bond Liebig Ltd Mallya [1975] EA 266, and Flora N. Wasike v Destimo Wamboko [1982-88] KAR, and stated that the application herein is an attempt by the applicants to set aside the consent of 4th July, 2023 without demonstrating the requisite grounds that would warrant setting aside of the said consent.

20. Ms. Ndumia, learned Counsel for the 3rd respondent cited the provisions of Section 35 of the *Arbitration Act* and submitted that this Court has no jurisdiction to entertain the application herein having been filed approximately three (3) years after the subject Arbitral Award was published. To buttress the said assertion, Counsel relied on several cases, inter alia Ezra Odondi Opar v Insurance Company of East Africa Limited [2020] eKLR and the Court of Appeal case of Ann Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR. She argued that the provisions of Sections 7, 14(3), 15 & 17(6) of the *Arbitration Act* under which the instant application has been filed are not relevant to the instant application in so far as it seeks to amend a previous application.

21. Counsel stated that this Court has no way of verifying the authenticity of the letter dated 5th March 2024 as it is neither valid nor factual, and it is part of the issues before the Insurance Appeals Tribunal. She stated that the Insurance Tribunal stayed the effect of the said letter, and it is not only inappropriate but also premature to refer to it at this point. She submitted that under the *Insurance Act*, the Insurance Appeals Tribunal has the power to uphold, reverse, revoke or vary that decision.

22. Mrs. Wambugu, learned Counsel for the 5th respondent cited Section 35 of the *Arbitration Act* and the decisions in Reliable Concrete Works v Ngewanji Company Limited [2022] eKLR, and Lalji Meghji Patel & Co. Ltd v Nature Green Holdings Limited [2017] eKLR, and submitted that the instant application is bad in law as it is contrary to statute for seeking to introduce documents brought outside what is contemplated in law. She further submitted that the letter sought to be introduced by the applicant has was stayed by the Insurance Appeals Tribunal on 29th April 2024 until 24th May 2024.

23. Ms Jan Mohammed, learned Counsel for the 7th respondent submitted that the applicants intend to introduce a letter 5th March 2024 from the Insurance Regulatory Authority in an attempt to challenge the Arbitral Award published on 11th May 2022 that determined the dispute between the 1st applicant's shareholders. She submitted that the 5th & 7th respondents filed an appeal at the Insurance Appeals Tribunal challenging the Insurance Regulatory Authority's decision contained in the letter dated 5th May 2024.

24. In a rejoinder, Mr. Kamau Kuria (SC) submitted that the jurisdiction of this Court to determine the instant application cannot be ousted by the consent dated 4th July 2023. He further submitted that in as much as parties are bound by consent orders, there are exceptions to the rule as was held by the Court in Mallya v Brookeboard [1975] EA 266. He submitted that the letter dated 5th March 2024 falls under the exceptions as it reveals that the contract contained in Article 82 of the Articles and Memorandum of Association is illegal.

Analysis And Determination.

25. I have considered the application filed herein, the affidavits filed in support thereof, the grounds of opposition, the Notices of Preliminary Objection, and the replying affidavits filed by the respondents.

I have also considered the written submissions made by Counsel for the parties. The issues that arise for determination are-

i. Whether this Court has the jurisdiction to entertain the instant application and grant the orders sought; and

ii. Whether the application herein is merited.

26. It is trite law that a Preliminary Objection ought to raise a pure point of law. It should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The Court in the case of Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd [1969] EA 696, set out what constitutes a Preliminary Objection in the following words –

> So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

In the said case, Sir Charles Newbold P., stated as follows-

> ... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.

27. The Court's jurisdiction was challenged in the Notices of Preliminary objection filed by the 2nd, 3rd, 4th, 5th, 6th & 9th respondents herein. In the case of the Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, it was held thus-

> ...Jurisdiction is everything. Without it, a 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. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

28. In Arbitral proceedings, the High Court cannot intervene except as provided for in Section 10 of the *Arbitration Act* which states that –

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

29. It is not disputed that the 1st respondent, being the Arbitrator in the Arbitral proceedings that form the subject of this suit published his Final Award on the dispute on 27th September, 2022. Before the said Award was published, the applicants had filed this suit vide an Originating Notice of Motion dated 9th April 2021, which was amended on 10th June 2021, and further amended on 24th June 2022, challenging the Arbitrator's jurisdiction to determine the dispute between the parties herein, and seeking orders for the Court to terminate the Arbitral proceedings before the 1st respondent. The respondents cited the provisions of Section 32A of the *Arbitration Act* which provides that an

Arbitral Award is final and binding upon the parties to it, and no recourse is available against the Award otherwise than in the manner provided by the *Arbitration Act*. They argued that this Court has no jurisdiction to determine the instant application.

30. It is however evident from the foregoing that the application challenging the 1st respondent's jurisdiction to determine the dispute between the parties herein, and seeking orders for the Court to terminate the Arbitral proceedings before the 1st respondent was made before the Arbitrator published his Final Award on the said dispute, and the said application is yet to be determined. It is evident that the said application was filed pursuant to the provisions of Sections 7, 14(3), 15, 17(6) & 35 of the *Arbitration Act*, and Rule 3 of the Arbitration Rules 1997.

Section14(3) of the *Arbitration Act* provides that

> If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within thirty days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

Section17(6) of the *Arbitration Act* on the other hand states that –

> 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.

31. The applicants filed the suit herein vide an Originating Notice of Motion dated 9th April 2021, that was amended on 10th June 2021, and further amended on 24th June 2022. It is however noteworthy that the letter the applicants are seeking leave to introduce in this case is dated 5th March 2024 which means that by the time this suit was filed, and/or the Arbitrator's Final Award was published on 27th September, 202, the said letter was not in existence, hence it could not have been adduced and it could not have formed part of the evidence or pleadings before the Arbitrator, thus, necessitating the instant application.

32. The application herein has also been filed pursuant to the provisions of Rule 3 of the Arbitration Rules, 1997 which provides that applications under Sections 12, 15, 17, 18, 28 and 39 of the Act shall be made by Originating Summons. It is evident that the suit between the parties herein was filed vide an Originating Notice of Motion and not Originating Summons as provided for under Rule 3 of the Arbitration Rules. As such, the respondents contend that it is fatally defective. In deciding whether non-compliance with the provisions of Rule 3 of the Arbitration Rules, 1997 is fatal to the instant application, I am guided by the holding in the case of Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR, where the Court held that –

> Section1A of the *Civil Procedure Act* came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. The courts' duty in performing such mandate under Section 1B of the *Civil Procedure Act* are -
>
> a. The just determination of the proceedings,
>
> b. The efficient disposal of the business of the Court,
>
> c. The efficient use of the available judicial and administrative resources,
>
> d. The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties,

e. The use of suitable technology.

33. Further, Article 159(2)(d) of *the Constitution* of Kenya, 2010 provides that in exercising judicial authority, Courts and Tribunals shall administer justice without undue regard to procedural technicalities. Upon perusal of the affidavits filed in support of and in opposition to the instant application, the Grounds of Opposition and the Notice of Preliminary Objection, it is manifest that the parties herein understand what orders are being sought and the grounds upon which the said orders are anchored. Furthermore, the application is properly defended.

34. In the premise, this Court finds that failure to comply with the provisions of Rule 3 of the Arbitration Rules, 1997 is neither fatal nor does it make the application herein incurably defective, since the non-compliance affects the form rather than the substance of the application, an issue that can be cured by the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010.

35. As stated earlier on in this ruling, Section 32A of the *Arbitration Act* provides that an Arbitral Award is final and binding upon the parties to it, and no recourse is available against the Award otherwise than in the manner provided by the said Act. On the other hand, Sections 14(8) & 17(8) of the *Arbitration Act* provide that-

> Section14 (8)
>
> While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude Arbitral proceedings, but no Award in such proceedings shall take effect until the application is decided, and such an Award shall be void if the application is successful.
>
> Section17(8)
>
> While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude Arbitral proceedings, but no Award in such proceedings shall take effect until the application is decided and such Award shall be void if the application is successful.

36. Since the Originating Notice of Motion dated 9th April 2021, which was amended on 10th June 2021, and further amended on 24th June 2022 challenging the Arbitrator's jurisdiction to determine the dispute between the parties herein, and seeking orders that the Court terminates the Arbitral proceedings before the 1st respondent was filed before the Arbitrator published his Award, and the said application is yet to be heard and determined, the Final Award published by the Arbitrator on 27th September, 2022 shall not take effect until the Originating Notice of Motion dated 9th April, 2021, as amended twice, is heard and determined. Accordingly, this Court finds that it has the requisite jurisdiction to hear and determine the application herein.

Whether the application dated 11th April, 2024 is merited.

37. The instant application seeks leave to file a further affidavit for admission into evidence, a letter dated 5th March 2024 from the Insurance Regulatory Authority. The other orders sought will automatically flow, if the instant application is granted. The respondents challenge the admission of the said letter on grounds that the Arbitrator in his Final Award published on 27th September, 2022 determined the issue of the 1st applicant's shareholding, thus the said issue is no longer open for determination. Further, they state that there is an order issued by the Insurance Appeals Tribunal staying the effect of the contents of the said letter. The respondents are also challenging the validity and/or authenticity of the said letter.

38. On perusal of the interim orders issued by the Insurance Appeals Tribunal on 29th April 2024, one of the orders granted stayed the decision of the Commissioner of Insurance contained in the letter dated 5th March 2024 until 24th May 2024. As at the date of writing this ruling, no evidence had been placed before this Court by the respondents to state if the said orders were extended and/or if the decision by the Commissioner of Insurance contained in the letter dated 5th March 2024 had been set aside and/or reviewed Therefore, as it stands, this Court draws the inference that the decision contained in the said letter has neither been set aside, nor have the orders for stay been extended, as the said orders were to elapse on 24th May, 2024.

39. The above notwithstanding, at the time the Arbitral Tribunal rendered its Final Award in respect to the dispute between the parties herein, the letter the applicants now seek to introduce did not exist. It is worth noting that the said letter speaks to the shareholding of the 1st applicant, an issue which was determined by the Arbitral Tribunal in its Final Award published on 27th September, 2022. That means that the Arbitral Tribunal in arriving at its decision did not have the opportunity to not only look at the letter dated 5th March 2024 and consider its contents, but also to determine its validity and its effect to the dispute that was before the Arbitral Tribunal. This Court is alive to the fact that the High Court's jurisdiction in matters arbitration is limited only to the extent provided for under Section 10 of the *Arbitration Act*, as stated earlier on in this ruling.

40. In the case of Geogas S. A v Trammo Gas Ltd (The "Baleares") cited with authority by the Court of Appeal in Kenya Oil Company Limited & Kobil Petroleum Limited v Kenya Pipeline Company [2014] KECA 851 (KLR) it was held that –

> The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an Award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' Award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.

41. The Court of Appeal then went on to hold that –

> We are therefore in agreement with the High Court when it stated in its judgment that "even admitting that the arbitrator is the master of the facts, we hold the view that in an arbitration by documents, the mere presentation of documents by a party is not conclusive as to the fact sought to be proved. It remains incumbent on the arbitrator to be satisfied as to the probative value of those documents or reports particularly in the absence of cross-examination.

42. Bound by the aforementioned decision, it is my finding that admission of the letter dated 5th March 2024 into evidence at this juncture would be equivalent to inviting this Court to address matters within the limits and/or confines of the Arbitrator's jurisdiction contrary to the provisions of Section 10 of the *Arbitration Act*.

43. In addition to the above, it must be noted that this matter is before this Court at the 2nd stage, supervisory stage so to say, of the matter that was before the Arbitral Tribunal. Since the said Arbitral

Tribunal completed it work and published the Final Award on 27th September, 2022. The Supreme Court of Kenya considered the principles that guide a Court in allowing additional evidence in the case of *Minister for Health & another v Uasin Gishu Memorial Hospital Limited & another; Attorney General & another (Interested Parties) (Petition 20 of 2019*) [2019] KESC 14 (KLR) (29 November 2019) (Ruling). Although the Supreme Court considered the applicability of the said principles at an appellate stage, it is my considered view that the said principles aptly apply to the application before me, as the said application has been filed after the hearing and determination of the dispute which was before the Arbitral Tribunal. In the above case, the Supreme Court stated as follows-

> The law regarding the introduction of additional evidence before this Court was settled in Petition No. 7 of 2018 Hon. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others where the Court stated as follows regarding the principles for allowing such evidence:
>
> ...we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows;
>
> a. the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;
>
> b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> c. it is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
>
> d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
>
> e. the evidence must be credible in the sense that it is capable of belief;
>
> f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
>
> g. whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;
>
> h. where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
>
> i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filling gaps in evidence. The Court must find the further evidence needful;
>
> j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;

k. the Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other." (Emphasis added).

45. Since the 2nd to 5th applicants' contention is that they are the legitimate shareholders of the 1st applicant, if they had applied due diligence, nothing would have stopped them from procuring the letter they now wish to rely on at this stage, from the Insurance Regulatory Authority to support their position in the proceedings before the Arbitral Tribunal. The applicants' dispute on shareholding was determined by the Arbitrator, and at this stage, allowing new evidence at the supervisory stage of proceedings would completely alter the trajectory of the matters that were agreed on and contemplated by the parties for determination before the Arbitrator. If this Court was to allow the present application, it would in essence usurp the role of the Arbitrator in a matter that he heard and determined leading to publication of the Final Arbitral Award. As earlier stated in this ruling, the jurisdiction of the High Court is limited to the scope specified under the *Arbitration Act*. The applicants have had their "Aha!" moment too late in the day.

46. Given the said circumstances, it is my finding that the application dated 11th April, 2024 is devoid of merits. It is hereby dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Dr. Kamau Kuria (SC) for the plaintiffs/applicants

Mr. Wasonga for the 1st defendant/applicant

Mr. Njiru h/b for Mr. Kiragu Kimani (SC) for the 2nd, 4th, 6th & 9th defendants/respondents

Ms Ndumia for the 3rd defendant/respondent

Mr. Mugo h/b for Mrs. Wambugu for the 5th defendant/respondent

Mr. Nelson Havi for the interested party

Ms. B. Wokabi – Court Assistant.