Gamma Villa Limited v Kenya Ports Authority (Miscellaneous Application 207 of 2021) [2022] KEHC 12500 (KLR) (25 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12500 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION 207 OF 2021

OA SEWE, J

MAY 25, 2022

BETWEEN

GAMMA VILLA LIMITED ..... APPLICANT

AND

KENYA PORTS AUTHORITY ..... RESPONDENT

RULING

[1] Before the Court for determination is the Chamber Summons dated September 29, 2021. It was filed by the application, Gamma Villa Limited, on September 30, 2021 pursuant to Article 159 (2) (c) of the *Constitution of Kenya*, Section 36 of the *Arbitration Act*, 1995, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 46 Rule 18 of the *Civil Procedure Rules, 2010*, Rule 9 of the Arbitration Rules, 1997, and all other enabling provisions of the law. The applicant thereby seeks the following orders:

[a] That the Final Arbitral Award dated July 31, 2021 made by Ms Eunice Lumallas FCIArb., (Sole Arbitrator) in the Arbitration Matter between Gamma Villa Limited and Kenya Ports Authority be recognized and enforced as a Judgment of this Court and a Decree be duly issued.

[b] That costs of the application be provided for.

[2] The application was premised on the grounds that the parties herein subjected their dispute to arbitration pursuant to the provisions of Section 62 of the *Kenya Ports Authority Act*, Chapter 391 of the Laws of Kenya (hereinafter, the KPA Act); and that the arbitral proceedings were presided over by Ms Eunice Lumallas, FCIArb, as the Sole Arbitrator. It was further averred that a Final Arbitral Award was consequently published on July 31, 2021 in favour of the applicant; and that since then the respondent has not taken any steps either to comply or to have the Award set aside. Accordingly, the applicant sought that the said Award be recognized as binding and enforced as a decree of the Court.

[3] The application was supported by the affidavit of the applicant's Managing Director, Dr Francis P Kiranga, in which he deposed that the applicant is a private limited liability company duly incorporated

under the *Companies Act*, Chapter 486 of the Laws of Kenya (now repealed) and has been carrying on the business of logistics, clearing and forwarding agent at the behest of its clients. Dr. Kiranga further averred that on or about September 2018, in the course of its business as a clearing agent for CPF Financial Services Limited, the respondent acted negligently and in breach of the instructions related to the clearing and forwarding of goods; which resulted in the applicant incurring storage charges, container demurrage and custom warehouse rent that it would otherwise not have incurred.

[4] Consequently, the applicant declared a dispute and initiated efforts towards amicable settlement pursuant to the dispute resolution provisions set out under Section 62(1) of the KPA Act. He further deposed that, having failed to reach a consensus with the respondent, the applicant referred the matter to arbitration on July 1, 2020 by way of an application to the Registrar of the Nairobi Centre for International Arbitration (NCIA) for appointment of an arbitrator. The dispute was thus referred to arbitration, heard and a Final Arbitral Award made on July 31, 2021 by Ms Eunice Lumallas, FCIArb.

[5] Annexed to the affidavit of Dr Kiranga were copies of correspondence exchanged between the parties and the NCIA, as well as a certified copy of the Final Arbitral Award. On the basis thereof, Dr. Kiranga averred that, as the respondent has not applied to have the Award set aside and/or challenged in any way, it is in the interest of justice that the application be allowed; and the Final Award be recognized for purposes of enforcement.

[6] In response to the application, the respondent filed Grounds of Opposition on October 28, 2021, contending that:

[a] The subject application is fatally defective for failure to comply with the express mandatory provisions of Section 36(3) of the *Arbitration Act*;

[b] The applicant, in failing to present the Arbitral Award dated July 31 2021 for filing in the Court, cannot be granted the prayers sought for in the subject application; and particularly in respect to recognition of the said Award;

[c] The prayers sought for in the subject application as pertains to recognition and enforcement of the Arbitral Award dated July 31, 2021 are contrary to public policy of Kenya; particulars of which were set out under subparagraphs [a] to [d] of the Grounds of Opposition.

[7] In addition, the respondent filed a Replying Affidavit, sworn by one of its Senior Legal Officers, Ms Wamuyu Waikwa-Ikegu. She averred that, the respondent did not owe a duty to the applicant; and therefore that it could not have acted negligently against it. She added that the applicant was the author of its own misfortune and is not entitled to any award of damages.

[8] It was further averred on behalf of the respondent that the applicant was and is not entitled to have commenced any action against the respondent under Section 62(1) of the KPA Act; and that, as an agent of a disclosed principal, coupled with the fact that the respondent did not owe it any duty of care, the applicant had no legal basis for bringing an action under the KPA Act. At paragraph 7 of the affidavit of Ms. Waikwa-Ikegu, she indicated that the respondent was in the process of filing an application for the setting aside of the Final Arbitral Award on the grounds that it was made in disregard of the laws of Kenya; and therefore in breach of the public policy of Kenya.

[9] Indeed, the respondent filed an application by way of a Notice of Motion dated October 28, 2021 for setting aside of the Final Award on the ground that it is contrary to public policy and the provisions of the East African Community Customs Management Act, 2004 (The "EACCMA"), KPA Act, *Arbitration Act*, *Evidence Act* and the Constitution of Kenya. The respondent's application was filed separately and registered as Mombasa High Court Miscellaneous Application No E234 of 2021: *Kenya Ports Authority v Gamma Villa Limited & Eunice Lumallas*. The matter was filed under Certificate

of Urgency; and on being placed before the duty judge, directions were made for the latter file, Miscellaneous Appliction No 234 of 2021 to be handled alongside this file.

[10] Directions were thereafter given for the two applications to be handled simultaneously by way of written submissions. Granted the tenor and effect of the two applications, it is only logical that the respondent's application filed in High Court Miscellaneous Application No E234 of 2021 be considered first; seeing as it outcome will undoubtedly impact on the applicant's application dated September 29, 2021; and for purposes of consistency, I will henceforth refer to it as the 2nd application. The applicant herein, Gamma Villa Limited, will continue to be refered to as the applicant throughout in this ruling, although it is the 1st respondent in the 2nd application. In the same vein, the respondent, who is the applicant in Miscellaenous Application No E234 of 2021 (the 2nd application) will be referred to henceforth as the respondent; while the Arbitrator, Ms. Eunice Lumallas, who is the 2nd respondent in Miscellaneous E234 of 2021 will be referred to simply as the Arbitrator.

[11] The 2nd application is expressed to have been filed under Articles 47 and 50 of the *Constitution of Kenya*, Sections 35 (2) (b) (ii) of the *Arbitration Act* (as amended in 2009), Rule 7 of the Arbitration Rules, 1997, Section 147 of the East African Community Customs Management Act, 2004 and Section 62 (1) and 66(b) of the *KPA* Act and all other enabling provisions of the law, for the orders that:

[a] Spent

[b] Spent

[c] The Court be pleased to set aside the Final Award for being contrary to public policy and the provisions of the East African Community Customs Management Act 2004 (The "EACCMA"), *Kenya Ports Authority Act* (the "KPA Act"), *Arbitration Act* 1995, *Evidence Act* (CAP. 80) and *the Constitution* of Kenya, 2010 to the extent that the arbitrator found:

[i] That the applicant had a legal right and standing to institute the claim against the respondent as an agent of a disclosed principal;

[ii] That the applicant's claim was not time barred;

[iii] That the respondent owed the applicant a duty of care;

[iv] That the respondent is to pay the applicant the sum of Kshs 10,770,394.00 on account of storage charges and accrued demurrage plus interest at 14% per annum from July 31, 2021 until payment in full;

[v] That the applicant was entitled to costs.

[d] The costs of the application be provided for.

[12] The application was supported by the affidavit of Ms Wamuyu Waikwa-Ikegu, sworn on October 28, 2021 in which she averred that it was not in dispute that 21 containers covered under Bill of Lading No COSU6167012110 and consigned to CPF Financial Services Limited were discharged at the Port of Mombasa into the hands of the applicant on or about September 26, 2018. She averred that thereafter, CPF Financial Services Ltd wrote to the applicant as its appointed clearing agents, to nominate some of the subject containers for transfer to Mitchell Cotts CFS at Kibarani, from where they would be cleared by the applicant.

[13] It was further averred by Ms Waikwa-Ikegu that 13 of the subject containers were accordingly transferred to Mitchell Cotts CFS at Kibarani while 8 of them were transferred by SGR to the Inland Container Depot, Nairobi (ICDN). Later, on or around December 1, 2018, 19 containers were cleared

from Mitchell Cotts CFS; while the remaining two containers were ultimately transferred from ICDN to Mitchell Cotts CFS, Kibarani, on February 5, 2019; and were cleared on February 6, 2019. She also explained that a dispute ensued between the applicant and the respondent in connection with a Tax Invoice No 77325231 for Kshs. 909,331/= as a result of which the applicant's biller account with the respondent was blocked between December 22, and 28, 2018.

[14] At paragraph 8 of her Supporting Affidavit, Ms Waikwa-Ikegu explained that the applicant blamed the respondent for the impasse in that 8 of the subject containers which were transferred to ICDN could not be cleared separately from the 13 that were stored at the customs warehoulse; hence the unwarranted accrual of warehouse rent, container demurrage and allied expenses. She therefore confirmed that, as a result, the applicant instituted arbitration proceedings claiming Kshs 12,480,985/= plus interest and costs.

[15] In response to the applicant's claim, Ms Waikwa-Ikegu averred that other than being time barred, the applicant was acting as an agent of a disclosed principal and therefore had no right to institute the claim in its own name. She also asserted that the Arbitrator misapprehended not only the provisions of Section 147 of EACCMA but also Section 62(2)(a) of the KPA Act in finding that the applicant had the *locus standi* to commence the arbitral proceedings. She also impugned the Award at paragraphs 15, 16, 17, 18, 19 and 20 of her Supporting Affidavit and asserted that the Arbitrator had, in effect, opened a Pandora's Box of hitherto unknown causes of action against the respondent by agents of disclosed principals; a position which is not only contrary to public policy but againt the laws of Kenya; hence the prayer by the respondent that the Final Award be set aside.

[16] In response to the respondent's application, the applicant relied on the Grounds of Opposition dated November 23, 2021. The applicant thereby contended that:

[a] The application is incompetent, misconceived and an abuse of the Court process;

[b] The application does not meet the threshold for setting aside arbitral award under the provisions of Section 35(2)(b)(ii) of the *Arbitration Act*;

[c] The application as presented goes to the merits of the Award by contesting the findings of law and fact by the Arbitrator thus making the application an appeal veiled as an application for setting aside; and,

[d] The application is in fact contrary to public policy which propagates the finality and autonomy of arbitration proceedings.

[17] In addition to the Grounds of Opposition, the applicant relied on the Replying Affidavit sworn by Dr Kiranga on November 23, 2021. He confirmed that following the issuance of the Final Award, the applicant applied for enforcement herein; and that the dispute between the parties was referred to arbitration under Section 62 of the KPA Act. In paragraph 8 of the Replying Affidavit, Dr. Kiranga specifically responded to the respondent's averments as set out in paragraphs 10 to 17 of Ms. Waikwa-Ikegu's affidavit. He reiterated the applicant's posturing that the public policy in Kenya supports the finality and autonomy of arbitration; and that the respondent is merely intent on evading its liabilities. He consequently prayed that the application dated October 28, 2021 be dismissed with costs.

[18] The said application was canvassed by way of written submissions, as directed by the Court on November 29, 2021. Counsel for the respondent, Mrs Akwana, relied on the written submissions filed herein January 17, 2022. On the authority of *Mall Developers Limited v Postal Corporation of Kenya* [2014] eKLR, she urged the Court to interrogate the Arbitral Award with a view of satisfying itself as to whether the conclusions reached by the Arbitral Tribunal would have been consistent with the decision of the Court, had the matter been placed before it for determination. Counsel reiterated

the respondent's stance that the Final Award was in respect of a dispute not capable of settlement by arbitration, not only because the claim was barred by time by virtue of the provisions of Section 34 of the *Limitation of Actions Act* and Section 66(b) of the KPA Act; but also because Section 62(2)(a) and (b) of the KPA Act creates a negligence exception.

[19] Counsel also urged the Court to find that the Arbitrator made an Award that is in conflict with the public policy of Kenya in its perverseness. In her submission, the Award makes a mockery of basic and long-established principles of law arising from the *Constitution*, written laws, the common law and principles of equity in so far as the Arbitrator went to the extent of "...conjuring up new laws, rules and principles in total ignorance of the in-built constitutional safeguards such as Article 10 of the *Constitution* of Kenya..." Reliance was placed by counsel on *Christ for All Nations v Apollo Insurance Company Limited*[2002] 2 EA 366; *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited* [2017] eKLR and *Continental Homes Limited v Suncoast Investments Limited* [2018] eKLR, among other authorities, to support her submission that the applicant had no locus standi to initiate legal proceedings on behalf of CPF Financial Services.

[20] Hence, Mrs Akwana submitted that whereas Article 159(2)(c) of the Constitution requires the Court to promote alternative dispute resolution mechanisms like arbitration, a balance needs to be drawn between the principle of finality on the one hand and the constitutional dictate to uphold the rule of law, fairness and justice on the other hand. She added that arbitral decisions ought to be in consonance with the law and established legal principles. Thus, Mrs Akwana urged the Court to allow the Notice of Motion dated October 28, 2021 with costs.

[21] On behalf of the applicant, written submissions were filed herein on February 11, 2022 by Mr Karega, in which the following two issues were proposed for determination:

[a] Whether the respondent has established valid grounds for setting aside the Award;

[b] Who should bear the costs of the application.

[22] On whether the respondent has established valid grounds for setting aside the Final Award made on July 31, 2021, Mr Karega took the position that the respondent's submissions were at variance with the application itself, in so far as reliance was placed on the ground that the dispute was not arbitrable. He argued that, as the application was predicated on Section 35(2)(b)(ii) of the *Arbitration Act*, it was not open for counsel for the respondent to make submissions in respect of Section 35(2)(b)(i) of the Act as there is no substantive prayer in the application in that regard. On the authority of *Republic v Chairman Public Procurement Adminsitrative Review Board & Another, Ex Parte Zapkass Consulting and Training Limited & Another* [2014] eKLR; *P M M v M G M* [2021] eKLR and *Arif Ahmedali Sitafalwala v Africare Limited (Medanta)*[2020] eKLR, counsel submitted that parties are bound by their pleadings and that the Court can only adjudicate upon the matters pleaded before it.

[23] Mr Karega also took issue with the fact that the respondent has brought up new issues that were never canvassed before the Arbitral Tribunal, such as the issue of negligence exception provided for under Section 62 of the KPA Act. He considered this a mischievous attempt to surprise and embarrass the applicant and urged the Court to thwart the move by having the contents of paragrpahs 5.1 to 6.6 and any other part of the respondent's written submissions premised on Section 35(2)(b)(i)expunged from the record.

[24] On whether the Award is contrary to public policy of Kenya, counsel relied on Christ for All Nations(*supra*) and urged the Court to find that the respondent completely failed to establish that the Award was inconsistent with the laws of Kenya; or that it is inimical to the national interest of Kenya; or even that it is contrary to justice and morality. He took the view that the respondent simply set

out to impeach the Award on the merits; which would be impermissible as it amounts to an attempt to re-litigate the merits of the dispute. Counsel further urged the Court to uphold the principle of finality in arbitration; and in this regard, he cited *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR;*Elige Communications Limited v Safaricom PLC* [2021] eKLR;*Mahican Investments Limited & 3 Others v Giovanni Gaida & Others*[2005] eKLR and *Brookside Dairy Limited v Limuru Milk Processors Limited & Another* [2020] eKLR.

[25] Mr Karega also reminded the Court that the respondent's arguments that the claim was statute-barred and that the respondent owed no duty of care to the applicant were raised before the Arbitrator and substantive findings made thereon upon the examination of the facts and the evidence placed before her. Accordingly, the Court was urged to dismiss the application dated October 28, 2021 with costs.

[26] I have given careful consideration to the respondent's application dated October 28, 2021 along with the averments set out in the pertinent affidavits and the written submissions made by learned counsel. As the said application was brought under Section 35 (2)(b)(ii) of the *Arbitration Act*, the single issue for consideration is whether sufficient cause has been shown for the setting aside of the Final Award published by Eunice Lumallas, FCIArb, Arbitrator, on July 31, 2021 from the prism of the provision aforementioned. Section 35 of the *Arbitration Act* states thus:

> [1] Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
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> [2] An arbitral award may be set aside by the High Court only if—
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> [a] the party making the application furnishes proof—
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> [i] that a party to the arbitration agreement was under some incapacity; or
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> [ii] the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
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> [iii] the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
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> [iv] the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
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> [v] the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
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> [vi] the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
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> [b] the High Court finds that—
>
> [i] the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

[ii] the award is in conflict with the public policy of Kenya.

[27] With the foregoing provisions in mind, I have looked at the Notice of Motion dated November 28, 2021 and noted that, indeed the application was premised under Section 35(2)(b)(ii) of the Act; namely, that the Award was against the public policy of Kenya. No reference at all was made to Subsection (2)(b)(i) in the entire body of the application. That being the case, the submissions by Mrs. Akwana for the respondent that touched on the arbitrability of the dispute between the parties for purposes of Section 35(2)(b)(i) of the Act were misguided; there being no such substantive prayer in the application itself upon which those submissions could be predicated. In this connection, I am in full agreement with the viewpoint taken by Hon Tuiyott, J in Arif Ahmedali Sitafalwala v Africare Limited (*supra*) that:

> ...it does not seem permissible that an applicant can properly, without leave of Court, argue grounds not raised in the application as originally presented. This is because it is only fair that the respondent has notice that the Application has been formally expanded and that the matter may indeed be determined on the basis of grounds which he initially did not have to confront. Such leave gives the respondent a fair opportunity to respond to the new grounds..."

[28] Hon Mutuku, J took the same view in P M M v M G M[2021] eKLR. Here is what she had to say in more or less similar circumstances:

> The problem I am having with the Applicant's submissions is that they do not support the application and the prayers sought...On that issue, it is my considered view that the Applicant has changed his pleadings at the submission stage. It is trite that this change cannot be allowed through submissions. The only way pleadings can be changed is by amendment of the same. If the Applicant is allowed to do so at submission stage, this would be against the law and practice. It will catch the other party and the court by surprise. The principle that parties are bound by what they have pleaded comes into play..."

[29] Indeed, the Court of Appeal aptly captured the purpose and place of submissions in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi* [2014] eKLR thus:

> ...Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented..."

[30] In the premises, and as aptly put by Hon Korir J. in Republic v Chairman Public Procurement Adminsitrative Review Board & Another, Ex Parte Zapkass Consulting and Training Limited & Another (*supra*) "...new issues raised by way of submissions are best ignored..." I propose to do exactly that and confine myself to the ground that the Award is in conflict with the public policy of Kenya as set out in the application and the Supporting Affidavit.

[31] Although Mr Karega took issue with the fact that the respondent brought up new issues that were never canvassed before the Arbitral Tribunal, such as the issue of negligence exception under Section 62 of the KPA Act, the Final Award clearly reveals, at paragraphs 62 to 69 as well as 81 and 82 that Section 62 was the basis of the arbitral proceedings; and that the issue of negligence exception under Section 22 also featured promptly as per paragraphs 32, 63, 81, 82.

[32] Moreover, the ground of public policy broad enough to encompass questions to do with whether the Final Award was attuned to the Constitution and the laws of Kenya. In Christ for All Nations (*supra*) for instance, Hon Ringera, J held that:

> ...although public policy is a most broad concept incapable of precise definition, or that as the common law judges of yonder years used to say, it's an unruly horse and when once you get astride of it you never know where it will carry you, an award will be set aside under Section 35(2)(b)(ii) of the *Arbitration Act* as being inconsistent with the Public Policy of Kenya if it is shown that it was either (a) inconsistent with the *constitution* or other laws of Kenya, whether written or unwritten or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear. In the second category I would without claiming to be exhaustive include the interest of the national defence and security and good diplomatic relations with friendly nations and the economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive include such considerations as whether the award was induced by corruption, fraud or whether it was founded on a contract contrary to public morals..."

[33] Looked at from that broad perspective, it is not difficult to see that the sticky issue of negligence exception is key to the instant application in so far as it entails the primordial question of the Arbitrator's jurisdiction; which the respondent raised at Part 6 of its written submissions. While it is the law that the issue of jurisdiction be taken before the Arbitrator, it becomes a matter for consideration under the public policy rubric, whether it is permissible to tackle the issue of the Arbitrator's jurisdiction, under Section 35(2)(b)(ii) of the *Arbitration Act*; particularly where, as in this case, the matter was never raised before the Arbitrator in the first place. I shall revert to this issue shortly.

[34] Mr Karega also argued that the respondent simply set out to impeach the Award on the merits with a view of having the very issues which were resolved by way of arbitration re-litigated. Counsel mentioned that the arguments as to the applicant's locus standi; that the claim was statute-barred; whether the respondent owed the applicant a duty of care and whether that duty was breached, were all raised before the Arbitrator and a determination made on each of them on the basis of the facts and the evidence placed before the Arbitrator.

[35] I find considerable merit in this argument; for at paragraphs 55 on page 12 of the Final Award, it is manifest that these were the very issues raised by the respondent before the Arbitrator. At paragraph 56, the Arbitrator picked the same issues for determination and thereafter gave consideration to each of them before coming to her final conclusion and Award, as is evident at pages 13 to 25 of the Award. In the premises, and on account of the principles of autonomy and finality of arbitration, I am of the considered view that a merit re-evalution of the Arbitral Award is not permissible. I therefore agree entirely with what wa stated by Hon. Ransley, J in Mahican Investments Limited & 3 Others v Giovanni Gaida & Others (*supra*) that:

> ...A court will not interfere with the decision of an Arbitrator even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties..."

[36] And, as was pointed out by the Court of Appeal in *Nyutu Agrovet Limited vs Airtel Networks Limited* [2015] eKLR, where parties opt for arbitration, it is to be understood that they expect nothing but finality and due expedition from the process. The Court of Appeal held that:

> Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treat with deference, is all about."

[37] Indeed, Section 10 of the *Arbitration Act* is explicit that:

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

[38] The above provision was explicated by Nyamu, J. (as he then was) in *Prof Lawrence Gumbe & Another v Honourable Mwai Kibaki & Others*, High Court Miscellaneous No. 1025 of 2004, thus:

> Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented..."

[39] To that end, issues touching on the jurisdiction of the arbitrator are best raised before the said arbitrator for resolution. Hence,Section 17 of the *Arbitration Act*, is explicit that:

[1] The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose –

[a] an arbitration clause which forms part of a contract shall be treated as an independent agreement of the other terms of the contract; and

[b] a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

[2] A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

[3] A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. (4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3) admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitral award on the merits.

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under subsection (6) is pending before the High Court, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award.

[40] From the facts presented herein, it is the contention of the respondent that the arbitrator lacked jurisdiction to deal with the claim, on the ground that it was a claim under Section 22 of the *Kenya Ports Authority Act*, and therefore exempt from arbitration as contemplated by Section 62 of the *Kenya Ports Authority Act*. Ideally, this is an issue that ought to have been raised as a preliminary point before the Arbitral Tribunal; granted the clear provisions of Section 17(2) of the *Arbitration Act* aforestated. Indeed, in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, Hon. Nyamu, JA. expressed the view, in connection with Section 17(2) aforementioned, that:

> ...The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the *Arbitration Act* as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of section 17 and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is "Competence to decide upon its competence" and as expressed elsewhere in this ruling in German it is "Kompetenz/Kompetenz" and in French it is "Competence de la Competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."*

[41] The foregoing notwithstanding, the primacy of jurisdiction in the administration of justice and the entire edifice of the rule of law cannot be over emphasized. It is now settled that jurisdiction of any court or tribunal emanates from either the *Constitution* or written Statute. Hence, in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 it was held:

> ...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given..."

[42] Although the question of jurisdiction was not raised before the arbitrator as a preliminary issue, Section 17(2) recognizes that it can be raised in an application for setting aside an award. Indeed, it is trite that the issue of jurisdiction can be raised at any time, granted centrality to the legitimacy of legal proceedings. Court of Appeal made this clear in *Dubai Bank Kenya Limited v Kwanza Estates Limited* [2015] eKLR where it was held: -

> ...It would therefore have been prudent for the appellant to raise the question of jurisdiction before the superior court as that way this court would have had the benefit of reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In Floriculture International Ltd v Central Kenya Ltd & 3 Others (1995) eKLR, the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows:
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> > "It has been held in the case of Kenidia Assurance Co. Ltd v Otiende (1989) 2 KAR 162 that the normal rule that a party could not raise for the first time on

> appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."
>
> The reasoning is that even where the question of jurisdiction is not raised that does not necessary confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court..."

[43] A perusal of the Award reveals that the applicant was appointed by CPF Financial Services Limited under the bill of Lading No COSU616701211 to clear a consignment of 21 containers on its behalf. It was alleged that, out of the 21 containers, only 13 were delivered at Mitchell Cotts Freight in Mombasa as was required. It emerged that 8 containers were misdelivered to the Inland Container Depot in Nairobi (ICDN). The applicant raised the issue with the respondent on several occasions; and in particular vide the letters dated November 7, 2018, December 10, 2018 and December 20, 2018.

[44] The applicant therefore took the stance that, due to the respondent's negligent actions in misdelivering the said containers to the ICDN, it incurred unnecessary charges, container demurrage and customs warehouse rent, all amounting to Kshs 11, 823, 388/=. The applicant indicated that it further incurred storage charges of Kshs 428,069/=; thereby increasing the total loss suffered to Kshs 12, 251, 457/=. It was on that account that it requested for arbitration, pursuant to Section 62(1) of the KPA Act, which stipulates that:

> In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Registrar of the Nairobi Centre for International Arbitration established under the Nairobi Centre for International Arbitration Act, 2013 (No 26 of 2013).

[45] I have also perused the Final Award and and ascertained therefrom that the claim was hinged on negligence for the following reliefs:

(a) A declaration that the respondent was liable for negligence and/or vicariously liable for the negligent actions of its employees and/or agents who sent the subject containers to ICDN against the express instructions of the applicant;

(b) An award against the respondent in favour of the applicant for the sum of Kshs. 12,480,985/=;

(c) Simple interest on the aforesaid sum of Kshs 12,480,985/= at the rate of 14% per annum from March 20, 2019 until repayment in full;

(d) Costs of the proceedigns;

(e) Costs of the arbitration together with interest thereon at court rates;

(f) Any other or futher relief as the Tribunal may deem appropriate.

[46] A look at Sections 12, 14, 15 and 16 of the *KPA Act*, shows that, whereas Section 12 outlines the powers and authority of the respondent in broad strokes to include acting as warehousemen and to consign goods on behalf of other persons to any place, whether within Kenya or elsewhere, Sections 14, 15 and 16 are specific to the respondent's statutory power to enter any land for purposes of survey, to prevent accidents and to alter position of water pipes, electric or telephone poles, for the purposes of the Authority. It is in that context that the respondent contended that the applicant's claim, being a

claim premised on negligence on account of misdelivery, did not fall within the ambit of Section 62(1) of the Act; and was therefore excluded by dint of the negligence exception set out in Section 62(2) thus:

> Nothing in this section shall be construed as entitling any person to compensation-
>
> > (a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section;
> >
> > (b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.

[47] Misdelivery on the other hand is provided for in Section 22 of the KPA Act, which provides thus:

> Subject to this Act or any contract, the Authority shall not be liable for the loss, misdelivery or detention of, or damage to, goods delivered to, or in the custody of the Authority except where such loss, misdelivery, detention or damage is caused by the want of reasonable foresight and care on the part of the Authority or any employee:
>
> Provided that:
>
> > (i) the authority shall in no case be liable for such loss, misdelivery, detention or damage arising from—
> >
> > (ii) the liability of the Authority for loss, misdelivery or detention of or damage to goods accepted by the Authority for warehousing in relation to which an account false in any material particular has been given under section 25 shall not in any case exceed the value of the goods as calculated in accordance with the description contained in such false account.

[48] In *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the Court of Appeal had occasion to consider the correlation between Section 22 and 62 of the KPA Act; and here is what it had to say on the matter:

> 28. A plain reading of Section 22 of the Act imposes liability on the part of the Kenya Ports Authority for loss of goods occasioned by mis-delivery caused by want of reasonable foresight and care on the part of the Authority or its employee. In the instant matter, the claim and cause of action against the appellant is founded on negligence whose particulars prima facie allege want of reasonable foresight and care on the part of the Authority.
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> 29. Conversely, Section 62 of the Act specifically refers to the powers of the Authority exercised pursuant to Sections 12, 14, 15 and 16 of the Act. Of relevance to this appeal is the exception in Section 62(2)(a) and (b) of the KPA Act which stipulate that a person is entitled to compensation for any damage suffered through negligence or damages entitled otherwise than through the provisions of the *Kenya Ports Authority Act*
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> ...
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> 31. The legal question is what forum would determine the loss or damage suffered otherwise than through the provisions of the *Kenya Ports Authority Act*? The answer to this question perforce incorporates negligence as a cause of action that is not covered by Section 62 of the KPA Act.

32. Convinced that Section 22 of the KPA Act impose liability for mis-delivery of goods and satisfied that Section 62(2)(a) and (b) of the KPA Act creates a negligence exception, we find the learned judge did not err in his determination that the High Court had jurisdiction to entertain, hear and determine the respondent's claim which is founded on negligence and want of care on the part of the appellant and or its employees."

[49] In the light of the foregoing binding interpretation of the law by the Court of Appeal, it would follow that the Arbitral Tribunal did not have the requisite jurisdiction to entertain the applicant's claim; it being a claim predicated on Section 22 of the KPA Act, and therefore outside the ambit of the procedure provided for in Section 62 of the KPA Act. That being my view of the matter, the question to pose is, what, then, is the effect on the arbitral proceedings and the Final Award? The Court of Appeal in *Joseph Muthee Kamau & another v David Mwangi Gichuru & Another* [2013] eKLR held: -

> When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being the case of *Kagenyi v Musirambo [1968] EA 43*. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction..."

[50] To the extent therefore that the Arbitrator lacked the jurisdiction to handle the applicant's claim, the ensuing Award was made in disregard of the public policy of Kenya for purposes of Section 35(2)(b)(ii) of the *Arbitration Act*. I therefore find merit in the respondent's application dated October 28, 2021. The same is hereby allowed and orders granted as prayed therein. And, in the light of that outcome, the application dated September 29, 2021 for enforcement of the final award cannot stand. The same is accordingly struck out for being incompetent.

[51] In the result, the orders that commend themselves to me in respect of the two applications, and which I hereby grant, are as hereunder:

(a) That the Final Award published on July 31, 2021 be and is hereby set aside for having been made contrary to the public policy of Kenya.

(b) That each party shall bear own costs of the two applications.

(c) That this ruling shall apply with equal force to Mombasa High Court Miscellaneous Application No. E234 of 2021; and that a copy thereof be filed in that suit for completion of records.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MAY 2022.

OLGA SEWE

JUDGE