REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 306 OF 2002

KAMAU J.G NJENDU T/A GITUTHO ASSOCIATES ....PLAINTIFF

VERSUS

DOSHI IRON MONGERS LIMITED.....DEFEDNANT

JUDGMENT

1. On the 17/01/2002 the plaintiff filed a plaint dated 15/02/2002 and sought the recovery of the sum of Kshs. 13,765,092 from the defendant on account of architectural services offered to the defendant on account of a proposed development upon the defendant's property situate in Mombasa Island and known as LR No. 782 and 787/XXVI/MI.

2. It is pleaded in the plaint that the defendant appointed the plaintiff as a consultant for the purposes drawing of architectural drawing and submitting same for approval to the then Mombasa municipal council. Having executed its brief, the plaintiff wrote to the defendant on the 15/6/2000 seeking further instructions but received no response hence on the 27/3/2001 he deemed the project to have been abandoned and thus rendered a fee note in the sum of Kshs. 13,765,092 for services rendered so far in accordance with the Architects and Quantity Surveyors Act. It is that sum that when not settled the plaintiff sought to recover by this suit together with costs and interest thereon at court rates.

3. The suit was resisted by the statement of defense dated 19/02/2002 and filed in court on the 20/02/2002. In the defense the appointment of the plaintiff and ownership of the two identified properties upon which the proposed development was to be executed were denied it being asserted that the two properties were owned by one Dim Properties Ltd. It was however pleaded in terms not far from departure, that in the year 1996, the defendant had intended to develop the two properties for which reason its director, one Ashok Doshi met and discussed with the plaintiff to come up with an outline proposal to enable the defendant arrange for funds just in case there was a decision to proceed with the work. Pursuant to a second meeting held between the two individuals the plaintiff presented outline proposal. It was added that the proposals presented were sketchy and below the expectations of the defendant and deficient in many material details for which reason several changes were agreed to be made and to await further discussions and consensus. It was further pleaded that at the second meeting between the two individual on the 23/11/1996 the defendant made it known to the plaintiff that the subject properties were grants subject to conditions as to development, and that one of such was that the development had to be carried out with set timelines which was running out hence it was agreed that the plaintiff would present its sketch drawings to the municipal council of Mombasa for approval to enable the putting up of structures to beat the deadlines. It was then alleged that the fees due and payable up to the date of presentation would be Kshs. 183,113.00 which sum as discounted and paid to the plaintiff on the 26/11/1996 in full and final settlement.

4. It was then asserted that the plaintiff did no other work beyond the work paid for, which was the extent and scope of work agreed upon, pending formal appointment upon discussion and agreement on the outline proposals. It was then denied that the plaintiff was entitled to demand and seek to recover the sum of Kshs. 13,765,092 under Part 3, clause C2 paragraph C of the Cap 525 or any other sum and at all. It was equally pleaded that no work was done pursuant to clause C2, Part 3 of schedule 4 paragraph C which in any event only entitles the plaintiff to charge on hourly basis but not as a portion or percentage of the estimated cost of project construction. In addition, it was pleaded that the project had not reached the tender stage and the plaintiff had not provided the defendant with the project costs hence there is no basis to peg the fees in the sum of Kshs. 470,000,000.

5. The defendant then added that the suit is bad for being barred by the arbitration clause imposed by the provisions of Forth Schedule, Part 1 clause A7 of the Act which make it mandatory that all disputes regarding conditions of engagement and scale of fees payable to an architect to be determined by arbitration.

6. Because the suit was filed and was then pending before the Nairobi Milimani commercial courts, the defendant contended that the court lacked both territorial and pecuniary jurisdiction to entertain and determine the suit and reserved the right to have the matter transferred to Mombasa within whose jurisdiction both parties resided.

6. To that very elaborate defense, pleading defenses based on a statute, the plaintiff filed a reply to defense dated the 5/4/2002. In that reply

to defense plaintiff underscored the fact that there was indeed engagement of the plaintiff by the defendant with a further stress that the defendant did write to the plaintiff on the 23/11/1996 setting out the agreed terms of engagement and that the payment of Kshs. 103,720 was only deposit towards the fees payable. Responding to the defense that the drawing were sketchy the plaintiff took the position that the defendant could not have approved submission and paid for the approval fees.

8. All allegations were denied and in particular it was asserted that there was never any agreement on remuneration of Kshs. 183,113.00 and that the plaintiff is entitled to fees under the statute. Even though no rebuttal was made to the pleadings on jurisdiction being ousted by the arbitration charge, the plaintiff asked the court to disregard the defense and enter judgment as prayed in the plaint.

9. With the advent of the 2010 Civil Procedure Rules, parties filed witness statements and at trial both were limited to the documents and statements as filed. It was directed that at trial parties would rely only upon the witness statements filed as evidence in chief and the documents be produced by the witnesses who would have filed the witness statements.

10. At trial the plaintiff gave evidence as PW1 and called one **HARRY NJOROGE KAKWIYA** as PW2. The evidence of PW1 in the witness statement and upon cross examination sums up that he was retained by one Ashok Doshi on behalf of the defendant to do sketch proposal; that he asked for a retainer fees of Kshs. 150,000 plus disbursement and was paid the disbursement and some Kshs. 100,000. In his evidence, he executed his instructions and submitted the plans for approval to the Mombasa Municipal council but was unable to confirm if the same were ever approved. That in his submissions made to the municipal council, he gave the project costs of K$ 15,000,000 but later commissioned the quantity surveyor to establish the project costs for his own use in coming up with the fee note for which reason he did not need the defendant's approval because he would not expect the defendant to pay fees to that other professional.

11. The witness said that he deemed the project abandoned by letter of 27/3/2001 before seeking to have the project cost established. When asked a questioned by the court the witness said that the stop gap period he talked about in his letter of 25/11/1996 regarded the proposed enhancement of the project and not the drawn plans.

12. The evidence of PW 2 was to the effect that he was instructed by P.W 1 to do a bill of quantities which he did and returned a value of kshs. 470,000,000. He however admitted that he only received architectural drawing but need other drawings to come to the estimate but he nonetheless arrived at an estimate based not on those other requisite drawings but on other past projects. He admitted that his estimates would be subject to revision after he was availed engineering designs. He also said that his estimates on electrical works could not be based on the drawings provided but on similar projects executed before and admitted that the details of costs of landscaping had not been provided and he did not have such details in court when he gave evidence. With the evidence of the two witnesses the plaintiff case was closed.

13. On the side of the defendant, one Ashok Doshi gave evidence relying on his witness statement whose effect was that he indeed commissioned the plaintiff but for purposes of making sketch proposals and not architectural designs and that for the work done the plaintiff charged 150,000 of which the defendant paid Kshs. 100,000 and the balance was never paid because approval was yet to come from the plaintiff. He denied having seen the plans produced in court beforehand and insisted that he saw the same plans for the first time in court while pointing out that while there was a provision for his signature, the same was never signed by him.

14. He stressed that the project was put on abeyance as disclosed in the letter of 25/11/1996 that there was never any engagement between the parties thereafter to merit the plaintiff seeking to charge additional fees as the plaintiff sought to do five years thereafter.

15. He made comments on the project estimates by P.W 2 to be erroneous for being based upon architectural drawing other than structural drawings and that the landscaping costs not based on drawing was not reasonable nor justifiable.

16. Upon cross examination, the witness admitted having instructed the plaintiff which culminated in the meeting of 23/11/1996 with an agreement on sums payable for which he made out and paid to the plaintiff the sums for submission of plans and part of the plaintiff's fees by two cheques. He stressed that the deliberations at the meeting were well captured in the letter of 23/11/1996 whose position he never contested but accepted by doing the settlement cheque. When challenged to state his own quantity and value of the project, he said he could not because there were no structural drawings to ground same.

17. He then pointed out that the plaintiff had sought from him change of user by a letter of 15/06/2000 in which it was stated the plans had stalled at the municipal council due to that need. He however denied receipt of the letter and in conclusion he stated that the development was put in abeyance to await approval of the sketch proposals and that he still owed the plaintiff the sum of Kshs. 46,000 upon approval plans being availed.

18. In re-examination he maintained that he expected duly approved plans which he still awaits. He prayed that the suit be dismissed with costs. Parties thereafter sought time to file and serve written submissions.

19. The plaintiff submissions were filed on the 29/11/2019 together with list of authorities in separate bundles while the defendant filed submissions on 09/12/2019 together with list of authorities. In response to the defendant's submissions, the plaintiff filed supplementary submissions on 18.03.2020 to which supplementary submissions the defendant filed own supplementary submissions on 13.07.2020.

20. Even though the court had on 24/7/2018 directed parties to settle and file an agreed statement of issues, none was filed with both opting to identify such issues in their written submissions. In the submissions the plaintiff has identified six issues while the defendant has identified only two issues.

Submissions by the plaintiff

21. The summary of the plaintiff submissions is that he was indeed instructed and retained by the defendant a fact confirmed by DW1 in his evidence; that the oral terms of engagement were that the fees would not be agreed upon outside the statute, cap 525, and that the plaintiff did

respond to his request for retainer by drawing two cheques for Kshs. 103,720 and Kshs. 89,393 to meet part of retainer fees and disclosed disbursement as well as submission fees, respectively, but without a forwarding letter to allege the same to be in full and full settlement or that the balance of Kshs. 50,000 would be paid upon approved plans being availed.

22. The plaintiff faulted the defendant for being contradictory in his pleadings by stating that the fee was agreed at KSHS. 183,113 after the sum of Kshs. 50,000/= had been discounted then going ahead to lead evidence that the fees was actually kshs. 150,000 of which Kshs. 100,000 was paid leaving a balance of Kshs. 50,000 to be paid upon plans being approved. The plaintiff cited to court the decisions **on Daniel Otieno Mogore vs South Nyanza Sugar Company Ltd, HCCA (2018) Eklr, IEBC VS Stephen Mutinda Muliu (2014) eKLR and Dakiaga Distributors ltd vs Kenya Seed company Ltd (2015 eKLR** for the position that parties are not permitted to depart from their pleadings by giving variant evidence and that evidence led in such departure goes to the issue and must be disregarded.

23. On whether the plaintiff executed the work as instructed, the plaintiff made submissions to the effect that the plans having been drawn and lodged for approval, the plaintiff had earned his fees under the provisions of the Architects and quality Surveyors Act in that the plans are only submitted at the scheme design stage and not before. Reliance was also placed upon planning Act with a stress that only scheme designs can be submitted not sketches.

24. Such submissions were followed by those to the effect that having done plans and submitted same he was entitled to raise a fee note as he did and that the retainer fees was the fees payable upfront to ensure commitment of the consultant. Further it was submitted upon making submissions of the plans to the approval authority, he never received any further communication from the defendant, sought further instructions on 15/6/2000 on issue of the change of user before deeming the project abandoned by his letter of 27/3/2001 pursuant to clause B10 of Forth schedule to the Act. On the basis of such development the plaintiff contends that he was entitled under schedule 4 part 3 of the Act to charge fees at 2.5% of the project costs as given by PW 2.

25. The decision in **Kenya Tea Growers Association – VS –Kenya plantation and Agricultural workers Union (2018) eKLR** was cited for the proposition that the opinion of the expert is important to court and the court must have a cogent reason to ignore or reject same.

26. On interests the plaintiff submitted that section 26(1) of the civil Procedure Act vests court with the discretion to award interest to include the period before the suit and **New Tyres Enterprises Ltd Vs Kenya Alliance Company ltd[1988] eKLR** was cited to support that position. The plaintiff lastly cited section 27(1) of the Act from the proposition of the law that costs follow the event and should be awarded to the plaintiff on his success.

27. For the defendant having identified the two issues for determination by the court, it offered submissions steering clear of whether there was a retainer or not while choosing to dwell on the extent of the plaintiff engagement and if the claim is merited.

28. The starting point was that the burden of proof rests with him who alleges and in this case that burden was always upon the plaintiff to prove that he was engaged to provide complete architectural works. It was submitted that from the letter by the plaintiff dated 3/9/1996 the plaintiff confirmed that he was engaged to do sketch proposals and come back to the defendant when ready. The decision in **SURESH KAPILA VS MANU SHAH & ANOTHER (2010) eKLR** was cited for the proposition of the law that when sketch plans are done and submitted for approvals or speculatively, no claim for remuneration arises as such drawings are in the nature of tender or were offer to do work. On the identity of the drawing produced in court it was submitted that those could not have been the drawings submitted for approval but merely generated to justify the claim for fees because they are not even signed by the plaintiff. The court was urged to find that the plaintiff mandate was limited to developing sketch proposal and not complete scheme drawings.

29. On whether the plaintiff was entitled to the amount claimed on account of having undertaken complete drawings, counsel submitted that any work outside the sketch proposals could have been done without instructions and thus no obligation upon the defendant to pay and the decision in **Juresh Kapila's case (supra**) **was** cited and relied upon once again. It was reiterated that no approvals were ever obtained and no consultants were retained as no change of user was obtained to activate the project leading to the abandonment of the proposed works. In those circumstances it was submitted that the plaintiff could not finalise the works so as to be entitled to the full remuneration sought. The evidence of the plaintiff himself was relied on when he said that only upon the plans being approved would other consultants; structural engineers, quantity surveyors, mechanical/electrical engineers and environmental consultant be engaged.

30. The report by the quantity surveyor, PW 2, was said to be incapable of reliance on the basis that his engagement was without consent of the defendant and secondly that he said that his estimates were based on the plaintiff drawing over and above admitting that some eight (8) items could not be derived from the plans by the plaintiff. The decision in **Kenya Tea Growers Association (supra**) was relied upon to discredit the report by PW2 as not credible for failure to be grounded upon reason.

31. On whether there was agreement on fees at 150,000 and if there had been departure from what was pleaded, the defendant submits that there is no such departure as the defendant had been steadfast that the sum agreed was 150,000. It was then added that even in the event of there being no agreement, the work was never concluded therefore part 3 clause C2(b) of 4A schedule mandated that the fees be 1% of the project costs yet the costs had not been agreed upon.

32. The plaintiff claim was termed an afterthought it being stressed that it is not logically plausible that one with claim of the magnitude here could wait for five years to remember that his fees was outstanding. The defendant then prayed that the suit be dismissed with costs.

33. In the supplemental submissions or reply to the defendant's submissions, the plaintiff seeks to re-valuate the submissions by the defendants even on matter of fact, which I consider to be improper. He is only entitled, under order 18 Rule 2(3), to respond to issues of law as cited by the defendant. What I consider to be of relevance in those submissions is the citation and presentation of portions of the Act regarding charges. In deed that digression did not escape the attention of the defendant who the accused the plaintiff's counsel of introducing new matters not pleaded not led in evidence regarding the point at which submitted plans get stamped. A lot was the said about the plans which I consider unhelpful to the case. The comments on the statutory provisions on charging fees was however relevant and I have given same due regard.

Issues for determination.

34. I have pointed out that the statement of defense filed and the evidence tendered all agree that there was an agreement between the plaintiff and the defendant to develop sketch proposal. It is also agreed that such proposals were lodged with the Mombasa Municipal council for approval on the 16/12/1996 but no approvals were given for reasons unknown to court except the requirement for change of user which the defendant did not provide. Pursuant to the meetings between parties on the 23/11/1996, the plaintiff captured the resolutions reached in his letter of 25/11/1996 and asked to be paid Kshs. 153,720 for his retainer fees and disbursement together with Kshs. 78,393 being the submission fees for approval. It is common evidence by both sides that the defendant paid the submissions fees in full but only paid Kshs. 103,750 out of the sum asked by the plaintiff towards his fees. From those common and conceded facts, I do consider that the engagement between the parties cannot be an issue for determination. For that reason and now that the parties did not agree on the issues for determination, I consider the following issues to isolate themselves for determination-;

a. Whether the court has jurisdiction to entertain the matter.

b. What was the scope of work for which the plaintiff was instructed?

c. Did parties agree on the fees for the agreed scope of work?

If c above is answered in the affirmative, is the plaintiff entitled to charge fees under 4th schedule to Cap 525.

d. What order should be made as to costs?

Competence of the suit

35. I consider this to be a jurisdictional issue which must take precedence as a threshold issue and determined before all else. The defendant pleaded at paragraph 21 of the statement of the defense that: -

> **"21. The defendant avers further that this suit is misconceived and incompetent as this Honourable court lacks the jurisdiction to entertain this suit as the plaintiff's claim could only be determined by reference to an arbitration under cause A.7, part 1, fourth schedule of the architects and quantity surveyors Act (cap 525) laws of Kenya which makes it mandatory for all disputes arising out of the conditions of engagement and scale of fees and charges of an architect to be determined by arbitration. The plaintiff would apply to this Honourable court to strike out the plaintiff's suit with costs."**

36. As said before, that paragraph was never responded to in the reply to defense. That failure to respond to the objection to jurisdiction affords no benefit to the defendant because the law under Order 2 Rule 12 (1) stipulates that there is a joinder of issue with the defense when no reply is filed.

37. That places the matter squarely on my laps for determination. Schedule part 1 clause A7 of the Architects and Quantity Surveyors' Act, Cap 525 provides

> **A7. Arbitration**
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> **(a) Where any difference or dispute arising out of the conditions of engagement and scale of profession fees and charges cannot be determined in accordance with paragraph (a) of clause A6, it shall be referred to arbitration by a person to be agreed between the parties, or failing agreement within fourteen days after either party has given the other a written request to concur in the appointment of an arbitrator, to a person to be nominated at the request of either party by the president of the East Africa Institute of Architects**.

38. I read the provisions to mandate that a dispute as to conditions of engagement and scale of fees which cannot be determined in accordance with paragraph (a) of A 6, shall be referred to arbitration by a person agreed between these parties or appointed by the president of the Architectural Association of Kenya. In such circumstances the jurisdiction of the court is not obvious. In the words of the court of appeal in **Kenya Ports Authority Vs Modern Holdings Ltd [2017] eKLR,** the jurisdiction is postponed even if not ousted. In the decision the court said.

> **"Secondly we reiterate that jurisdiction of any court or tribunal flows from either the Constitution or statute or both; that, though the High Court under Article 165 (3) the Constitution has unlimited original jurisdiction in both civil and criminal matters, the same Constitution in Article 159 (2) (b) recognizes the application of alternative forms of dispute resolution mechanisms and enjoins the courts and tribunals in exercise of their judicial authority to be guided by and to promote all forms of alternative dispute resolution mechanisms, including reconciliation, mediation and arbitration.**
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> **It is, in our respectful view, a misapprehension of the law to argue that, to the extent that section 62 provides that, "where any person suffers damage, no action or suit shall lie", that that section is inconsistent with the Constitution for limiting the right to access to justice. The provision does not at all oust the jurisdiction of the court but merely limits and postpones it in the first instance…**
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> **Section 62 aforesaid only provides a simpler, faster and cost-effective avenue of disputes resolution. The parties, must in the first place, themselves explore a settlement on the quantum of compensation, failing which the Chief Justice is required to appoint a single arbitrator to determine the quantum. The award of the single arbitrator is subject to the High Court's**

supervisory jurisdiction or to an appeal. In other words, court adjudication is treated in this instance as the final stage in the dispute resolution process." (Emphasis provided)

39. The issue of the ouster clause in statements of Defense when juxtaposed against the unlimited jurisdiction of the High court under the constitution has been a matter of controversy by the superior courts with some courts taking the absolutist position while others have been in favour of the overriding position and supremacy of the constitution[1].

40. The controversy to me has not been finally settled by the supreme court by its judgment in **Modern Holdings Ltd Vs. Kenya Ports Authority (2020) Eklr** when the court said: -

> **"55. The Court of Appeal in Kenya Ports Authority v African Line Transport (supra) was however, of a contrary view and following Kenya Ports Authority v Kustron (Kenya) Limited, Civil Appeal No.315 of 2005 (unreported) made the curious pronouncement that the High Court's jurisdiction was ousted by Section 62 aforesaid and that "parties could not confer jurisdiction on the superior court."**
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> **56. We have no doubt in our minds that any judicial pronouncement that purports to elevate a statutory provision conferring jurisdiction above the express provision of the Constitution is erroneous. We wish to state that Section 62 of the KPA Act, though now succored by and anchored in Article 159(2)(c) of the Constitution, cannot oust the jurisdiction conferred on the High Court expressly by Article 165(3)(a). We thus agree with Ojwang J. (as he then was) when he stated in Three ways Shipping Services (K) Ltd v Kenya Ports Authority [2012] eKLR that "the law today is that the High Court has unlimited jurisdiction in all causes save in matters reserved by the Constitution itself to the Supreme Court, or to certain specialized courts. Consequently, the contention that, in the suit herein, S.62 of the Kenya Ports Authority Act has ousted the High Court's jurisdiction is untenable"**

41. The convergent position by the two courts in the matter is that the provisions of section 62 of Kenya Ports Authority is neither an ouster clause nor is it constitutional but it postpones the right to prefer litigation and mandates negotiations and arbitration by the parties.

42. I see that to be the same position circumscribed and mandated by Forth Schedule Clause A6 and A7 of Cap 525. The law postpones the jurisdiction of this court until parties have exhausted negotiations failing which arbitration. When the statute says so, this court as court of law, must observe the law and say that when approached, its jurisdiction remained postponed and not crystalized. It matters not that the statute we are considering was a pre- 2010 enactment. That critical part played by alternative dispute resolution in the administration of justice by inviting expertise and thus easing the ever present problem of backlog in the court system has always been underscored. That is what I get the Supreme Court to say in modern holdings case (supra) by these words-;

> **"48. We have no doubt that expeditious and efficient (with the input of experts) disposal of disputes like the one in this case was one of the objectives that informed the enactment of Section 62 of the KPA Act and other similar provisions such as Section 83(1) of the Kenya Railways Corporation Act; Section 33 of the Kenya Airports Authority Act; Section 29 of the Kenya Roads Act; and Section 32 of Inter-Governmental Relations Act (IGRA).**
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> **49. Save for the Inter-Governmental Relations Act, all the others enactments preceded the promulgation of our 2010 Constitution. It is trite that by requiring courts to promote "*alternative forms of dispute resolution including … arbitration*", Article 159(2)(c) of the 2010 Constitution entrenches arbitration in our legal system. So the arbitration under Section 62 of the KPA Act is therefore no aberration. It is a jurisdiction that has been given constitutional *imprimatur*. In the circumstances, contrary to the appellant's contention, it cannot be ousted even by a broad interpretation of Section 62 of the KPA Act read together with Section 7 of the 6th Schedule to the Constitution which requires "*All law in force immediately before the effective date … [to remain in force but] … be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution*." Therefore, short of an amendment that deletes Article 159(2)(c) of the Constitution, that jurisdiction is here to stay."**

43. From the foregoing, I find and hold that when the plaintiff opted to bypass the alternative dispute mechanism under the statute he is registered to operate, it acted contrary to that Act and expectations of administration of justice and therefore affronted the principle of law that where a statute or the constitution provide for a mode of resolving a dispute such words must be complied with strictly[2]. I may only add that legislative mandate is parliamentary on behalf of Kenyans and the court must only interpret and apply the law as enacted until and unless a provision of a statute be declared unconstitutional. I therefore find and hold that this suit was prematurely filed and was untenable from the onset. On that basis I would order it struck out with costs.

44. This determination essentially and finally rests the dispute for if the matter is not properly before me then I am not expected to take next step. I stop at this level and order that the suit be struck out with costs. That I conclude because, I think, I would do no good to parties by seeking to appreciate the industry employed by both in making comments on the evidence led and take a position on whether there was agreement on fees and whether the plaintiff was entitled to seek to charge fees as he did. I decline to do so because, parties may end up at the statutorily provided alternative dispute resolution mechanism and such comment may prejudice such a process.

45. It is so ordered.

Dated, signed and delivered this 29th day of January, 2021

Patrick J.O Otieno

Judge

[1] **Kenya Ports Authority V Kuston (Kenya) Limited** , **Kenya Ports Authority V African Line Transport Company Limited, Multi-serve Oasis Company Limited V Kenya Ports Authority,** Civil Suit No.252 of 2010, and **Threeways Shipping Services (K) Limited V Kenya Ports Authority all took the position that such provisions as 62 of Kenya ports Authority Act ousted jurisdiction while Multi-serve Oasis Company Limited V Kenya Ports Authority and Threeways Shipping Services (K) Limited V Kenya Ports Authority preferred to honour the supremacy of the constitution**

[2] In **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille,** Civil Appeal No. 202 of 2015, the Court of Appeal said;

"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."