REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

HCCC NO. 018 OF 2020

BRIAN MARTIN FRANCIS

THE ESTATE OF THE LATE HIRAM NGARUIYA

ISAAC NJOROGE GITOHO

JAMES NJUGUNA GITOHO

KRISCO HOLDINGS LTD

MUIBORO ENTERPRISE LTD........................APPLICANTS

VERSUS

DR. SAMUEL THENYA MAINA...............1ST RESPONDENT

MARTIN MUNYU (ARBITRATOR)........2ND RESPONDENT

RULING

Introduction

1. For a better appreciation of the applicants' Originating Summons dated **17th** December 2019, the subject of this ruling, it is necessary to bring into view, albeit briefly, the factual matrix preceding these proceedings. It is common ground that the applicants incorporated a company known as Adlife Plaza Limited (ADL). The company developed a **7-storey** office block on L.R. No. **1/36**, Kilimani, Nairobi, known as Adlife Plaza. On **19th** June 2017 the **1st** Respondent and applicants entered into a Share Purchase Agreement (SPA) pursuant to which the **1st** Respondent purchased **77%** of ADL's shareholding for a sum of **Kshs. 1,540,000,000/=.**

2. However, the applicants contend that after signing the SPA, the **1st** Respondent disappeared and the SPA lapsed between **1st** August 2017 and **6th** May 2018. That he resurfaced in April 2018 after which the parties negotiated and signed a Deed of Amendment valid up to **30th** May 2018 which raised the consideration to **Kshs. 1,845,000,000/=.**

3. The Plaintiffs state that the full purchase price was to be paid upon delivery of completion documents to the **1st** Respondent's financiers advocates which was done. Further, the shareholding, management of the company, possession of the company's assets and control of the company was effected in favour of the **1st** Respondent on the strength of a professional undertaking issued by the advocates of the **1st** Respondent's Bank. The applicants aver that after transferring the entire shareholding, the **1st** Respondent instructed its bank not to release the balance of the purchase price of **Kshs. 102,000,000/=** which was the subject of the professional undertaking citing alleged breach of the contract. Further, the Plaintiffs state that the **1st** Respondent subsequently conceded part of the amount but unilaterally sought to pay **Kshs. 37,000,000/=** in full and final settlement.The dispute was referred to arbitration as per the terms of reference contained in the **1st** Respondent's letter dated 1**8th** October 2018, and, at the preliminary meeting, the arbitrator (the **2nd** Respondent) directed the parties to file their pleadings and scheduled a date for further directions.

4. The point of divergence is that the applicants state that the **1st** Respondent filed a substantially and fundamentally different claim falling outside the terms of reference by including new claims in his Amended Statement of Claim. They state that the new claims are beyond the

scope of the SPA and the arbitral clause, and, that the Respondent seeks a remedy unknown to law. Further, the **1st** Respondent's claim for **Kshs. 67**,**000,000/=** mutated to a fresh claim of over **Kshs. 259,000,000/=.**

The applicants' Preliminary Objection

5. The applicants filed a Preliminary Objection before the arbitrator dated **11th** June 2019 challenging the arbitrator's jurisdiction and the legality of the claim on grounds that:- the claim was different from the claim which was referred to arbitration; that the proceedings could not proceed against parties who are strangers to the primary agreement; that the issues raised were subject to court proceedings; that a party cannot be forced to arbitral proceedings when the arbitral clause is elective; whether a claim for unpaid taxes could be entertained in the arbitration proceedings; whether the issues raised in the statement of claim fell outside the scope of arbitration; whether the tribunal can re-write the contract; whether a dispute on general damages for breach of contract can be entertained in arbitration proceedings; whether the proceedings were proper for want of a notice of their institution; whether the arbitrator had jurisdiction to entertain the claim without ordering security for costs to be deposited.

6. In his dated **29th** November 2019, the **2nd** defendant ruled as follows:- that the claims were within the dispute envisaged in the arbitration agreement under clause **16.1 (b)** of the SPA; that the claim was not *sub judice;* that the validity of the specific claims will be tested at the full hearing; that the prayer for security for costs cannot be considered as framed in a Preliminary Objection; that the Preliminary Objection raised significant factual questions as opposed to pure points of law; and that the Preliminary Objection did not meet the pre-requisite for a valid Preliminary Objection.

The Originating summons

7. Aggrieved by the above ruling, the applicants moved this court vide the Originating Summons dated **17th** December 2019, the subject of this determination seeking to set aside the ruling and in lieu thereof an order be made allowing their challenge to the arbitrator's jurisdiction and/or an for security for costs. They also pray that this court removes the arbitrator from the arbitration proceedings. Lastly, they pray for the costs of this application and the costs of the arbitration.

8. The grounds in support of the summons are that the arbitrator focused on the arbitral clause and failed to determine the implication of the letter of reference to arbitration and also, that he failed to consider the implication of claims raised for the first time in arbitration without following the mandatory requirements of the arbitral clause in relation to his jurisdiction. They also fault the arbitrator for failing to consider the applicant's submissions and authorities on the question of jurisdiction and for ignoring the law that an arbitral tribunal can only draw its jurisdiction from the terms of reference or by agreement of parties in enlarging his scope.

9. Further, the applicants fault the arbitrator for entertaining claims arising after the applicant's full performance of the contract. They accuse the arbitrator of aiding the **1st** Respondent in disregarding the mandatory requirements of the arbitral clause. They contend that the arbitrator is compelling the applicants to submit to jurisdiction in respect of claims outside the scope of the SPA, the arbitral clause and the jurisdiction of an arbitrator. Also, they state that the arbitrator was wrong in dismissing the applicants' plea on jurisdiction on a technicality.

10. Additionally, the applicants contend that the ruling was overly biased and it was intended to assist the **1st** Respondent to circumvent the law and the mandatory contractual provisions including the arbitral clause to secure a favourable award. As a consequence, the applicants state that they have lost faith in the arbitrator's impartiality on account of assumption of jurisdiction which he does not have. Further, the applicants state that they stand to be prejudiced by the arbitral proceedings which are essentially intended to secure an ulterior motive which is to delay the payment.

11. They fault the arbitrator for failing to order provision of security for costs despite it being apparently clear that the Respondent is not in a position to even pay the balance of the purchase price. They state that unless the proceedings are set aside, the arbitrator will proceed with the claim to their prejudice. Further, that this court has power under section **14 (5)** of the Arbitration Act to either confirm the rejection of the challenge or uphold it and remove the arbitrator. Lastly, they state that it is in the interests of justice that the application be allowed.

The 1st defendant's Reply

12. The **1st** Respondent's Response is contained in his Replying affidavit dated **16th** January 2020. The nub of his case is that on or about **19th** June 2017 the applicants agreed to sell to him **77%** of the building owned by ADL (ADL Plaza) for a consideration of **Kshs. 1,540,000,000/=**, of which **Kshs. 1,077,000,000/=** less the adjustments payable by the purchaser; that under the SPA, the applicants were prior to the completion date required to ensure that each company and its respective officers complied with Schedule **8** of the SPA; and to deliver to him completion documents listed in Part **1** of Schedule **4** of the SPA. Also, they were required to take necessary steps to properly effect the completion as set out in Schedule **2** Part **4** of the SPA and to deliver to him duly signed minutes of board meetings. Further, the applicants were to ensure that no loan to or loan capital of any company has been repaid or has become liable to be paid whether in whole or in part otherwise than in accordance with the repayment schedules disclosed in the accounts, and not to declare, authorize, pay or make a dividend or other distribution whether in cash, stock or in kind, and, not to incur or pay any management charges or other payments to themselves from the ADL.

13. The **1st** Respondent also states that by a Deed of Amendment dated **7th** May 2018, the consideration was reviewed and agreed at **Kshs. 1,382,000,000/=** and he paid a further sum of **Kshs. 442,000,000/=** including *inter alia* interests which raised his percentage of ownership of the building to not less than **80%** and the balance was to be financed by a KCB loan. He states that after the second payment he took over the management of ADL and Adlife Management Company ltd, but, prior to taking over, he was not provided with the requisite company documentation as envisaged in the SPA including financial statement, management accounts, bank statements, executed commercial leases. Upon taking over the companies, he commissioned a preliminary financial due diligence on the accounts of APL for purposes of reviewing compliance with the SPA with respect to financial transactions by APL, its directors and shareholders for the period **19th** June 2017 and **23rd**

July 2017 and **23rd** July 2018 which revealed that the applicants were in breach of several obligations under the SPA and Deed of Amendment including: -

i. Failure to adhere to their obligations under Clause **3.1** of the SPA which required them to fulfil all the conditions and their obligations under the contract and specifically Clauses **2.4** and **5.2** of the agreement;

ii. Failing to ensure that no loan to or loan capital of any company has been repaid or has become liable to be paid out of the company's accounts;

iii. Declaring, authorizing, paying or making a dividend or other distribution whether in cash, stock or in-kind contrary to the express terms of the agreement;

iv. Incurring or paying management charges or other payments to themselves from the companies' accounts;

v. Paying the rental income and service charge payable to APL in accordance with the various leases and tenancy agreement into a Barclays Bank of Kenya, Adlife Plaza Limited Rent Collection Account controlled by company known as Broll Kenya limited, the property manager appointed by the applicants;

vi. Failing to supply him with the updated bank statements relating to the payments in (v) above for the last three years despite making repeated requests for the same;

vii. Failing to transfer the security deposits paid by the tenants into the APL bank account;

viii. Failing to deliver the duly registered leases relating to sold office suites in accordance with clauses **5.5 (a)** of the SPA and the duly executed and registered commercial tenancies in accordance with clause **5.5 (b)** of the SPA;

ix. Failing to make accurate statutory tax remittances to the Kenya Revenue Authority in respect of the companies; and mispresenting the annual rental income of APL at **Kshs. 177,925,932/=** for 2017 and **Kshs. 201,048,337 for 2018.**

14. It's the **1st** Respondent states that efforts to mutually settle the dispute failed and he requested the Chairman of the Institute of Arbitrators, Kenya Branch to appoint an arbitrator pursuant to Clause **16** of the SPA. Further, his case before the arbitrator relates to the applicant's breaches of the contract which are within the ambit of the reference, and, that, the institute appointed Martin Munyu, the **2nd** Respondent as the arbitrator and upon filing his Amended Statement of Claim, the applicants filed their statement of defence together with a Notice of Preliminary Objection challenging the jurisdiction of the arbitral tribunal and seeking an order for deposit of security for costs by the **1st** Respondent. Further, by a ruling dated **29th** November 2019, the arbitrator dismissed the applicants' Preliminary Objection. He maintains that this suit is bad in law, an abuse of court process and ought to be dismissed with costs. Further, the suit is an attempt to set aside the arbitral proceedings in a manner not permitted by the Arbitration Act and the rules.

15. Additionally, he states that these proceedings are an attempt to mislead the court to stay the proceedings and set aside the arbitral proceedings. Further, that the applicants have not approached the court with clean hands and they have withheld material facts from this court. Also, that the claim before the arbitrator is based on the applicants' breach of the terms of the SPA and the Deed of Amendment which are within Clause **16** of the SPA. Also, he states that the application does not satisfy the tests for grant of orders for security nor did the applicant set out any grounds to show that he will not be able to satisfy any decree made against him. Additionally, no evidence has been tendered to show that the **1st** Respondent is removing his assets from the jurisdiction of this court with a view to defeating any decree that may be passed against him. Further, that the application raises matters which were not raised before the arbitrator. Lastly, no misconduct or bias on the part of the arbitrator has been established.

The 2nd Respondent's Replying affidavit

16. Mr. Martin Munyu, an advocate of the High Court of Kenya swore the Replying affidavit dated **16th** January 2020. He deposed that he was appointed the sole arbitrator by the Chairman of the Chartered Institute of Arbitrators, Kenya Branch on **18th** March 2019 and the parties duly accepted his appointment. He relied on the justifications and reasons for the findings contained in his ruling dated **29th** November 2019.

Applicant's further affidavit

17. The applicants filed the further affidavit of Isaac Njoroge Gitoho dated **24th** March 2021 stating *inter alia* that judgment has been entered in HCCC No **21** of 2021 2018 and payment ordered to be made forthwith; that the applicants had questioned the arbitrator's jurisdiction in dealing with part of the claim that touched on issues that were pending in the said case, and that the dispute referred to the arbitrator was pegged on the issue of payment of balance of the purchase price in the sum of **Kshs. 102,378,022.93** which the **1st** Respondent sought to recoup in the arbitral proceedings.

18. Additionally, he averred that following the above judgment, the **1st** Respondent filed **E092** of 2021 seeking to restrain the payment of the amount awarded in the above case, but the matter was withdrawn but the **1st** Respondent filed a similar matter being **E112** of 2021 against the applicants seeking to restrain the payment of the decretal sum in HCCC No **21** of 2021 (OS) and in the said case the **1st** Respondent admits that the sum of **Kshs. 102,378,022.93** is the subject matter of the arbitral proceedings. He also deposed that it is apparent in **E112** of 2021 that the withholding of the balance of the purchase price was done in collusion with the Kenya Commercial Bank, the **1st** Respondent's financier and chargee of the suit premises under instructions from the **1st** Respondent.

19. He contends that KCB Ltd is an active player in the transaction whose dispute has been referred to the arbitrator and has played a huge role in the dispute to the prejudice of the applicants and from the Ruling and Judgment in HCCC No. **21** of 2021 (OS), it is clear that the Bank tried albeit without success to stay the said proceedings pending the arbitral proceedings. He contended that the arbitrator is a partner in the firm of Iseme Kamau and Maema Advocates, and the said firm is in the panel of advocates acting for KCB Bank, and that the arbitrator is actively litigating for KCB in several matters in court, in the circumstances, the applicants have reasonable apprehension that they will not get justice before the arbitrator. Lastly, that the arbitral proceedings were intended and meant to frustrate their quest to be paid the balance of the purchase price which is still being withheld despite the judgment.

The 1st Respondent's further affidavit

20. The **1st** Respondent filed a further affidavit in reply to the applicant's further affidavit dated **22nd** April 2020. The substance of the further affidavit is that the contents of the applicants' further affidavit are aimed at further delaying these proceedings and part of the applicants' further affidavit does not form part of the grounds for which the applicants sought the removal of the Arbitrator, but the applicants now seek to introduce new and extraneous issues in their further affidavit and Submissions which are a deliberate misapprehension of the judgment in HCCC No. **21** of 2020 (OS) in an attempt to mislead this court to stay the proceedings and set aside the arbitral proceedings.

21. He averred that in COMM E l12 of 2021, he seeks orders of interim protection pending arbitral proceedings, hence, the issues raised therein are *sub judice*. He averred that the allegations of collusion between himself and his bank are in bad faith and baseless and the Bank is not an active player in the transaction nor is it a party to the arbitration proceedings. Additionally, the allegations of bias on the part of the Arbitrator are baseless and the said the allegations were not raised before the Arbitrator, so, the applicants are asking this court to decide on matters which were not before the Arbitrator or before this court.

22. He also deposed that in his ruling, the Arbitrator found that the arbitration clause as framed refers to all disputes emanating from the SPA, hence, the Arbitrator has jurisdiction to hear and determine the issues raised in the Amended Statement of Claim including any issues the applicants wish to raise regarding HCCC No. **21** of 2020 (OS).

Applicants' advocates submissions

23. The applicants' counsel submitted that before the arbitrator, the **1st** Respondent filed a substantially different claim outside the terms of reference, prompting the applicants to file a Preliminary Objection challenging the arbitrator's jurisdiction to entertain the claim. He argued that the applicants also applied for security on grounds that the Respondent's only known asset is the shares in ADL which are encumbered by a charge, but vide the Ruling dated **29th** November 2019, the arbitrator dismissed the objection.

24. He submitted that the arbitrator's jurisdiction is governed by the arbitral clause and the terms of reference, and that an arbitrator is competent to determine his own jurisdiction under section **17** of the Arbitration Act while under section **17 (6),** an arbitrator's decision that he has no jurisdiction cannot be challenged in court. (*Sebhan Enterprises Ltd v West Mount Power (Kenya) Ltd cited****[1]*** cited). He submitted that the court has power under section **14 (5)** of the Arbitration Act to confirm or uphold the challenge. He submitted that the referral letter defined the scope of what was to be determined, and that the **1st** Respondent's claim falls outside the scope of the reference and the arbitral clause. He cited *Centurion Engineers & Builders Ltd v Kenya Bureau of Standards*[2] and section **35 (1)** & **(2)** of the Arbitration Act and argued that the arbitrator was wrong to hold that he has jurisdiction to adjudicate upon claims outside the scope of reference. He also relied on *Crescent Construction Limited v Ministry of Local Government*[3] which set aside an award on grounds that it contained matters beyond the scope of the reference to arbitrate.

25. Counsel submitted that adjudicating on the matters outside the reference would be in breach of Clause **16 (1)** of the SPA. He cited *Chania Gardens Limited v Gilbi Construction Company Limited & another*[4] for the proposition that in law the arbitrator would not arrogate to himself any jurisdiction which is not given under the reference or the law or by agreement of parties. He submitted that the court will not hesitate to set aside any award based on issues falling outside the scope of the reference and cited *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited*. He submitted that the arbitrator's jurisdiction must flow from the law and an award must be known to law. He argued that the **1st** Respondent seeks general damages for breach of contract, payment of tax and claims for and on behalf of third parties who are not parties to the SPA (i.e. KRA & Broll).

26. He argued that the claim for general damages is outside the scope of the matters referred to arbitration. He also argued that the arbitrator has no jurisdiction to entertain a claim for general damages. He relied on *Provincial Insurance Company East Africa Limited v Mordekai Mwanga Nandwa*[5] which held that general damages cannot be awarded for breach of contract. He cited *Sirgoi Holdings Limited v Bowen Building Contractors (K) Ltd*[6] which set aside an award for general damages on grounds that it fell outside the ambit of arbitrator's powers. He submitted that the claim for general damages is an attempt to widen the scope of the dispute referred to the arbitrator.

27. Counsel submitted that raising claims for the period between **1st** August 2016 (after the expiry of the SPA long stop date) and **6th** May 2018 (when the Deed of Amendment was executed) amounts to asking the arbitrator to renegotiate and re-write the contract. He submitted that the said period is not covered by the two agreements and it cannot be made the subject of the proceedings. He argued that the scope of the arbitration is not the same as the scope of jurisdiction. He argued that the said claims include the clams by Broll (K) Ltd, claim against directors and claim in respect of taxes. He cited *Cape Holdings Limited v Synergy Industrial Credit Limited*[7]in which the court faulted the tribunal for exceeding his scope by awarding compound interest and interest on interest. He argued that from the pleadings, the contract was concluded save for payment of the balance of the purchase price. Additionally, counsel faulted the arbitrator for proceeding on issues pending in court in HCCC No. **233** of 2018.

28. Regarding the plea for security, counsel submitted that the sum of **Kshs. 102** million is yet to be paid and the **1st** Respondent has no known assets and the suit property is heavily encumbered, hence, it is only in the interests of justice that the security for costs be deposited. He submitted that the **1st** Respondent has not demonstrated that he has the means to meet an award of costs in the event that such an award is

ultimately made. Counsel cited *National Agricultural Export Development Board v Cargill Kenya Limited*[8] which held that the arbitral tribunal has jurisdiction to order security for costs to be provided. He also cited *Kenya Oil Company Limited & another Kenya Pipeline Company Limited*[9] which held that upon an application for security being filed, the arbitrator was empowered to order any party to provide security. Lastly, the applicants' counsel faulted the arbitrator for failing to consider his submissions. As a consequence, he argued that the applicant has lost faith in the arbitrator's impartiality which is an indication of bias.

The 1st Respondent's submissions

29. Counsel for the **1st** Respondent's submitted that the applicants have not demonstrated grounds to warrant staying and/or setting aside the ruling, and that the application seeks orders not envisaged or permitted by law and in particular the Arbitration Act or the rules. He argued that the provisions of the law upon which the application is founded do not aid or support the application, and that the parties' agreement to have all disputes between them resolved by arbitration is well set out at **Clause 16 of the SPA.**

30. He submitted that the claim for compensation falls within the reference terms and the scope of the arbitration agreement and that Tribunal has the jurisdiction to hear and determine any dispute relating to the SPA and the Deed of Amendment that is not resolved amicably. He argued that the arbitration Agreement is valid and enforceable and the Tribunal has jurisdiction to hear and determine the issues in dispute before it. Further, counsel submitted that the issues set out in the Amended Statement of Claim arise from and relate to the breach by the applicants of the provisions of the SPA, hence, they fall within the matters contemplated under the arbitral clause. He cited *Ashville Investments Ltd v Elmer Contractors Ltd*[10] which defined '*matter arising from the contract'* thus: -

> "There is one further principle of construction that in my judgment support the meaning which I attribute to this clause, viz. That all the words used should, so far as possible, be given meaning. Disputes as to the construction of the contract, or as to the matters arising under the contract are covered by the opening words of the clause. **So disputes as to matters arising in connection with the contract must be taken to refer to disputes other than about questions of construction, or as to matters arising under the contract..."[Emphasis ours]**

> The Court went further at page 884 citing with approval Viscount Simon L.C. in the case of **Heyman v. Darwins Ltd [1942] A.C. 356**, **360** to state as follows:
>
> "The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute and (b) what disputes the arbitration clause covers."

31. Counsel submitted that the arbitrator correctly addressed himself to the law and facts and that the letter of reference sets out clearly that the **1st** Respondent's cause of action against the applicants. He also referred to point (v) of the reference letter that any other matters arising as it continued to look into the finance and management of the company would be brought for determination before the arbitrator and submitted that all the claims in the Amended Statement of Claim arise in connection with the SPA and the Deed of Amendment, and relate to the applicants breach thereof. Counsel cited *Equity Bank Limited v Adopt a Light Limited****[11]*** which held that an Arbitral Tribunal has the jurisdiction to interpret contractual documents and this does not necessarily amount to re-writing the contract or acting outside the scope of the matters referred to Arbitration.

32. Additionally, the **1st** Respondent's counsel submitted that in his ruling, the Arbitrator carefully analysed the dispute before him and correctly concluded that the matters set out in the Amended Statement of Claim fall within the Arbitration clause over which he has jurisdiction. Counsel submitted that the applicants have not pointed out which of the claims fall outside the scope of the SPA as alleged nor have they demonstrated the alleged bias by the Arbitrator to merit orders of his removal. In addition, counsel submitted that the applicant's Preliminary Objection fell short of the requisite legal threshold. To fortify this proposition, he cited the definition of a Preliminary Objection in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd.* [12] Further, he submitted that the facts relied upon comprise of contested facts which will be considered by the arbitrator.

33. Regarding the prayer to stay these proceedings pending hearing of *HCCC No. 233 of 2018: Bilha W Mwangi & Another v Njeri Benson Ngugi & 2 Others,* counsel submitted that the **1st** Respondent is not a party in the said case; that the parties in the said suit are not parties to the SPA and the Deed of Amendment; and that the subject matter is not the same. He argued that the said suit relates to the unpaid balance of the purchase price while the issues before the Tribunal relate to the breach of the SPA and the Deed of Amendment. Additionally, the court vide a ruling dated **27th** June 2019 dismissed an application made in the suit to stay the proceedings pending the arbitration upholding the aforesaid grounds. Also, counsel submitted that the arbitrator has the jurisdiction to ensure a just, expeditious, economical and a final determination.

34. Counsel submitted that the applicants have not presented any material to warrant interfering with the arbitral process and that the courts power to order stay of arbitral proceedings when an application seeking the removal of an arbitrator is pending before it is only in exceptional cases. He cited section **14(8)** of the Arbitration Act which provides that 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. He relied on *Zadock Furnitures Systems Limited & another v Central Bank of Kenya****[13]*** in which the court cautioned against staying and/or setting aside arbitral proceedings. He submitted that the applicants have not demonstrated any compelling reasons to warrant stay of the arbitral proceedings. Also, counsel cited *Chania Gardens Limited v Gilbi Construction Company Limited & another****[14]*** in which the court stated: -

> Whereas section 14(8) of the Arbitration Act does not deny this Court jurisdiction to order stay of proceedings, the spirit of the Constitution in Article 159 and the entire corpus of the Arbitration Act is that arbitration as an alternative mechanism of dispute resolution should not be impeded by the Courts. Section 10 of the Arbitration Act is clear on that. I would, therefore, advocate that Courts should be very wary to issue a stay of arbitral proceedings unless there are compelling reasons to do so. I should also state here my personal approach; that, while an application under section 14(3) is pending before the High Court, the arbitral proceedings

should continue unless otherwise ordered by the Court.

35. Further, counsel submitted that in declining to stay of the arbitral proceedings, the court hoisted high the provisions of Article **159** of the Constitution which require courts to promote alternative dispute resolution and section **10** of the Arbitration Act which restricts court intervention in arbitration proceedings.

36. Regarding the prayer for security for costs, counsel submitted that the applicant failed to satisfy the tests to warrant the said orders. He argued that the applicants did not adduce evidence to show that the **1st** Respondent would not be able to satisfy any decree made against him nor did they submit evidence to show that the **1st** Respondent is seeking to remove his assets from the jurisdiction of the court with a view to defeating any decree that maybe passed against him.

37. Counsel submitted that the applicant has not satisfied the threshold for the removal of an arbitrator as set out is section **13(3)** of the Arbitration Act. He relied on *Bremer v Ets Soules*[15] which set out the conditions for removal of an arbitrator as follows: -

> a. Where it is proved that the arbitrator suffers from what may be called 'actual bias'. In this situation, the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavorably towards him, for reasons peculiar to that party, or to a group or of which he is a member. Proof of actual bias entails proof that the arbitrator is in fact incapable of approaching the issues with the impartiality which his office demands.
>
> b. Where the relationship between the arbitrator and the parties, or between the arbitrator and the subject-matter of the dispute, is such as to create an evident risk that the arbitrator has been, or will in the future be, incapable of acting impartially. To establish a case of misconduct in this category, proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in circumstances where there is manifest risk of partiality. This may be called a case of 'imputed bias.'
>
> c. Where the conduct of the arbitrator is such as to show that, questions of partiality aside, he is, through lack of talent, experience or diligence, incapable of conducting the reference in a manner which the parties are entitled to expect.

38. He submitted that to satisfy the above conditions, the applicants are required to demonstrate that the arbitrator conducted himself in a manner that was capricious, irrational or independent of the terms of reference under the statement of claim, or under the letter of reference. Therefore, to succeed in their application, the applicants were required to show that there was misconduct on the part of the arbitrator, or the arbitrator acted, or omitted or committed certain acts which are contrary to the said function and obligation. Nothing to that end has been established in the Application herein. The arbitration should be allowed to proceed.

39. He argued that bare allegations of bias are not enough, but the applicants must by way of cogent evidence demonstrate the alleged bias. He cited *Chania Gardens Limited v Gilbi Construction Company Limited & another****[16]*** which underscored the need for the allegations to meet the threshold to avoid the danger of abuse by those desiring to disrupt the arbitral process. The court went further to state that the test for bias or prejudice is that there is real danger that the arbitrator is biased, and in deciding whether bias has been established, the Court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there was real likelihood of bias.

40. In addition, counsel cited *Zadock Furnitures Systems Limited & another v Central Bank of Kenya****[17]*** in which the court stated that justifiable doubts as to impartiality and independence of an arbitrator do not include *"… peripheral or imagined or fanciful issues or mere belief by the Applicant…"* and cautioned the court to be wary of *"**those intent on obstructing arbitral process...**"* Counsel submitted that the applicants have failed to establish the alleged bias. Counsel submitted that the applicants are engaged in forum shopping by seeking to terminate the mandate of the arbitrator. He cited *Kenya Pipeline Company Limited v. Kenya Oil Company Limited & Another,****[18]*** which held that: -

> "… given the nature of challenge and the process in section 14(3) and (5) of the Arbitration Act, such challenge to the High Court should not, therefore, assume a totally different trajectory or challenge or matters which were not discussed before and decided by the arbitrator."

41. Further, counsel submitted that the issues raised in these proceedings ought to be raised before the arbitrator. Also, He distinguished *Centurion Engineers & Builders Ltd v Kenya Bureau of Standards, Crescent Construction Limited v. Ministry of Local Government, and Kenya Tea Development Agency Ltd & 7 Others v. Savings Tea Brokers Limited,* cited by the applicants' counsel on grounds that they all relate to setting aside a Final Award under section 35 of the Arbitration Act. Also, counsel argued that in the said cases the courts unanimously held that setting aside of an Award can only happen where the Arbitrator exceeds his mandate which has not been demonstrated in the instant application.

42. He also distinguished *Provincial Insurance Company East Africa Limited v Mordekai Mwanga Nandwa, and Sirgoi Holding Limited v. Bowen Building Contractors (K) Ltd* on ground that unlike the said cases, in the instant case the arbitrator has not has not made an Award on damages and in any event general damages are awarded for breach of contract where the same are specifically pleaded. He also distinguished *Cape Holdings Limited v Synergy Industrial Credit Limited****[19]*** on the ground that the Tribunal herein has not exceeded its scope. Further, he distinguished *National Agricultural Export Development Board v Cargill Kenya Limited* and *Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited* on the grounds that no application for security for costs was made before the arbitrator and the Arbitrator rightly dismissed the prayer for security for costs noting that the applicants did nothing to demonstrate their entitlement to orders for security for costs.

The applicants' further submissions

43. The applicants counsel reiterated that the arbitrator has no jurisdiction to determine matters raised in HCCC No. **21** of 2020, that the **1st** Respondent filed **E092** of 2021 seeking to restrain the payment of the decretal amount awarded in the said case, but he withdrew the case only to file HCCC No. **E112** of 2021 seeking similar orders. He argued that under Article **165 (3) (e)** and **(6),** the High Court has both appellate and supervisory jurisdiction over the arbitrator, and that the arbitrator has no jurisdiction to entertain matters already determined by the court. He argued that it is "apparent from the applications in **E112** of 2021 that the withholding of the balance of the purchase price was done in collusion with the **1st** Respondent's financier, hence, the Bank is an active player in the transaction.

44. Additionally, counsel submitted that the arbitrator is a partner in a law firm which happens to be in the panel of the bank's lawyers, hence, the applicants have reasonable apprehension that the arbitrator was biased and they will not get justice before him. He relied on *Jasbir Rai and 3 Others v Tarlochan Singh Raid and 4 Others****[20]*** which held that the court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible.

The 1st Respondent's advocates further submissions

45. The **1st** Respondent's counsel submitted that the issues raised in the arbitration do not relate to the payment of the balance of the Purchase Price in HCCC No. **21** of 2020 because in the arbitration, the **1st** Respondent claims **Kshs 259,463,073.69** and costs and damages for breach of contract. He argued that the substratum of the dispute is inextricably linked to the settling of final accounts which will be addressed in the arbitration, and that the **1st** Respondent filed COMM E **l12** OF 2021 seeking interim measures of protection under section **7** of the Arbitration Act and obtained interim orders. He argued that the matters in issue in the said case are *sub judice* and the applicants cannot purport to rely on the same before this court. (Citing *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga*[21]*)*. Counsel dismissed the allegations of collusions with the **1st** Respondent's Bank as unfounded. He argued that the applicant cannot introduce new issues at this stage and cited *Distributors (K) Ltd v Kenya Seed Company Limited****[22]*** for the proposition that parties are bound by their pleadings. He urged the court to strike out the applicants' further affidavit and further submissions which seek to introduce an entirely different cause of action.

Determination

46. A germane introductory point is to emphasize that the general approach on the role and intervention of the court in arbitration in Kenya is provided in section **10** of the Arbitration Act which stipulates that except as provided in the Act, no court shall intervene in matters governed by the Act. In unqualified terms, the section restricts the jurisdiction of the court to only such matters as are provided for by the Act. Section **10** exemplifies the recognition of the policy of party's ?autonomy" which underlie the arbitration generally and in particular the Act. The section enunciates the requirement to check the court's role in arbitration so as to give effect to that policy.[23] The principle of party autonomy is recognized as a critical precept for guaranteeing that parties are satisfied with results of arbitration. It also helps to achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

47. Section **10** leaves no doubt that it permits two possibilities where the court can interfere in arbitration. *First* is where the Act expressly provides for or permits the intervention of the court. *Second*, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. Thus, parties who resort to arbitration must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds. And applications under section **17 (6)** of the Act 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

48. Section **17 (7)** provides that the decision of the High Court shall be final and shall not be subject to appeal. Perhaps, it's important to mention that under subsection **(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.

49. The gravamen of the applicant's case is that they challenged the arbitrator's jurisdiction to entertain and address a mutated and substantially different claim which fell outside the scope of the arbitration clause and the reference. The arbitrator's findings and disposition are articulated at page **614** of the applicants' original bundle of documents. It will add no value to rehash them here. It will suffice to state that the arbitrator held that the Preliminary Objection did not meet the requisite requirements of a valid Preliminary Objection.

50. Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration processes and awards meet certain standards to prevent injustice.[24] However, by agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the process of the hearing will be determined by the provisions of the Act and nothing else; and by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in Act, and, by necessary implication, they waive the right to rely on any further grounds of review, "common law" or otherwise.

51. A preliminary objection must *first*, raise a point of law based on ascertained facts and not on evidence. *Second*, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law. As Law JA in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd*[25] stated-

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

52. In the words of Sir Charles Newbold P, at page 701, B:-

"...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 the 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."

53. I have carefully studied the entire Preliminary Objection as drawn and filed before the arbitrator. It is largely premised on issues of fact including details of essentially matters which would require evidence to be proved. The applicants essentially converted grounds of the Preliminary Objection into averments. The Preliminary Objection as drawn does not meet the definition of a Preliminary Objection laid down in the above authorities. It does not raise pure points of law. On this ground alone, the applicants' assault on the arbitrator's ruling collapses.

54. Notwithstanding the above finding, I will examine the merits or otherwise of the applicants' case. It has been argued that the Amended Statement of Claim falls outside the scope of the arbitration clause. An arbitrator's jurisdiction derives from the parties' agreement. For an arbitrator to have jurisdiction, all the following must apply: - (i) There must be a binding agreement to arbitrate. (ii) The arbitrator must have been validly appointed. (iii) There must be a dispute that the parties had agreed to arbitrate. There is no contest that these three essential attributes are present in this case. The contestation is that the Amended Statement of Claim contains matters not contemplated in the arbitration clause and the reference to arbitration. The arbitration clause is couched in the following language: -

16.1 Arbitration

a. In the event of any dispute or difference arising out or relating to this agreement, the parties shall use their best endeavors to settle such disputes or differences amicably to this effect they shall consult and negotiate with each other in good faith and understanding or their mutual interests to reach an equitable solution satisfactory to both parties. If an amicable settlement has not been reached within forty-five (45) days of the dispute first arising, then the dispute shall be referred to arbitration in accordance with Clause **16.1 (a).**

b. Any dispute, disagreement or questions arising out of or relating to or in consequence of this agreement or relating to its construction or performance which cannot be settled amicably as referred to in Clause 16.1 (a) shall be referred to and finally resolved by arbitration in Kenya in accordance with the provision of the Arbitration Act, 1995 of the Laws of Kenya by one arbitrator appointed by the Chairman for the time being of the Chartered Institute of Arbitration, Kenya Branch, on application of a party. The language of the arbitration shall be English. Each party shall bear its own cost of preparing and presenting its case. The costs of arbitration (including fees and expenses of the arbitrators) shall be shared equally between the parties unless the award provides otherwise.

c. The terms of this Agreement shall not prevent or delay the parties from seeking orders for specific performance or interim or final injunctive relief on a without notice basis or otherwise and the terms of Clause 16.1 (a) and (b) shall not apply to any circumstances where such remedies are sought.

55. The applicants' argument calls for a faithful interpretation of the above clause to determine its scope and the Tribunal's powers under the clause. Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. In *Arnold v Britton*,[26]Lord Neuberger explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in the light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.

56. In 2019, Professor A. Burrows QC in *Federal Republic of Nigeria v JP Morgan Chase Bank NA*[27] usefully abridged the modern approach to contract interpretation in the following terms: -

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

57. The courts have established that in order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible and typically ruled that they will adopt a broad test for establishing the admissible background. A recent ruling provided clarification that the 'background' to a contract includes 'knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating.'[28] Other important points to note regarding the courts' approach to contractual interpretation include: - (a) the courts will endeavor to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;[29] (b) the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and (c) where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the contra proferentem rule). This last principle has limited applicability in cases involving sophisticated commercial agreements where a contract has been jointly drafted by the parties or where the parties are of comparable bargaining power.[30]

58. In *Fili Shipping Co Ltd v Premium Nafta Products and Others [On appeal from Fiona Trust and Holding Corporation and others v Primalov and others*[31]], Lord Hoffmann, delivering the speech with which all their lordships concurred, said: -

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

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

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

And

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

And

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

60. The opening words of Paraphs **(a)** & **(b)** of Clause **16.1** read: -

a. In the event of **any dispute or difference arising out or relating to this agreement**, …..

b. Any dispute, disagreement or questions arising out of or relating to or in consequence of this agreement or relating to its construction or performance *which cannot be settled amicably as referred to in Clause 16.1 (a)….*

61. Having regard to the arbitration clause and the agreement as a whole, it is my view that the parties envisaged and intended, at the time of concluding the agreement, that all their disputes regarding the agreement or questions arising out of or relating to or in consequence of the agreement would be determined by way of arbitration. To view it differently would give the agreement a commercially insensible meaning. In any event, the arbitration clause in effect constituted a separate self-standing agreement to refer ANY disputes such as the one that featured in the matter before the arbitrator whatever the ultimate consequence or outcome thereof might be. To me this clause constituted an irrevocable agreement to go to arbitration, from which agreement the parties could not withdraw. The parties clearly intended to isolate and ring-fence their agreement to go to arbitration for determination of ANY Dispute arising in connection with the agreement. The arbitration clause was therefore immunized from any attempt to isolate some claims arising from the agreement. The clause covers consequential disputes. The applicants' attempt to bar the disputes referred to arbitration is unattainable and it cannot stand on the face of the clear arbitration clause. My reading of the arbitration clause and the Amended Statement of Claim leaves no doubt that the claims fall within the ambit and scope of the arbitration clause. The merits of the claims will be determined during the arbitration.

62. The argument that in dismissing the Preliminary Objection, the arbitrator assumed jurisdiction he does not have or that he expanded his jurisdiction or he exceeded his jurisdiction is incorrect. As was held in *Cf Bull HN Information Systems Inc v Hutson*[32] "to determine whether an arbitrator has exceeded his authority . . . courts "do not sit to hear claims of factual or legal error . . ." . . . and "even where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards. . ." The term acting outside the scope of his mandate must be understood in context. The ground is to all intents and purposes identical to a ground of review available in relation to proceedings of inferior courts. It is a valid ground under the Act for setting aside an award if an arbitrator had 'exceeded his powers.' To exceed one's powers does not go to merit but to jurisdiction. The applicants in my view are advancing pure grounds of appeal as opposed to the question whether viewed from the lens of the arbitration clause, the dispute falls within the ambit of the clause.

63. The Arbitrator was required to determine whether the dispute lodged by the **1st** Respondent fell within the arbitration clause which include disputes relating to the interpretation of the agreement. In this regard the Arbitrator had to choose between two opposing contentions. He was required to interpret the agreement, which he did and determined the issues raised by the applicants and the Amended Statement of Claim fell within his mandate. He *inter alia* concluded that the main prayer sought by the **1st** Respondent is a declaration that the applicants breached the SPA and Deed of Amendment. He observed that the rest of the prayers are consequential and an elaboration of the alleged breach. He also noted that determination of the said prayer will require a consideration of the obligations of the parties under the SPA. It follows that the argument that the Arbitrator went outside his mandate. In *Mahican Investment Limited v Giovani Gaid & 80 Others* it was held: *In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute."*

64. Next, I will address the argument that the arbitrator failed to consider the applicants' submissions. It is imperative for the trial court/tribunal to evaluate all the evidence and the submissions presented by the parties. This is because a court/tribunal cannot afford to be seen to be selective in determining what submissions to consider. However, some of the submissions might be found to be irrelevant or of little value. The best indication that a court has applied its mind in the proper manner to all the material presented before it is to be found in

its reasons for judgment/ruling.

65. On the other hand, requiring the trial court to consider and weigh all the submissions is not meant that the judgment/ruling of the trial court must also include a complete embodiment of all the submissions made, as if it comprises a transcript of the proceedings. This courts duty is to determine whether the trial court/tribunal applied the law or applicable legal principles correctly to the facts in coming to its decision. In other words, in order to determine the merit of the applicants' contention, this court must consider their submissions before the tribunal, and, juxtapose it against the judgment/ruling, and finally determine whether there is any basis for interfering with the judgment/ruling. If this court finds that a particular fact or submission is so material that it should have been dealt with in the judgment/ruling, but such fact or submission is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court/tribunal. This court must then consider whether either the said misdirection, viewed on its own or cumulatively together with any other misdirection, is so material as to affect the judgment/ruling, in the sense that it justifies interference by this court.

66. Other than making the blanket statement that their submissions were not considered, the applicants did not with specificity point out which submissions were ignored. On the contrary, a reading of the ruling shows that the arbitrator carefully addressed his mind to the material before him. He was alive to the issues flowing from the pleadings and the party's argument and he addressed his mind to the issues. This ground of assault fails.

67. I now turn to the allegations of bias made against the arbitrator. Its important to mention that the issue of bias was not raised before the arbitrator. No application was made before the arbitrator to disqualify himself. Aggrieved by the impugned ruling, the applicants now say they have lost confidence in the impartiality of the arbitrator.

68. The independence and impartiality of the arbitrator is the basic requirement of any arbitration proceeding. The rule against bias is one of the fundamental principles of natural justice which applies to all judicial and quasi-judicial proceedings. The genesis of this principle is the necessity of an arbitrator appointed in terms of the contract and by the parties to the contract to be independent of the parties. His functions and duties require him to rise above the partisan interest of the parties and not to act in a manner so as to further the particular interests of either party. *The Black's Law Dictionary*[33]defines the word bias as:-

> "Inclination; prejudice,…judicial bias. A judge's bias toward one or more of the parties to a case over which the Judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge's bias usually must be personal or based on some extra judicial reason.''

69. The test for establishing a Judge's impartiality is the perception of a reasonable person, this being a 'well-informed, thoughtful observer who understands all the facts' and who has examined the record and the law and thus 'unsubstantiated suspicion of personal bias or prejudice' will not suffice.'[34] The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[35]There are many similar judicial pronouncements, which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer.[36] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases, the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making.

70. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's celebrated declaration that *"justice should not only be done, but be seen to be done."*[37] On this view, appearances are important. Lord Hewart's statement beckoned the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be impartial, rather than the narrower problem that they might in fact not be impartial. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[38] A claim of apprehended bias requires a finding that a fair-minded and reasonably well-informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent," "imputed," "suspected" or "presumptive" bias. [39] As the Supreme Court of Kenya in *Hon. Lady Justice Kalpana Rawal v Judicial Service Commission & Anther*[40] citing Professor Groves M. in *"The Rule Against Bias*"[41] stated that-*"…* claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand." In articulating the proper test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[42] The standard is one of a "real danger" as opposed to a "real likelihood" or "real suspicion." A fair-minded observer should take account of the circumstances of the case at hand.[43]

71. Actual bias has been applied in the following two fact-situations: (a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.[44]What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias,[45] apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.[46]

72. As formulated, the test is: "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel. Turning to the facts before me, the applicants never raised the issue of bias before he arbitrator. They never asked him to disqualify himself. Unhappy with the ruling, they now want him out of the proceedings. The appointment of the tribunal or its acceptance even after appointment is not always straightforward or free from controversy "as any party that considers an arbitration as contrary to its interest can capitalize on every opportunity to obstruct the appointment process, or to challenge a tribunal once appointed."[47]

In such instances the crisis of arbitration is the ironical situation whereby parties who have consciously chosen arbitration in preference to litigation have often first to resort to litigation for court assistance to constitute the arbitral tribunal or to rule whether the tribunal will proceed to hear the dispute.

73. In determining applications of this nature, there is absolute need for a robust application of the standards. The Supreme Court of Papua New Guinea confirmed in *Yama v Bank South Pacific*[48] that it "is not the law that a Judge should disqualify himself just because a litigant has been or continues to be adversely critical of him even to the point of being defamatory and contemptuous." Sedley L.J. continued: - "Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation. "Ward L.J. said that the judicial duty must be "performed both without fear as well as without favour."

74. Lord Neuberger (the President of the Supreme Court of the United Kingdom and lead judge of the Judicial Committee of the Privy Council) in '*Judge not, that ye be not judged' : judging judicial decision-making FA Mann Lecture 2015 (29 January 2015)* stated:-

> "36. … It is all too easy for a litigant who does not want his case heard by the assigned Judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge. It is contrary to justice for one party to be able to pick the judge who will hear the case. In small jurisdictions or in specialized areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court."

75. The allegations levelled against the arbitrator do not in any manner demonstrate that the subject ruling was tainted with bias or influenced by any other considerations other than the law and the evidence before the tribunal. I also find that there is no indication or suggestion that the proceedings will not be conducted fairly if the matter proceeds before the arbitrator.

76. Lastly, I turn to the prayer for security. It appears that the issue of costs was first raised as a ground in the applicants' Preliminary Objection as opposed to a formal application supported by affidavit which would afford the other party the opportunity to reply. Its not clear how the applicants hoped to obtain a substantive prayer as a ground in a Preliminary Objection. The arbitrator said it all when he noted that "the prayer for security for costs cannot be considered as framed in a preliminary objection." That alone summarized the correct statement of the law because there was no basis upon which such a prayer could have been considered

77. The applicants fault the arbitrator for failing to award costs and urge this court to grant the order as prayed in their Originating Summons. An application for security for costs is an exception to the rule. In *Farrell v Bank of Ireland*[49] Clarke J. explicated the law with impressive clarity. He said: -

> "… the jurisprudence in relation to all of the areas where security for costs is considered … starts from a default position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. The reasoning behind that view is that, if it were otherwise, all impecunious parties might, in substance, be shut out from bringing cases or pursuing appeals. Such a balance would be untenable and disproportionate. It is for that reason that there must be some additional factor at play before an order for security for costs can be made."

78. In determining an order for security for costs the onus lies on the party seeking security for costs to go beyond merely showing that the other party is unable meet an adverse costs order. The applicant must satisfy the court that the main action is vexatious, reckless or otherwise amounts to an abuse. An action will be vexatious if it is obviously unsustainable. A reading of the Amended Statement of Claim leaves me with no doubt that the claim is not vexatious, reckless or an abuse of court process.

79. An applicant for security must demonstrate that the Respondent has no known assets or abode within the jurisdiction, that he is in the process of removing his assets from the court's jurisdiction, or he is about to leave the courts jurisdiction. In coming to a decision, the court should have due regard to the particular circumstances of the case and considerations of equity and fairness to both parties. There must be some special facts, inherent to the action itself, which will persuade a court to exercise its discretion in favour of the applicant. The court should exercise its discretion in favour of granting the order only sparingly and in exceptional circumstances.

80. The discretion should be exercised in a manner reflecting its rationale, not so as to put a litigant at a disadvantage compared with his opponent. The onus lies on the person alleging to persuade the court that it would be impossible to recover the debt. The defendants failed to discharge the burden placed upon them by the law to demonstrate that the **1st** defendant may not be able to pay any sum or costs payable to the applicant should they win the case nor did the applicants establish a basis to support their apprehension that he may exit the jurisdiction of this court. The applicants are required to furnish evidence to support their claim that the **1st** Respondent is financially unstable so as to justify their claim that it will experience difficulties in recovering costs from him should they be successful in the suit. Even where a party is shown to be poor, impecuniosity of an individual or a company within the jurisdiction is not the sole basis for seeking security. Other considerations include substantial obstacles to enforcing the judgment. None of these were cited or demonstrated. If the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular Party. An application for security must be supported by cogent or convincing evidence.

81. Flowing from my conclusions on the issues discussed above, I find and hold that the applicants' Originating Summons dated **17th** December 2019 lacks merit. The same is hereby dismissed with costs to the **1st** Respondent.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 19TH DAY OF AUGUST, 2021

JOHN M. MATIVO

JUDGE

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[1] {2006} e KLR.

[2] {2017} e KLR.

[3] {2001} e KLR.

[4] {2015} e KLR.

[5] Civil Appeal No. 179 of 1995.

[6] {2019} e KLR.

[7] {2016} e KLR.

[8] {2014} e KLR.

[9] {2008} e KLR.

[10] {1988} 3 All ER 867, 882.

[11] {2014} e KLR.

[12] {1969} EA 696 at page 700 letter D.

[13] {2014} e KLR,

[14] {2015} e KLR.

[15] {1985} 1 Lloyd's L.R. 160.

[16] {2015} e KLR.

[17] {2014} e KLR.

[18] {2015} e KLR.

[19] {2016} e KLR.

[20] SCOK Petition No. 4 of 2012 {2013} e KLR.

[21] {2013} e KLR.

[22] {2015} e KLR.

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

[24] Redfern and Hunter Law and Practice of International Commercial Arbitration 4ed (Sweet & Maxwell, London 2004) at 65-6; Kerr "Arbitration and the Courts – The UNCITRAL Model Law" (1984) 50 Arbitration 3 at 4-5; London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 WLR 271 at 278

[25] {1969} E.A 696 AT PAGE 700

[26] *Arnold v. Britton* {2015} UKSC 36.

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

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

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

[30] See *Persimmon Homes v. Ove Arup* {2017} EWCA Civ 373.

[31] [2007] UKHL 40; [2007] Bus LR.

[32] 229 F 3d (1st Cir 2000) 321 at 330.

[33] 8th Edition at page 171.

[34] As was held in the American case of Perry vs Schwarzenegger, 671 F. 3d 1052 (9th Circ. Feb. 7th 2012

[35] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[36]Minister for Immigration and Multicultural Affairs Ex p Jia (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); Bell v CETA (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[37] R v Sussex Justices Ex p McCarthy [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": Shrager v Basil Dighton Ltd [1924] 1 KB 274 at 284.

[38] Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

[39] Anderton v Auckland City Council [1978] 1 NZLR 657 at 680 (SC NZ); Australian National Industries Ltd v Spedley Securities Ltd (in Liq) (1992) 26 NSWLR 411 at 414 (NSW CA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

[40]Supreme Court No. 11 of 2016.

[41] {2009} U Monash LRS 10.

[42] [1993] UKHL 1; [1993] AC 646 at 670.

[43] Porter v Magil [2001] UKHL 67; [2002] 2 AC 357.

[44] See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v IABSORIW Local No 97* 2008 CanLII 39763 (BCLRB) para 1.

[45] On the contrary, Burns and Beukes Administrative Law 303-304 think it is the other way round. For them, it is generally "a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised." In their view, "a reasonable suspicion of bias or perceived bias is rather more complex"

[46] Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant's medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him

[48] (2008) SC921.

[49] {2012} IESC 42, at para. 4.17.