



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC/E580/2021

PAUL DEBACKO GOGO.....1ST PLAINTIFF

BELL ESTATE AGENCY LIMITED.....2ND PLAINTIFF

VERSUS

SIFA & KINGS INVESTMENTS CO. LTD.....1ST DEFENDANT

SIFA TOWERS MANAGEMENT LIMITED.....2ND DEFENDANT

TAHERALI DA WOODBHAI HASSANALI.....3RD DEFENDANT

ABDUL KADIR SHABBIR HUSSEIN D HASSANALI.....4TH DEFENDANT

RULING

Introduction

1. This ruling determines two substantially identical applications, namely, one filed by the 2nd defendant dated 25th May 2021 (herein after referred to as the 1st application) and another one filed by the 1st, 3rd and 4th defendants of even date (herein after referred to as the 2nd application). The common thread between the two applications is that they both seek orders that these proceedings be staying and the dispute be referred to arbitration. The 2nd application proposes the proposed arbitrator. The other similarity is that the two applications are premised on identical grounds.

2. In order to put the two applications in a proper context, it is necessary to highlight, albeit briefly the nub of the Plaintiffs' case against the defendants. A summary of the Plaintiffs' Plaint dated 17th May 2021 will serve this salutary purpose. *First*, I examine here below the prayers sought in the Plaint. This will help us to understand what the Plaintiffs intend to achieve or cure with these proceedings. In their Plaint, the Plaintiffs pray for: -

- a. A declaration that only the 1st defendant is legally mandated to manage the affairs of Sifa Towers until the reversionary interest therein is purchased by the 2nd defendant.
- b. A declaration that Abdul Kadir S H D Hassanali was not regularly, properly, validly, lawfully and/or legally elected/appointed as a director of Sifa Towers Management Limited and that he illegally and un-procedurally acquired shares in the said company.
- c. A declaration that Abdul Kadir S H D Hassanali was not regularly, properly, validly, lawfully and/or legally elected/appointed as a Director of Sifa and Kings Investments Company Limited.
- d. A declaration that Nannette Wangari Miingi was not regularly, properly, validly, lawfully and/or legally appointed as a Company Secretary of Sifa Towers Management Limited.
- e. A declaration that Daniel O. Ogola was not regularly, properly, validly, lawfully and/or legally appointed as a Company Secretary of Sifa Towers Management Limited.

f. An order permitting the 1st Plaintiff to hold valid meetings of the 2nd defendant and to pass resolutions therein.

g. General damages.

h. Costs of the suit.

3. It is also necessary examine the averments upon which the above reliefs are derived. The Plaintiffs aver that the 1st Plaintiff, the 3rd defendant and a one Dorah Wuganga Gogo are the only validly appointed Directors of the 1st defendant; that at the time of its incorporation, the 2nd defendant had 3 directors, namely; the 1st Plaintiff, 3rd defendant and a one Shabbir Dawoodbhai Hassanali-Deceased. The Plaintiffs contend that the 1st and 2nd defendants have never changed their directors since they were incorporated. The aver that the deceased died on 22nd May 2015, hence, the 1st and the 3rd defendant are the only remaining directors of the 2nd defendant. They aver that the 1st defendant is legally mandated to manage the affairs of Sifa Towers erected on LR. No. **xxxx**.

4. Additionally, the Plaintiffs aver that the 2nd Plaintiff owns 8 units in Sifa Towers vide Lease Agreements dated 26.03.2012 between herself and the 1st defendant and Clause E of the lease provides that: -

11. The Manager will immediately after registration of all the leases in respect of the Units in Sifa Towers serve upon the Lessor three months' prior notice in writing of its intention to purchase the reversionary interest in the Land and from the date of the transfer of the said reversionary interest all the obligations and like benefits herein contained on the part of the Lessor shall vest in and be carried out by the Manager.

5. The Plaintiffs contend that the term 'Manager' in the Lease documents refers to the 2nd defendant. They maintain the implication of the said clause is that the 1st defendant has the legal mandate to manage the affairs of Sifa Towers, and the said role will only be taken over by the 2nd defendant after registration of all the leases and purchase of the reversionary interest which is yet to happen. Additionally, the Plaintiffs aver that the 2nd defendant's Memorandum of Objects expressly recognizes that the 2nd defendant can only validly operate in accordance with the terms of the Leases and that clause 3(c) provides that the objects for which the Company is established are (c) to supervise, control and manage the estate in accordance with the obligations of the Company pursuant to the leases to which it is a party.

6. The Plaintiffs aver that the 3rd defendant has never attended the 1st and 2nd defendant's meetings even though his name and signature have been continuously used by third parties to interfere with the management of the two companies. They state that the 3rd defendant has declined all attempts by the 1st Plaintiff to ensure that legal meetings of the 1st and 2nd defendants are held. They state that on 13th February 2017, the 3rd defendant together with third parties who are strangers to the 2nd defendant purported to hold a board meeting of the 2nd defendant which resolved to appoint 5 additional members of its board of directors. They also state the Registrar of Companies, relying on the said resolutions, effected changes to the 2nd defendant's Register.

7. Further, the Plaintiffs state that on 8th October 2019, the 1st Plaintiff complained to the Registrar of Companies seeking revocation of appointment of the aforesaid 5 directors under section 862 of the Companies Act. They aver that on 15th October 2019, the Registrar of Companies wrote to the 3rd defendant together with the aforesaid 5 directors seeking to know how the 5 directors and the 4th defendant were appointed to the 2nd defendant's board of directors. They aver that on 10th September 2020, M/s Majanja Luseno & Co. Advocates replied stating, *inter alia*, that no meeting of the 2nd defendant was convened as the law requires and that the 3rd defendant has never passed a resolution to change its directors.

8. They aver that on 28th April 2021, the Registrar of Companies concluded that the 3rd defendant's meeting of 13.02.2017 was irregular and the appointment of the 5 directors to the Board was illegal and revoked their appointment. Further, they state that they received a notice dated 29th April 2021 allegedly signed by the 3rd defendant purporting to call for a virtual meeting of the 2nd defendant to be held on 21st May 2021 whose agenda was to ratify the appointment of the said directors and to reinstate the entries notified by the documents filed with the Companies Registry on 28th April 2017. The Plaintiffs contend that the said Agenda is void *ab initio* because it seeks to ratify an illegality since the appointment was revoked by the Registrar of Companies. The Plaintiffs maintain that only the board of directors can convene a meeting of a company, and, that the 1st Plaintiff and the 3rd defendant are the only validly appointed directors and shareholders of the 2nd defendant.

9. Concurrent to the Plaintiff, the Plaintiffs filed a Notice of Motion seeking an interlocutory injunction restraining the 2nd and 3rd Respondents from proceeding with the meeting scheduled to take place on 21st May 2021 (past) and to permit the 1st defendant to manage the affairs of the 2nd defendant. They also prayed for an order directing the 1st applicant to hold a valid meeting of the 2nd Respondent and to pass resolutions in absence of the 3rd Respondent. Lastly, they prayed for costs of the application.

10. The Plaintiffs filed an Amended Notice of Motion dated 24th May 2021 seeking orders that this court permits the 1st defendant to manage the affairs of Sifa Towers pending hearing and determination of this suit. They also seek an order that the court declares invalid any and all resolutions passed in the 2nd Respondent's meeting held on 21.05.2021. Further, they pray for an order that the court declares that Benard Busiku Chenge, Charles Odhiambo Ayoro, Patrick Ngotho Chege, John Oscar Juma and Tom Odago Opiyo are legally barred from transacting business in the name of, and on behalf of the 2nd defendant pursuant the Registrar of Companies determination made on 28.04.2021. Additionally, they pray for an order that this court to orders that the 1st applicant is at liberty to hold a valid meeting of the 2nd Respondent and to pass resolutions therein in the absence of the 3rd Respondent. Lastly, they pray for costs of this application be granted to the applicants.

The instant applications

11. During the pendency of the Plaintiffs' amended application, the defendants filed the two separate but identical applications mentioned earlier the subject of this ruling.

12. In the 1st application, the 2nd defendant prays that there be a stay of further proceedings in this suit and that this court refers the parties and the dispute to arbitration. The 2nd defendant also prays for costs of the application to be provided for. The grounds in support of the application are that the 2nd defendant's Articles of Association contains an arbitration clause which is valid and that the instant dispute is capable of being referred to arbitration. The 2nd defendant also states that the court's jurisdiction is limited by virtue of the arbitration agreement and, for purposes of respecting the parties' autonomy, it is necessary that the proceedings be stayed and the dispute be referred to arbitration.

13. The 1st, 3rd and 4th Respondents in their application pray for an order that this court refers this dispute to John Ohaga SC or an Arbitrator agreed upon by parties. They also pray for an order that time be limited within which parties are to agree on the name of an Arbitrator. Additionally, they pray for an order there be liberty to apply. Lastly, they pray for costs of the application to be borne by the Plaintiffs. Their application is premised on the grounds that there exists a valid Arbitration agreement between the parties; that a dispute has arisen relating to Leases and Memorandum of Objects and Articles of Association of the 2nd defendant which ought to be determined by way of Arbitration and that this court has no jurisdiction over the instant dispute.

14. In addition to the above application, the 1st, 3rd & 4th Respondents filed a Notice of a Preliminary Objection objecting to this court's jurisdiction on grounds that there is a valid arbitral clause contained in the Lease and the Articles of Association. They also state that the parties having chosen arbitration as a mode of dispute resolution and in absence of compliance with Section 7 of the Arbitration Act, this court lacks jurisdiction to hear and determine the dispute. Lastly, they state that this suit was commenced without the authority of Bell Estate Agency Limited, a majority shareholder.

Courts directions

15. On 2nd June 2021, I directed that the two applications to be heard and determined before the Plaintiffs' application. I directed Plaintiffs to file their responses to the applications within 3 days and scheduled the matter for hearing on 6th June 2021.

The Plaintiffs grounds of opposition

16. In opposition to the 1st application, the Plaintiffs filed substantially similar grounds of opposition to those they filed in opposition to the 2nd application. Since I will highlight the said grounds below, I will only mention here those not appearing in respect of the 2nd application which I will address shortly. They stated that:- whereas Clause 31 of the 2nd defendant's Articles of Association talks of 2 Arbitrators, Clause 8(2) of the Lease talks of 1 Arbitrator; and, whereas Clause 8(2) of the Lease provides that disputes "be resolved amicably through negotiations, failing which the same shall be referred to arbitration, Clause 31 of the 2nd defendant's Articles of Association does not have such a provision; hence the two provisions are at variance; that Clause 8(4) of the Lease which provides for finality of the arbitral award is unconstitutional.

17. Further, they state that the 2nd defendant is legally non-operational pursuant to Clause E of the leases between the 2nd defendant and the 2nd Plaintiff and therefore the issue of a dispute with its members as envisaged under Clause 31 of its Articles of Association is non justiciable. Also, they state that the 2nd defendant's Supporting Affidavit is sworn by a person whose directorship was revoked by the Registrar of Companies.

18. In opposition to the 2nd application and the Preliminary Objection, the Plaintiffs filed grounds of opposition dated 31st May 2021. The grounds are there is no arbitration agreement between the applicants and the Respondents; that Clause 31 of the 2nd Respondent's Articles of Association talks about differences between 2nd Respondent on one hand and any of its members on the other; that the 2nd, 1st and 4th Respondents are not members of the 2nd Respondent.

19. They also stated that Clause 8 of the Lease Agreement between the 1st applicant and the 2nd Respondent talks about dispute resolution through negotiations at first instance, not appointment of an Arbitrator by the court; that Clause 8 of the lease does not apply to the 1st, 3rd and 4th defendants because they are not parties to the lease; and even if the said clause was applicable, it would not be a bar to this court to issuing interim measures which are expressly recognized under Clause 8.5 of the Lease.

20. Additionally, they stated that their application relates to a determination by the Registrar of Companies made on 28th April 2021 which cannot be subjected to arbitration because the arbitrator has no jurisdiction to quash the Registrar's decision; and, that their application seeks to prevent the Respondents from committing an illegality by ratifying fraudulent and illegal appointment of directors to the 2nd defendant's Board.

The submissions

21. Mr. Muite SC, leading with Mr. Muriithi on behalf of the 2nd Respondent (the applicant in the 1st application) argued that Clause 31 of the Memorandum & Articles of Association provides for arbitration. He pointed out that the word "shall" is used in the said Article which is connotes mandatory terms. He submitted that the instant dispute is between shareholders, and that the Plaintiffs are seeking orders that the 1st Plaintiff should be the Managing director. He argued that the defendants' position is that the subject property falls under the sectional

properties act, hence the purchasers of the units became shareholders of the company upon purchasing their respective units. He submitted that before this court is a dispute among shareholders which falls under the Memorandum and Articles of Association, hence it is subject to the arbitration clause in the Articles of Association. He argued that the 2nd defendant has been managing the property for 5 years. He urged the court to refer the matter to arbitration. Additionally, Mr. Muite SC submitted that this court is obliged by Article 159 of the Constitution to encourage Alternative Dispute Resolution.

22. Mr. Luseno, counsel for the 1st, 3rd and 4th Respondents relied on the documents filed by the Plaintiffs, namely, the lease agreement and the Memorandum & Articles of Association and referred to paragraph 10 of the Complaint in which the 2nd Plaintiff states that he owns the premises and admits that the other units are owned by other persons. He also referred to paragraph 9 of the Complaint in which the 2nd Plaintiff confirms that he is paying service charge. He also referred to the reliefs sought in the Complaint and argued they are referred to the management of the company.

23. Mr. Luseno urged the court to consider the parties' chosen mode of dispute resolution under the lease and the Memorandum and Articles of Association which is arbitration. He also pointed out that no relief has been sought against the Registrar of companies, but rather, before this court is a dispute among members of a company. He submitted that the Plaintiff is relying on contested issues of fact.

24. Regarding the objection in the manner in which the application is drafted, he argued that form cannot be elevated above substance. He relied on *Asano Tatsunori & Another v Joel Kimutai Bosek*,^[1] *Zulfiqar Qamar Din & Another v Brookside Pearl Limited*^[2] and *Mart Networks Kenya Limited v Horizon Media Solutions Kenya Limited*^[3] and urged the court to allow the application.

25. Mr. Kojo, the Plaintiffs' counsel relied on the grounds of opposition filed in response to the 2 applications. Regarding the manner in which Mr. Luseno's application was drafted, he left it to the court to decide.

26. Responding to the 1st application, Mr. Kojo submitted that the directorship of the deponent to the supporting affidavit was invalidated by the Registrar of companies. On this ground alone, he argued he has no capacity to swear the affidavit on behalf of the company. He submitted that the cited arbitration clause is inapplicable or inoperative.

27. He submitted that Clause 8 of the Lease Agreement & Article 31 of the Memorandum & Articles of Association are at variance and urged the court to decline the applications. Further, he argued that the defendants have committed acts of illegality and cited *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others*^[4] in which the Court of Appeal emphatically reiterated the judgment of Lord Denning in *Macfoy v United Africa Co. Ltd*^[5] that:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

28. Mr. Kojo argued that the 2nd defendant is estopped from insisting on arbitration because it is a beneficiary of a favorable judgment against the Plaintiffs in *Sifa Towers Management Limited v Bell Estate Agency Limited & 4 others*.^[6] He also argued that the 1st, 3rd and 4th defendants are guilty of mistreating and dealing unfairly with a minority shareholder, i.e. the 1st Plaintiff, hence, they have approached the court with unclean hands and they do not deserve any equitable remedy from the court. He argued that there is no resolution by the 2nd defendant sanctioning filing of the application. Further, he submitted that there are only 2 validly appointed directors of the 2nd defendant, that is the 1st Plaintiff and the 3rd defendant, and they have not authorized filing of the application. On this ground alone, he submitted that the application is not properly before the court.

29. Mr. Kojo argued that under Article 50 of the Constitution, everyone has the right to have a dispute determined by the court. Further, he argued that section 6 of the Arbitration Act does not oust the jurisdiction of the court. He also submitted that this court has unlimited jurisdiction under Article 165 of the Constitution. Additionally, he submitted that the dispute is of such a nature that it cannot be determined by an arbitrator. He argued that the defendant has not clearly stated the dispute they seek to refer to arbitration and relied on the *UAP Provincial Insurance Company Ltd v Michael John Beckett*^[7] in which the court held that a stay should not be granted if there are no disputed facts. Also, he cited *Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited* ^[8] and *Adcock Ingram East Africa Limited v Surgilinks Limited*^[9] for a similar proposition.

30. Additionally, Mr. Kojo submitted that the 2nd defendant's application is defective for want of valid resolution and cited *UAP Provincial Insurance Company Ltd v Michael John Beckett*^[10] in support of his submission that the court cannot sanction an illegality. He argued that the Respondents have approached the court with unclean hands because they sued the Plaintiff in *Sifa Towers Management Limited v Bell Estate Agency Limited & 4 others*^[11] which was not referred to arbitration because there were other parties who were not parties to the arbitration clause. Lastly, counsel submitted that the cases cited by the defendants' advocates are not binding to this court.

Determination

31. When two or more parties enter into an agreement to refer disputes that arise in relation to an underlying contract to arbitration, certain legal principles exist to respect and uphold the sanctity of the agreement. Arbitration is a contract-based form of binding dispute resolution. In other words, a party's right to refer a dispute to arbitration depends on the existence of an agreement (the "arbitration agreement") between them and the other parties to the dispute that the dispute may be referred to arbitration. In entering into an arbitration agreement, the parties agree to refer their dispute to a neutral tribunal to decide their rights and obligations.

32. The Arbitration Act defines an "arbitration agreement" to mean an agreement by the parties to submit to arbitration all or certain disputes

which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

33. Section 4 of the Arbitration Act provided for the Form of arbitration agreement as follows:

- (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (2) An arbitration agreement shall be in writing.
- (3) An arbitration agreement is in writing if it is contained in—
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.
- (4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

34. Our arbitration law also recognizes the principle of *pacta sunt servanda* (Meaning, agreements must be kept). Thus, where a valid agreement to refer a dispute to arbitration is in place, our courts generally prefer that parties seek recourse through arbitration first.

35. Clause 31 of the Memorandum and Articles of Association of the 2nd defendant provides:

“Whether (*sic*) any dispute arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted or suffered in pursuance of these Articles, or of the statutes or touching any breach or alleged breach or alleged breach (*sic*) of these Articles, or any claim on account of any such breach or alleged breach, or otherwise relating to the premises or to these Articles or to any statutes affecting the company, or (*sic*) shall be referred to the decision of an arbitrator, to be appointed by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators of whom one shall be appointed by each of the parties in difference.”

36. Clause 8 of the Lease Agreement dated 26th March 2012 reads:-

8.1 This lease shall be governed by and construed in all respects in accordance with the Kenyan Law.

8.2 Any dispute arising out of or in connection with lease shall be resolved amicably through negotiations, failing which the same shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of a dispute upon the application by either party, by the Chairman for the time being of the Kenya Branch of Chartered Institute of Arbitrators of the United Kingdom.

8.3 Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995, or any other modifications or replacements thereof.

8.4 To the extent permissible by law, the determination of the Arbitrator shall be final and binding upon the parties and any party may apply to a court of competent jurisdiction for the enforcement of such award.

8.5 Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive reliefs or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the Arbitrator.

37. The dispute in this case as disclosed in the Plant concerns shareholding, appointment of board of directors, control and management of the affairs of the 2nd defendant and the management of Sifa Towers. The Plaintiffs are also seeking a determination of the question whether Abdul Kadir Hassanali and Nannette Wangari Miingi were lawfully elected/appointed as a director and secretary of the 2nd defendant respectively and whether Daniel O. Ogola was lawfully appointed as a company secretary of the 2nd defendant. Also, the Plaintiffs seek a determination of the question whether the 1st Plaintiff would be permitted to hold valid meetings of the 2nd defendant and to pass resolutions. The question is not whether a dispute exists, but whether the dispute falls within the ambit of the arbitration clauses reproduced above. This question is primarily a question of interpreting the arbitration clause(s) to get its/their real meaning and the intention of the parties. Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. In *Arnold v Britton*,^[12] 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.

38. In the 2019 case of *Federal Republic of Nigeria v. JP Morgan Chase Bank NA*,^[13] Professor A Burrows QC, usefully summarized the

modern approach to contract interpretation in the following terms: -

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

39. 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.’^[14] 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;^[15] (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.^[16]

40. In absence of fraud or misrepresentation, parties are bound by their choice. This court cannot re-write their preferred choice. 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]*,^[17] 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).

41. 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.’

42. I am reminded of the House of Lords decision in *Premium Nafta Products Limited n(20th defendant) and others (Respondents) v Fili Shipping Company Limited (14th Claimant) and others (appellants)*^[18] that :-

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

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

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

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

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

43. A reading of Article 31 of the Memorandum & Articles of Associates leaves no doubt that it is couched in very broad terms. It covers any dispute between the company and its members, executors, assigns including consequences of the articles or even any alleged breach. The declarations sought in the Plaintiff and indeed all the averments relate to and involve a dispute between the shareholders and or appointments of directors. Whether or not the impugned meeting was properly convened and whether the persons appointed own units in the premises and whether they are members of the management company are all matters falling within the ambit of Clause 31. It follows that the first port of call in terms of dispute resolution is the forum the parties consented to in the said clause.

44. Similarly, any dispute falling under the lease agreement ought to be resolved as provided under clause 8 of the lease agreement. This court is obligated to respect and uphold the parties preferred dispute resolution mechanism. The court cannot re-write a contract voluntarily entered into by the parties.

45. Mr. Kojo submitted that the arbitration clauses in the two documents are at variance and therefore inoperative. As alluded to earlier, the two documents are different. One is a lease and its terms a reclear. The other one is Articles of Association, which is the constitution of the company. Each arbitration clause is carefully framed to cover matters governed by the parent document.

46. Mr. Kojo argued that the arbitration clause is inoperative. It is useful to mention that the term "inoperative" was considered by Hammerschlag J in *Broken Hill City Council v Unique Urban Built Pty Ltd*. [19]Urban brought a motion for the matter to be referred to arbitration. The Council resisted on the grounds that the arbitration agreement was inoperative. The issues for determination were, what was meant by the term inoperative and whether clause 42.3 rendered the arbitration agreement inoperative. His Honour referred to the case of *Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd* [20] in which the parties had agreed that arbitration would be in accordance with the rules of procedure of an association which did not exist. Kaplan J noted that the phrase 'inoperative or incapable of being performed' had been taken from the New York Convention of 1958 and endorsed the following commentary of academic commentators: -

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

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

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

47. The phrase 'incapable of being performed' was also considered in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors*. [21] Fortuna brought a motion to stay court proceedings pending arbitration pursuant to the arbitration agreement contained in the contract. Bulkbuild resisted the motion, claiming that the arbitration agreement was incapable of being performed on the grounds that there would be a risk of different factual findings being reached if its claims against Fortuna were determined by arbitration but its claims against another party to the proceedings (the Superintendents) were determined by a court. It was argued that the claim against Fortuna arose out of similar factual matters as its claims against the Superintendents. The court, rejecting Bulkbuild's argument, held at that mere inconvenience, "such as might arise if the claims against the second and third defendants were permitted to be actively pursued in the court, at the same time as the arbitration of the claim against the first defendant," does not render the arbitration agreement incapable of being performed. The court considered the meaning of the phrase 'incapable of being performed' from which the following points can be taken: -

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

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

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

48. In *Dyna-Jet Pte Ltd v Wilson Pte Ltd*,^[22] it was recognized that an arbitration agreement is inoperative, at the very least, when it ceases to have effect as a binding contract. That can occur as a consequence of various contractual doctrines, such as discharge by breach, by reason of waiver, estoppel, election or abandonment. More specifically, an arbitration agreement will be inoperative where a party has committed a repudiatory breach of that agreement and the repudiation has been accepted by the innocent counter party. The phrase "incapable of being performed" was interpreted in the above case as being a situation where a contingency prevents the arbitration from being set in motion, whether or not that contingency is foreseen and bargained for.

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

50. There is nothing before me to show that the arbitration clause in either of the two clauses is inoperative, null or void. Commercial arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties. The law requires the parties to honour their contractual obligation to arbitrate. The law also provides for limited judicial intervention in arbitral proceedings, and supports the enforcement of arbitral awards in a manner similar to that for national court judgments. National laws generally recognize and support arbitration as a mutually exclusive alternative to litigation as a means of finally resolving disputes. It follows that the Plaintiffs argument that Article 50 of the Constitution guarantees them the right to have their dispute resolved by an independent court ignores the holistic cannon of constitutional interpretation. It ignores Article 159 of the Constitution which requires courts to embrace alternative dispute resolutions.

51. Flowing from the jurisprudence discussed herein above and the conclusions arrived at, it is my finding that the arbitration clause(s) in both the Memorandum & Articles of Association are valid, binding and enforceable upon the parties. It is also my finding that the dispute disclosed in this case falls within the ambit of Article 31 of the Articles of Association. Therefore, I find and hold that the 2nd defendant’s application and the 1st, 3rd and 4th defendants’ application both dated 25th May 2021 are merited.

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

53. As prescribed by the above statutory prescription, I order that these proceedings be and are hereby stayed pending arbitration of the dispute(s) between the parties. I make no orders as to costs.

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 10TH DAY OF AUGUST, 2021

JOHN M. MATIVO

JUDGE

Delivered electronically via e-mail and uploaded into the e-filing system

John M. Mativo, Judge

[1] Nairobi HCCC Number 248 of 2019.

[2] Nairobi HCCC Number E045 of 2019.

[3] Nairobi HCCC E074 of 2020.

[4] {1998} eKLR.

[5] {1961} 3 All E.R. 1169

[6] {2020} e KLR.

[\[7\]](#) {2013} e KLR.

[\[8\]](#) {2014} e KLR.

[\[9\]](#) {2012} e KLR.

[\[10\]](#) {2013} e KLR.

[\[11\]](#) {2020} e KLR

[\[12\]](#) Arnold v. Britton [2015] UKSC 36.

[\[13\]](#) 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.

[\[14\]](#) Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC [2019] EWCA Civ 526).

[\[15\]](#) Tillman v. Egon Zehnder Ltd [2019] UKSC 32.

[\[16\]](#) See Persimmon Homes v. Ove Arup [2017] EWCA Civ 373.

[\[17\]](#) [2007] UKHL 40; [2007] Bus LR.

[\[18\]](#) {2007}UKHL 4

[\[19\]](#) {2018} NSWSC 825.

[\[20\]](#) {1993} HKCFI 14.

[\[21\]](#) {2019} QSC 173.

[\[22\]](#) {2016} SGHC 238.