**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCOMM/E196/2021**

**POLYPHASE SYSTEMS LIMITED ..........................PLAINTIFF/APPLICANT**

**Versus**

**STERLING & WILSON SOLAR LIMITED..................................DEFENDANT**

**AND**

**MALINDI SOLAR GROUP LIMITED..........................INTERESTED PARTY**

**RULING**

**Introduction**

1. In order to fully appreciate the applicant's application dated **15th** April 2021, the subject of this ruling, it is useful, albeit briefly, to highlight the Plaintiffs case as enumerated in its Plaint of date. The factual background which triggered this dispute is essentially common ground or uncontroverted.

2. It is uncontested that on **2nd** October 2019, the Plaintiff and the defendant executed a contract pursuant to which it the Plaintiff was to provide electro-mechanical and ramming works for the installation of a 40MW AC Malindi Photovoltaic Solar Project. The contract was for a term of **6** months ending on or about **29th** April 2020. At paragraph 4 (b) of the Plaint its pleaded "the **2nd** defendant engaged the defendant (sic) for the design, engineering manufacture, procurement, construction, testing, commissioning and subsequent operation and maintenance of a 40 MW AC Malindi Photovoltaic Solar Project situated in Malindi." The Plaintiff states that it was employed at a basic order value of **Kshs. 220,000,000/=** excluding VAT.

3. The point of divergence is that the Plaintiff states that it never obtained legal advice and it innocently entered into the contract without considering implications of the dispute resolution clause nor did the defendant inform it that it would be insisting on any dispute being referred to Singapore for a purely domestic contract. It contends that since the contract was wholly performed in Kenya, the construction site was in Malindi and the several other contractors and sub-contractors were wholly Kenyan, the contract provided by implication for arbitration in Kenya. In support of this contention, the Plaintiff avers: -

*a. The Plaintiff and the defendant have their registered offices for purposes of the contract in Nairobi.*

*b. The Plaintiff and the defendant have all material times being resident in Kenya during the performance of the contract.*

*c. The substantial obligations of the commercial relationship are being performed in Kenya and the place with which the subject-matter of the dispute is most closely connected is Kenya.*

*d. Clause **4 (c)** of the contract that reads that"this Clause shall not apply in relation to the service of any claim form, notice, order, judgment or other documents relating to or in connection with any proceedings, suit or action arising out of or in connection with the Agreement contemplates that litigation would be in Kenya under Kenyan Law.*

*e. Clause 5(d) referred to "the General Conditions of Contract" and made no reference to "General Conditions of Contract for Foreign Services."*

*f. The Performance Guarantee created on **11th** November 2019 by Absa bank in favour of Sterling and Wilson, counter guaranteed by I & M Bank Limited in favour of the defendant provided at clause 2 that any dispute or difference arising out of or connected*

*with the guarantee would be referred to arbitration conducted in accordance with the rules of arbitration of the International Chamber of Commerce by a sole arbitrator appointed in accordance with those rules. The arbitration would be conducted in English and the seat and venue of the arbitration would be Kenya.*

*g. Other than the stamps of both the Plaintiff and the defendant on the individual pages of the General Conditions of Contract was not executed by the parties as a legally binding document.*

*h. The defendant did not bring to the Plaintiff's attention that it was imposing the General Conditions of Contract for Foreign Services that it had may have executed between itself and the 2nd Defendant on local Kenya contractors.*

*i. The General Conditions of Contract for Foreign Services contemplates execution and performance of a contract outside Kenya when in actual fact the contract was wholly executed and performed in Kenya and not outside Kenya.*

4. The other point of departure is that the Plaintiff avers, six months into the contract, the defendant unilaterally and without its concurrence changed the scope of works and for its own convenience in breach of the contract occasioning loss to the Plaintiff. It avers that a dispute has arisen between itself and the defendant on the following **4** areas which require resolution through arbitration: -

*a. Variations to the Contract.*

*b. Employer's delayed supplies of Electromechanical equipment comprising of 231 forty-foot containers that arrived in April-May 2020, which was two months after the original completion date.*

*c. Suspension Orders to shut down or close the site from mid-March 2020 to the end of August 2020 leading to substantial losses incurred by the Plaintiff.*

*d. Potential special damages in excess of Kshs. 200 million once documents sought are supplied.*

5. Additionally, the Plaintiff avers that Clause **22. I** of the General Conditions of Contract for Foreign Services provides that the seat and venue of the arbitrator will be Singapore, and, in compliance the above clause, it commenced negotiations to resolve the dispute within **30** days without success. It claims **Kshs. 155,001,616.88** from the defendant and seeks to restrain the Interested Party from making any payments equivalent to the said amount to the defendant until further orders of the court or determination of the intended arbitral dispute. The Plaintiff avers that it reserves the right to enhance the claim once it receives the change of scope of works and extension of works to factor the additional expenses and costs incurred.

6. The Plaintiff avers that conducting an arbitration in Singapore is very expensive as the Singapore International Arbitration Center (SIAC) Rules are exclusive of a standard tax of **7%** GST and may cost an estimate sum of 168,650 US $ excluding hiring a lawyer in Singapore, flight and accommodation expenses, miscellaneous expenses among other incidental costs, hence the total cost could exceed USD 500,000.

7. The Plaintiff avers that this court has the jurisdiction to rectify clause **22.1** and the cover page of the contract pursuant to section **3(2)** of the Arbitration Act. It states that the arbitration is by statutory implication domestic since the parties reside in Kenya and substantial obligations of the commercial relationship are being performed in Kenya and the place at which the subject matter of the dispute is most closely connected is Kenya.

8. Further, the Plaintiff avers that the court has jurisdiction under Section **6(1)(a)** of the Arbitration Act to find that the seat and venue of the arbitration in Singapore is null and void and inoperative. Further, the imposition of the seat and venue of the arbitrator in Singapore is unconscionable and inequitable and in breach of Articles **10(2)(b)** and **159** of the Constitution because the arbitration is purely domestic. Also, the applicant states that Clause **22 I(b)** impedes the speedy resolution of the dispute in an affordable and expeditious manner, and, that, there was an inequality of bargaining power between the parties as the arbitration clause favoured the defendant.

9. Also, the Plaintiff avers it obtained a performance guarantee from I & M Bank Ltd in favour of Absa Bank Ltd (formerly Barclays Bank of Kenya Limited) for the sum of Kshs. 33 million on the following terms, *inter alia*, that: -

*a. The Plaintiff and Defendant had entered into a contract dated 2nd October 2019 for a 40 MW AC Malindi Photovoltaic Solar Project, Contract No. SWS/Electromechanical and Ramming.*

*b. The bank undertook to pay the Defendant at Mumbai forthwith on first demand in writing stating that the Plaintiff had failed to perform its obligations under the contract and the amount claimed was due and payable towards the same up to an aggregate limit of Kshs. 33 million.*

*c. The performance guarantee was extended on diverse occasions with the last extension expiring on 30th April 2021.*

10. The Plaintiff avers that by a letter dated **19th** March 2021, its advocates Taibjee & Bhalla Advocates LLP demanded from the defendant and the Interested Party the following documents required for the extension of the period of performance beyond April 2020: -

*a. The extension of period of performance beyond April 2020.*

*b. Change of scope of works- deletion of Ramming Works and associated variations approved by the Interested Party*

11. The Plaintiff avers that it mandatorily requires the above documents to obtain the extensions from its bankers to consider extending the performance bond terms as the original performance guarantee was for a period of six months and no official extension and change of scope of works has been provided to it to date. Further, that the Plaintiff's eligibility for payment from the defendant is predicated on the transmission to the defendant of all the executed contract documents, Advance Payment Guarantee and Performance Security and failure to submit the aforementioned documents will delay any and all approved progress payments until the requirements are met. The Plaintiff avers that the defendant has demanded an extension of the Performance Bond by e-mail instead of a formal letter in accordance with Clause **4** of the Contract and has refused to respond to a letter of demand dated **15th** March 2021.

12. Also, by a letter dated **8th** April 2021, the Plaintiff informed the defendant that its bankers had demanded that before the Performance Guarantee could be extended the following documents were required as the Interested Party had already approved the extension which the defendant has refused to pass to the Plaintiff, namely; (a) the defendant's official demand for the extension of the bonds under its official letterhead and not by way of e-mail communication. (b) A separate letter confirming the advance amounts that had been recovered to date to enable the bank cover the outstanding amount. (c) The official extension of time and change of scope as demanded in the letter of **15th** March 2021.

13. The Plaintiff also avers that on **13th** April 2021, the defendant responded to its letter of **8th** April 2021 and refused to provide the information demanded and instead threatened the Plaintiff that unless the Performance Bank Guarantee and the Advance Bank Guarantee were extended the same would be called up and en-cashed. Further, that the threat by the defendant to call up the performance guarantee is in breach of the contract, unconscionable and in bad faith because (a) in the absence of the defendant providing the extension period of performance beyond April 2020 and the change of scope of works and associated variations approved by the Interested Party- it makes it impossible for the defendant to justify how the Plaintiff failed to perform its contractual obligations. (b) The change in scope has materially affected the performance guarantee as the aspect of ramming was removed from the scope of works and it is impossible to condemn the Plaintiff as having not performed when the fundamental component of the agreement was unilaterally altered. (c) The Plaintiff has substantially performed **84%** of the works leaving **16%** for completion once the terms are agreed. (d) The defendant's suspensions of works without granting any official extension of time has frustrated the Plaintiff. (e) The defendant has caused the Plaintiff to incur cost of **Kshs. 1,103,050/=** for the three extensions of the Performance Guarantee and Advance Payment Guarantee.

14. The Plaintiff states that if the performance guarantee is en-cashed and paid in Mumbai, India, the Plaintiff will suffer irreparable injury which cannot be compensated by money because the money will have been paid out of the court' s jurisdiction and the defendant is a shell company in Kenya. It also states that the defendant' delay and failure to supply the documents and information is frustrating the Plaintiff in fulfilling its contractual obligations which will result in massive losses to the Plaintiff who cannot hand over the site on an account of its contractor's lien.

15. As a consequence of the foregoing, the Plaintiff prays for judgment/orders against the defendant and the Interested Party for: -

*a. Declarations against the defendant that: -*

*i. Pursuant to Section **3(2)** of the Arbitration Act, the arbitration is by statutory implication domestic as the parties reside in Kenya and the substantial obligations of the commercial relationship are being performed in Kenya and the place with which the subject-matter of the dispute is most closely connected is Kenya.*

*ii. The imposition of the seat and venue of the arbitrator in Singapore is unconscionable and inequitable and in breach of Articles **10(2)(b**) and **159** of the Constitution by imposing a foreign seat and venue for a purely domestic arbitration.*

*iii. Clause **22.1 (b)** of the General Conditions of Contract for Foreign Services is null and void and inoperative.*

*b. Rectification of the General Conditions of Contract for Foreign Services by:*

i. *Deleting the words "For Foreign Services" from the cover page.*

ii. *Deleting Clause 22.1 (b) of the General Conditions of Contract for Foreign Services and replacing it with the following new paragraphs (b): "The parties hereby agree that any dispute, controversy or claim arising out of or in connection to the contract dated **2nd** October 2019 or breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Nairobi Centre for International Arbitration Rules. The Seat of arbitration shall be Nairobi, Kenya".*

*c. An order directing the parties to refer the dispute to the Nairobi Centre for International Arbitration to appoint a sole arbitrator within **14** days of the order of the court or such time as the court may deem fit.*

*d. A permanent injunction restraining the defendant, its directors, servants, agents or otherwise howsoever from commencing any arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Center, pursuant to Clause 22.1 (b) of the General Conditions of Contract for Foreign Services arising from any dispute with the Plaintiff.*

*e. A permanent injunction restraining the defendant, its directors, servants, agents or otherwise howsoever from calling up and en-cashing the performance guarantee for Kshs. 33 million pending determination of the intended arbitration and furnishing the Plaintiff with the extension of period of performance beyond April 2020 to date and the change of scope of works deleting and/or varying the Ramming Works and associated variations approved by the Interested Party.*

*f. An order directing the Interested Party to withhold paying the sum of Kshs. 155,001,616.88 to the defendant and instead hold it in escrow in trust for the Plaintiff pending the determination of the disputed sum owed to the Plaintiff by the defendant pending the*

*determination of the intended arbitration.*

*g. Alternatively, the defendant be ordered to furnish security for the sum of **Kshs. Kshs.155,001,616.88** to be deposited in a joint escrow account in the names of the Plaintiffs and defendant's advocates pending the determination of the intended arbitration.*

*h. A mandatory order be issued compelling the defendant and Interested Party within 3 days of the order of the court to supply the Plaintiff with copies of:-*

*i. The Performance Bond and Insurance setting out the duration and scope approved by the Interested Party.*

*ii. The extension of period of performance beyond April 2020 to date.*

*iii. The change of scope of works deleting and/or varying the Ramming Works and associated variations approved by the Interested Party.*

*i. Costs of this suit to be borne by the defendant.*

*j. Any further relief that the court may deem fit in the interest of justice.*

**The application**

16. Concurrent with the Plaint, the Plaintiff filed the Notice of Motion of even date seeking: -

*a. A temporary injunction restraining the defendant, its directors, servants, agents or otherwise howsoever from commencing any arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Center, pursuant to Clause **22.1 (b**) of the General Conditions of Contract for Foreign Services arising from any dispute with the Plaintiff.*

*b. A mandatory order be issued compelling the defendant and Interested Party within 3 days of the order of the court to supply the Plaintiff with copies of: -*

*i. The Performance Bond and Insurance setting out the duration and scope approved by the Interested Party.*

*ii. The extension of period of performance beyond April 2020 to date.*

*iii. The change of scope of works deleting and/or varying the Ramming Works and associated variations approved by the Interested Party.*

*c. An order directing the Interested Party to withhold paying Kshs. **55,001,616.88** to the defendant and instead hold it in escrow in trust for the Plaintiff pending the determination of the disputed sum owed to the Plaintiff by the defendant pending the determination of the intended arbitration.*

*d. Alliteratively, the defendant be ordered to furnish security for the sum of Kshs. **55,001,616.88** to be deposited in a joint escrow account in the names of the Plaintiffs and Defendant's advocates pending the determination of the intended arbitration.*

*e. The entire suit be determined on a priority basis on the basis of written submissions and affidavit evidence and judgment be entered as prayed in the Plaint.*

*f. The court be at liberty to make any orders in the interest of justice.*

*g. The costs of the application be to the Plaintiffs in any event.*

**The grounds in support of the application**

17. The applicant states that the application is precedent setting since it seeks to apply international trends in arbitration law on: - (i) changing a foreign seat of arbitration; (ii) injunction restraining performance guarantees on the basis of unconscionability; (iii) an unconscionable contract clause referring a domestic arbitration to foreign seat. The applicant draws a parallel with England, where the Court of Appeal in *Sabbagh v Khoury & Ors**[1]*** held that it had jurisdiction to grant an anti-arbitration injunction to restrain a foreign arbitration if the contract is vexatious and oppressive.

18. The applicant further cites the Court of Appeal in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd**[2]*** where the contract provided for all suits and arbitrations to be conducted in Bombay even though the contract was performed in Kenya and the parties were in Kenya, and, it held that Kenyan courts have discretion to assume jurisdiction over an agreement which is to be performed in Kenya notwithstanding a clause conferring jurisdiction to a foreign seat and, Kenya was to be the natural forum.

19. Additionally, the applicant cites the Canadian Supreme Court in *Uber Technologies Inc v Heller**[3]*** involving a challenge to Uber's standard agreement with drivers requiring disputes to be resolved by private arbitration in Netherlands and not Canada where the dispute

arose. The court held that the arbitration clause was unconscionable and set it aside. The applicant states that the above cases all support the grant of the injunctive prayers and the eventual reliefs in the suit.

20. The applicant also states that the original contract was for six months but was extended for **12** months thus causing huge costs and expenses to the Plaintiff and the defendant refused to provide the change in scope of works and the extension of time required by the Plaintiffs bankers when extending the duration of the performance guarantee. Also, it contends that the defendant cannot call up the performance guarantee as it was predicated on a six-month contract that was unilaterally varied by the defendant both in terms of change of scope of works outside the agreed terms and by suspension of contract and withholding of the formal extension of time. It maintains that it is impossible to blame it for non-performance when the performance guarantee was predicated on the works which were varied by the defendant in the fourth month of the contract and to date the defendant has refused to provide the change in scope of works.

21. It states that the imminent threat by the defendant in en-cashing the performance guarantee for Kshs. 33 million is both unconscionable and in breach of contract on account of the unilateral variation, suspension of works for months without legal justification and failing to negotiate a settlement. Further, the Plaintiff states that the defendant has refused to pay the contractors and sub-contractors and it has no known assets in Kenya, and that, the site has been blocked by angry innocent Kenyan workers who have suffered on account of the defendant not settling various invoices.

22. The Plaintiff maintains that the intended arbitration will be moot if the defendant winds up its operations in Kenya without depositing any security, and, that, there is imminent danger that the defendant's foreign manager and officers may flee the country and leave a shell company with no assets that can be attached worth **Kshs. 155,001,616.88** which reflects the costs and expenses incurred for the extra **12** months of the contract extension.

23. The Plaintiff also states that the defendant with intent to delay the resolution of the dispute has refused to negotiate with a view to settling costs incurred due to the **12** months extension, and it threatened the Plaintiff with arbitration in Singapore and also, it threatened to en-cash the performance guarantee. Lastly, the applicant states that under Sections **6** and **7** of the Arbitration Act, the court has jurisdiction to determine the inoperability of the seat and venue of arbitration and grant interim relief on the basis of Affidavit evidence and submissions.

**Defendant’s grounds of opposition**

24. The defendant filed grounds of opposition stating that the applicant has no justifiable legal basis to seek for the orders sought which contravene Kenya's domestic principles of international arbitration law and Kenya's obligation as a State Party to key international Conventions governing foreign arbitrations. The defendant states that the applicant seeks to have the court re-write the terms of a contact expressly agreed by the Plaintiff and the defendant without showing that the agreement was illegally, forcefully, mistakenly and/or fraudulently entered into. Further, the applicant seeks to selectively mutilate the arbitration agreement while citing non-existent and/or in applicable provisions of Statue.

25. The defendant also states that the court does not have jurisdiction to grant the orders **(2), (4), (5), (6), (7)** and **(8)** of the application which touch on merits of the arbitration proceedings, and, that, an anti-arbitration injunction can only be granted sparingly under exceptional circumstances none of which have been demonstrated. Further, the defendant states that under the English law (which governs the subject contract), the issues raised in the application and particularly on the scope of the arbitration proceedings are to be raised before the relevant supervisory courts of the country of the seat of the arbitration.

26. Further, the defendant states that neither the Arbitration Act nor the Judicature Act gives this court the jurisdiction to grant the orders, and, that, the applicant's assertion that the arbitration agreement is inoperable is an afterthought, scandalous and bad in law, and that the applicant has failed to demonstrate the defendant's oppressive and vexatious conduct to warrant the orders sought nor has it satisfied the conditions pre-requisite for obtaining orders for deposit of security.

27. The defendant states that the application seeks permanent injunctive orders against the defendant pending the hearing and determination of arbitration proceedings in Kenya in blatant disregard of the contractually agreed seat of arbitration. Also, it states that the application seeks to create contradictory jurisprudence on matters that have been settled by the Kenyan courts. Further, the applicant has not proved exceptional circumstances which cannot be financially compensated. Lastly, no cause of action has been proved, hence, the interim orders sought have no legal basis.

**Defendant’s Replying affidavit**

28. In addition to the above grounds, the defendant filed the Replying affidavit of Anand Raju Gangaraju, its director dated **13th** May 2021. Highlights of the affidavit are that on **2nd** October 2019, the defendant engaged the Plaintiff for Electromechanical works with tracker foundation including supply, installation, testing and commissioning the works at the site and to provide O and M Manuals and training to the defendant's personnel for the defendant to operate and maintain the works. That, it was an express term of the contract that the Plaintiff was to carry out the works as per the defendant's requirements and that the defendant would pay the Plaintiff the agreed consideration upon execution of works under the Agreement. It is the defendant’s position that Clause **5** of the Execution Cover expressly provides that the Agreement consists of:- (a) The Execution Cover; (b) Deviation Schedule; (c) Particular Conditions of Contract; General Conditions of Contract and the following schedules:- (i) Schedule I The Employers Requirement; (ii) Schedule 2 Payment Schedule and Price Schedule; (iii) Schedule 4 Quality Assurance Procedures; ( iv) Schedule 5 HSE Conditions of Contacts; (v) Schedule 6 Formats of Bonds (vi) Schedule 7 Code of Conduct; (vii) Schedule 8 Insurance Requirements; (viii) Schedule 9 Construction Schedule; (ix) Schedule 10 Warranty Assignment Format; and, (x) Schedule II Labour Recruitment and Management.

29. The defendant maintains that under "General Conditions of Contact for Foreign Services" it is expressly provided that General Conditions of Contract means the provisions of General Conditions of Contract for Foreign Services provided for in Clauses [l] — [23], and, in effect, any reference to the General Conditions of Contact for Foreign Services applies to reference of General Conditions of Contact. Further, that the General Conditions of Contact made express provisions for, among others the procedures in respect to the parties'

obligations on manner and execution of works, commencement and delay in the works, extension or acceleration of scheduled completion date, suspension of works and consequences of supervision, resumption of works, variation procedure and dispute resolution and arbitration.

30. Also, the defendant states that the construction schedule for completion of the electro-mechanical works including execution of tracker foundations testing and commissioning was to commence at the earliest on the **Ist** November 2019 and was to be completed at the latest on the **29th** April 2020, and, after the pull-out test which slightly changed the Plaintiff's scope of works, the defendant as early as **23rd** October 2019 communicated and provided a potential change in methodology. And, pursuant to numerous discussions with the Plaintiff on the defendant's intention to modify the scope of works; the defendant issued an amended Purchase Order to the Plaintiff which was acknowledged by a signed copy on the **26th** February 2020, hence, the defendant did not unilaterally amend the scope of works as deponed by the Plaintiff (Annexure AEG 5).

31. The defendant states that there were delays occasioned by the Plaintiff which led to the Plaintiff's failure to comply with the contractual schedule marked as Annexure "ARG — 4", and that the Plaintiff never committed sufficient mobilization at the site. It is the defendant's position that notwithstanding the inexcusable delays by the Plaintiff, the defendant requested the Plaintiff to submit delay analysis to enable it carry out a review of the impact of the delay, but it never submitted the same. Also, the defendant states that as a result of regularly demonstrating non-compliance of HSE requirements by the Plaintiff, the defendant received frequent Non-Compliance Reports from its client, and, as a result of the Plaintiffs breach of contract, the client who was and still is the owner of the project suspended the works on site subsequent to which the defendant on the **19th** March 2020 issued a Notice of Suspension in accordance with Clause **11** of the General Conditions of the Contact for reasons wholly attributable by the Plaintiff.

32. Further, towards the end of March 2020 when Kenya had reported a rising number of Covid-19 infections; Kilifi County Government declared a lockdown to contain the spread of the virus as did other parts of the country which also witnessed a raft of similar measures and the directive by the Kilifi County Government to lockdown the County was communicated to the Plaintiff even as the defendant was internally pursuing a way forward on how to proceed with some scope of works on the site.

33. The defendant states that having obtained a Conditional Permission from the County Government to resume the works with local manpower, this was communicated to the Plaintiff on the **3rd** of August 2020 to enable it put into plan a resource mobilization strategy to work on the sequence of activities that were planned by and still outstanding in respect to the Plaintiff's scope of work. Additionally, the defendant applied for Extension of Time and engaged in numerous discussions with the Interested Party on the same and upon conclusion of the discussions the defendant received an interim extension of time of **161** days for the duration of work suspension and immobilization out of the **293** days that were lost during the pendency of the lockdown directives. Further, that the project is ongoing and with all factors constant, is set to be concluded by end of June 2021(now past).

34. It is the defendant's position that the defendant wrote to all sub-contractors informing them of the extension of time together with a further grant upon the various sub-contractors to the extent of their entitlement to be accompanied by their respective delay analysis and revised schedule, but the Plaintiff failed to submit its delay analysis, contending that the suspension of works in relation to the Covid-19 lockdown by the Kilifi County Government was unwarranted, and it has since claimed for extension of time and related costs under Clause **I l** of the General Conditions of the Contract which provides for Suspension by the Employer, being the defendant.

35. Further, the defendant states that the events giving rise to the instant dispute fall within the scope of the arbitration proceedings under the contract. Also, the documentation to be relied on by both parties contain evidence which go to the root of what lies to be heard and determined before an arbitrator whose seat will be in Singapore as expressly provided for under the Contract, hence, the defendant could not attach the correspondence exchanged between the parties and documents in support of its position since to do so amounts to delving into issues that are outside the jurisdiction of this court.

36. The defendant states that considering the magnitude of the scope of works to be undertaken by the Plaintiff, the nature of due diligence to be undertaken prior to the execution of the contract and the overall monetary value of the project; it is extremely remote and in poor persuasion that the Plaintiff is seeking to be unbound by the contract because "no legal advice was obtained as it innocently entered into the contract without considering the implications of the dispute resolution clause."

37. According to the defendant, the Plaintiff cannot state that it was an implied term of the contract that any disputes arising between the parties would be subject to arbitration proceedings in Kenya because Clause **22:1** of the General Conditions of Contract expressly provides for the seat and the venue of the arbitration to be in Singapore. Further, as between the Plaintiff and the defendant, there are no issues that have arisen out of and/or are substantially in issue in respect to the Performance Guarantee created on the **11th** November 2019 by Absa bank in favour of the defendant nor is there imminent threat or realization of encashment of the Performance Guarantee.

38. Additionally, there are no written instructions issued by the Banks in which the defendant is seeking to en-cash the Performance Guarantee, hence, the Plaintiffs averments to that effect are therefore unjustifiable apprehensions which do not merit the injunctive orders. Also, any failed negotiations as deponed by the Plaintiff could only have catalyzed arbitration proceedings in accordance with the arbitration agreement which expressly provides for the seat and the forum of such arbitration to be in Singapore and not in Kenya. Further, that this court lacks the jurisdiction to consider the merits of the dispute, which would largely cover any monetary claims and as such cannot grant an injunctive order to any party making any payments equivalent to the amount claimed.

39. The defendant maintains that the subject contract is governed by English law which provides that the supervisory courts in the jurisdiction of the seat of the venue of the arbitration proceedings is Singapore which is entrusted with the jurisdiction to hear and determine matters arising from the contract. Additionally, that the Plaintiff is not a company of straw and in failing to attach its audited accounts, there is no legal basis upon which the Plaintiff can claim that the costs are prohibitive and unconscionable and, in any event, the costs and expenses incurred in such proceedings are awarded on conclusion of the arbitration proceedings and can be recovered.

40. The defendant states that on the **28th** April 2020, the President of the Singapore International Arbitration Center issued official

communication on the administration and conducting virtual hearings in accordance with international best practices in a season where the pandemic has disrupted travel and accommodation arrangements of parties to the arbitration proceedings, and, that the International arbitrations in Singapore has now accommodated the use of technology in virtual proceedings greatly minimizing the costs of the proceedings as evidenced by annexure "ARG-9.

41. The defendant averred that this court has no jurisdiction to intervene and re-write an express clause of a contract which was not mistakenly or fraudulently entered into nor is there an illegality or invalidity to warrant such orders. Further, that, there was no inequality of bargaining power between the parties in favour of the defendant, but on the contrary, given that the defendant was desirous to commence the project in Kenya and was keen to undertake the same with the support of the Plaintiff's electro-mechanical expertise, the circumstances, if at all, tilted any bargaining power in favour of the Plaintiff.

42. Further, in seeking to allocate extension of time to various sub-contractors, the defendant requested the Plaintiff to submit its delay analysis to enable it grant an appropriate allocation of extension of time to all subcontractors, but the Plaintiff failed to comply, hence, the defendant could not allocate any extension of time to the Plaintiff and there are no records of extension of time post April 2020 on the Plaintiff's scope of works. The defendant reiterates that the Plaintiff is wholly and singularly responsible for failing to comply with the pre-requisites of obtaining the necessary documents for renewal of the Performance Guarantee; that the defendant is not a shell company in Kenya, but it is a Kenyan subsidiary of a listed company in India, that it is registered in Kenya under the companies Act and it carries on business in Kenya.

43. The defendant states that there can be no irreparable injury incapable of monetary compensation in respect of a monetary claim and that the defendant will be prejudiced by offering security to a forum that cannot exercise supervisory jurisdiction on the matters in dispute, and, that I that the principles governing deposit of security have not been met. Further that the Plaintiff's application is an attempt to run away from the express and binding provisions of the contract and to frustrate the defendant from enforcing the contractual terms and in seeking to abdicate its contractual obligations, the Plaintiff is cherry-picking an arbitration forum for its convenience contrary to the binding contract.

44. Additionally, that the Plaintiff has not demonstrated oppressive conduct by the defendant or special circumstances to warrant court’s discretion, and, it has come to court with unclean hands seeking an order that neither protects an equitable nor a legal right which goes against judicial precedents on international arbitration. Also, granting the orders sought and particularly the anti-arbitration injunction is contrary to the international Conventions governing international arbitration, to which Kenya is a signatory and will communicate a negative message to the international community and affect foreign investments and potentially injure the Kenyan economy.

**The Interested Party’s Response**

45. The Interested Party relied on its grounds in support of its application dated **7th** May 2021. The grounds are that it has no contractual relationship with the Plaintiff; that it is not privy to the Subcontract dated **2nd** October 2019 between the Plaintiff and the defendant which is the document governing the dispute between the Plaintiff and the defendant; that it is not a party to the dispute between the Plaintiff and the defendant; and that it played no role in instigating or fueling the dispute between the Plaintiff and the defendant.

46. It also states that no allegations of wrongdoing have been made against it nor does it have any contractual obligation to produce any documents to the Plaintiff and it is not bound by confidentiality obligations under its contractual relationship with the defendant and therefore, it cannot divulge information or documents to third parties, including the Plaintiff. Additionally, the Interested Party states that the Plaintiff has no contractual or legal basis to demand that it withholds **Kshs. 155,001,616.88** pending determination of the arbitration because it is not privy to the Subcontract or party to the dispute between the Plaintiff and the defendant. It states that it has no contractual relationship with the defendant, hence it cannot withhold any monies for the Plaintiff. It states that the Plaintiff’s claim is against the defendant and in the event any security is to be met, it should be met by the defendant not the Interested Party.

47. Also, it states that the Plaintiff has not demonstrated that the defendant is incapable of satisfying any award that may be issued against it in the intended arbitration nor has it produced evidence to demonstrate that the defendant is in the process of dissipating its assets or absconding the jurisdiction of this court to justify an order against the Interested Party. Lastly, it is in the interest of justice that the suit against the Interested Party be struck out as there is no cause of action against it.

**Plaintiff’s supplementary affidavit**

48. Kirtan Saroop Saggar swore the supplementary affidavit dated **18th** May 2021 in reply to the defendant’s Replying Affidavit. The nub of the affidavit is that the audit report dated **5th** February 2021 confirms that the defendant is insolvent, hence, the court should allow the prayer for security. Further, that vide a letter dated **13th** April 2021 the defendant threatened to en-cash the performance guarantee despite the fact that it had refused to provide the information and documents sought by the Plaintiff.

**The Plaintiff’s advocates submissions**

49. The applicant’s counsel argued that this court has jurisdiction to determine the entire suit and refer the matter to arbitration under Sections **6** and **7** of the Arbitration Act. He submitted that the Plaintiff seeks documents from the defendant and the Interested Party relating to the extension of the contract and change of scope of works to support its claim for damages and no prejudice will be caused to them if they provide the documents. He argued that the defendant wants the extension of the performance bonds which can only be extended if the documents are availed and that the Plaintiff has a constitutional right to the information to enforce its contractual rights under Article **35(1) (b)** of the Constitution. He cited *Alnashir Popat & 8 others v Capital Markets Authority* ***[4]*** which held that access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights.

50. Regarding the order for security and interim relief, counsel argued that the Plaintiff’s averments at paragraphs **24** to **28** of its supporting affidavit are uncontroverted demonstrating the defendant’s inability to pay the contractors and sub-contractors which justifies the order for

security. He argued that the Interested Party as owner of the project holds the purse and it will suffer no prejudice if the amount claimed as security is withheld and placed in an escrow account pending determination of the intended arbitration. He also argued that it is not disputed that the defendant has no assets or ability to deposit the amount and it is domiciled in India. He likened the Interested Party to a garnishee who owes the defendant a debt.

51. Counsel submitted that the court has power under Section **7** of the Arbitration Act to grant interim measures of protection before the arbitration starts. He relied on *East African Breweries Limited v G4s Secure Data Solutions (Kenya) Limited* [5] which set out the grounds for granting interim measures of protection and held that the grounds are wide and encompass unique circumstances of each case. Further, the court held that "…it may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the *status quo* pending the outcome of the arbitration proceedings.

52. On the question of privity of contract, counsel submitted that the defendant and the Interested Party are inextricably bound to the project in Malindi. He argued that the Interested Party would grant Extensions of Time to the defendant who was obligated to pass on extensions to the Plaintiff since the performance bond is time bound and that the Interested Party and/or the defendant approved a major change in the scope of the works by deleting an integral part of the contract (i.e.) the Ramming Works that constituted a Variation to the works, which document is fundamentally essential to the Plaintiff to fulfil its obligations - extend the Period Performance Guarantee, Bonds, Insurance which need the Defendant's approval to justify the change and avoid the scenario of blaming the Plaintiff for default in performance when it has not be provided with formal variation of works.

53. He relied on *Dewdrop Enterprises Limited v Renocon****[6]*** which he argued bears similarities to the present suit, in that, in the said case, the parties executed a subcontract for the proposed remodeling of the National Bank (K) Ltd, that the Respondent was the main contractor and had separately executed a contract with National Bank of Kenya Ltd. The Respondent submitted that there was no privity of contract between the Respondent and the appellant or between the Respondent's employer in the said case, and the court held that *if the parties to an existing main contract nominate a sub-contractor under the terms of the main contract, and the said sub-contractor has inspected the main contact before entering into the sub-contract agreement, then the parties to the main contract are estopped from pleading that the said sub-contractor is not privy to the terms of the said main contract.* He argued that the Interested Party as the owner of the project also worked with the defendant through its engineer on the ground and the defendant's employees as well for the success of the project.

54. The Plaintiff's counsel cited Section **3(2)** of the Arbitration Act and submitted that the intended Arbitration is wholly a domestic and the seat should be in Kenya. He submitted that Section **3(3)** of the Arbitration Act defining international arbitrations does not apply in the present dispute. He argued that the court has jurisdiction under Section **6 (1)(a)** of the Arbitration Act to hold that Clause **22.1** of the General Conditions of Contract for Foreign Services making Singapore as the seat of arbitration and to be conducted by the Singapore International Arbitration Centre is null, void and inoperative. In support of this proposition, he argued that the Plaintiff and the defendant have their registered offices for purposes of the contract in Nairobi; both have been resident in Kenya during the performance of the contract; the substantial obligations of the commercial relationship are being performed in Kenya; and the place with which the subject-matter of the dispute is most closely connected is Kenya. Further, that the Performance Guarantee created on **11th** November 2019 by Absa bank in favour of Sterling and Wilson, counter guaranteed by I & M Bank Limited in favour of the defendant provided at clause 2 that any dispute or difference arising out of or connected with the guarantee would be referred to arbitration conducted in accordance with the rules of arbitration of the International Chamber of Commerce by a sole arbitrator appointed in accordance with those rules. He argued that the arbitration would be conducted in English and the seat and venue of the arbitration would be Kenya.

55. Additionally, counsel argued that other than the stamps of both the Plaintiff and the defendant on the individual pages of the General Conditions of Contract, it was not executed by the parties as a legally binding document nor did the defendant bring to the Plaintiff's attention that it was imposing the General Conditions of Contract for Foreign Services between itself and the defendant. Further, that the General Conditions of Contract for Foreign Services contemplates execution and performance of a contract outside Kenya when in actual fact the contract was wholly executed and performed in Kenya and not outside Kenya. Lastly, he submitted that conducting an arbitration in Singapore is very expensive and the total costs and expenses may exceed USD 500,000.

56. Counsel submitted that the court has jurisdiction to rectify contracts and find arbitration clause is unconscionable. He relied on the Supreme Court of Canada in *Uber Technologies Inc. v Heller****[7]*** that *"A court can depart from the rule of arbitral referral where a dispute would not be resolved if a stay of legal proceedings was granted."* In the said case, the court found that there was inequality of bargaining power between the parties, that the agreement was a standard form contract and that the Respondent was powerless to negotiate the terms and his only option was to accept or reject the terms nor could a person in the Respondent's position have been expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law. The court found that the Arbitration clause modified every term of the contract.

57. Counsel referred to the Court of Appeal decision in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd*[8] in which the contract provided that all disputes would be governed by the law prevailing in the domain of India to the exclusion of all other laws and courts of Bombay alone would have the jurisdiction to entertain any disputes between the parties. An objection was raised seeking, *inter alia,* to strike out the suit as all proceedings were to be filed in India despite the fact that the contract was performed in Kenya. Dismissing the objection, the Court of Appeal held that there was a strong case in favour of Kenya as the place of trial.

58. He cited *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [9]where the court defined unconscionable contract terms. It held that *"courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case."* He also relied on *Housing Finance Co of Kenya Ltd v Njuguna****[10]*** in which the court held that courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts.

59. On the prayer for injunction, counsel submitted that courts have departed from the strait jacket approach of only granting injunctions in

relation to performance guarantees if fraud was alleged. He cited the English case of *Simon Carves Ltd v Ensus UK Ltd* ***[11]***in which the court granted the injunction on grounds *inter alia* that there is no legal authority which permits the beneficiary to make a call on the bond when it is expressly disentitled from doing so. It also held that in principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained by the court from making a demand under the bond.

60. Counsel cited *Injunctions restraining calls on performance bonds: Is fraud the only ground in Singapore****[12]*** which underscored that parties have no untrammeled right to call on a performance bond in their possession irrespective of the merits of their case. He cited several decisions from Singapore which emphasized that whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted and once this can be established, there is no necessity to expend energies in addressing the superfluous question of “balance of convenience, and that it does not lie in the mouth of the defendant to claim that damages would still somehow be an adequate remedy. Lastly, counsel argued that Article **10(2)** of the Constitution elevated equity to a constitutional pedestal and it empowers the court to intervene when the contract is unconscionable.

**Defendant’s advocates submissions**

61. The defendant’s counsel submitted that the Plaintiff’s application is incurably and fatally defective and that by citing sections **6** and **7** of the Arbitration Act, the applicant seeks to rely on the court's jurisdiction to grant an anti-arbitration injunction to re-write express terms of a contract and refer the matter to arbitration in Kenya. He argued that the said sections and Rule **2** of the Arbitration Rules 1997, which is couched in mandatory terms, the application should be made by Summons and not by a Notice of Motion. He relied on *Telematics International Sales Limited v Stoic Company Limited and Another****[13]*** in which the Court of Appeal found an application to be fatally and incurably defective and observed that the manner of initiating a suit cannot be termed as a mere technicality.

62. Regarding the prayer for the anti-arbitration injunction, counsel submitted that clause **22:1** of the General Conditions of Contract expressly provides that the seat and the venue of the arbitrator will be in Singapore; and that either party may refer the dispute to be settled by arbitration in accordance with the Arbitration rules of the Singapore International Arbitration Center, by a sole arbitrator appointed in accordance with these Rules. He submitted that the agreement having expressly provided for the seat and venue of the arbitration to be Singapore, it creates an international arbitration in accordance with section **3(b) (i)** of the Arbitration Act. He submitted that once agreed on by the parties, and unless reviewed by the parties in writing; a party cannot therefore claim otherwise.

63. He argued that Section **2** of the Arbitration Act provides that arbitration is domestic if the arbitration agreement expressly or by implication provides for arbitration in Kenya, where the circumstances (a)- (d) apply. Section 2 (a) (d) in essence relate to parties being Kenya nationals or habitually reside in Kenya, bodies corporate or their central management and control are exercised in Kenya and when the place where a substantial part of the obligations of the commercial relationship is to be performed or subject matter of the dispute is most closely connected is Kenya. Counsel argued that where there is an express agreement that the seat and venue of the arbitration proceedings are to be held in Singapore; there cannot be any interpretation that the parties by implication, elected arbitration in Kenya. He submitted that implied and extrinsic terms of a contract cannot override and /or oust the express terms of a contract, unless there is found to be fraud, misrepresentation and mistake of those express terms.

64. Counsel cited section **6(1)** of the Arbitration Act and submitted that the court would stay the proceedings and refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative and incapable of being performed. He argued that Section **6** only relates to stay of proceedings which have been instituted before the court, or stay orders would be sought by contesting the jurisdiction of the court to hear and determine the matter. He submitted that it is only upon meeting the first two pre-requisites that the court may decline to grant the stay of proceedings if it finds that the arbitration is null and void, inoperative or incapable of being performed.

65. He submitted that the Plaintiff is shopping for a forum in Kenya contrary to the express provisions of the agreement and it is inviting this court to exercise authority it does not have in order to move the seat and venue to Kenya. He argued that the Plaintiff seeks an anti-arbitration injunction arguing that "no legal advice was obtained by the Plaintiff who innocently entered into the contract without considering the implications of the dispute resolution clause and that the agreement is null and void and inoperative. Counsel cited *Areva T and D India Limited v Priority Electrical Engineers and Another****[14]*** in which the Court of Appeal held that parties to a contract who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain and should only departed from it in special and exceptional cases. Further, counsel submitted that the Plaintiff has not provided evidence in support of the allegation that the agreement is oppressive.

66. Counsel submitted that the argument that the arbitration clause is unconscionable is based on the reasons that the same is not cost-effective. He submitted that in *Margaret Njeri Muiruri v Bank of Baroda (K) Ltd* [15]cited by the Plaintiff, the court in framing the elements of an unconscionable bargain made reference to the English Case of *Strydon v Vendside Ltd* [16]that for the court to set aside an unconscionable bargain, one party must have been disadvantaged in some ways compared to the other party, that the other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. He argued that the Plaintiff's perspective of an unconscionable bargain is that the arbitration costs in Singapore are oppressive. He argued that the Plaintiff has not substantiated the elements that this court should consider to find that the agreement was unconscionable to warrant a re-writing. He argued that the Plaintiff is seeking a reward for its negligence.

67. He referred to the Court of Appeal in *National Bank of Kenya Ltd v Pipelastic Samkolit (K) Ltd* ***[17]***for the proposition that a court of law cannot rewrite a contract between parties except on pleaded and proven grounds of coercion, fraud, undue influence or unconscionable bargaining. He also cited *Fina Bank Ltd v Spares and Industries Limited****[18]*** which held that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain and argued that the clause providing the seat of arbitration is *prima facie* binding on both parties.

68. Regarding the prayer for security, counsel cited *Safaricom Limited v Ocean View Beach Hotel Limited and 2 Other****[19]*** which held that it is imperative for the court to establish whether the subject matter of the arbitration is under threat and also for what period must the measure be given especially if requested before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision-making power as intended by the parties. He submitted that the subject matter of the arbitration is not under threat and that the Plaintiff's

apprehension that the defendant is unable to pay upon receiving a favourable award is extremely unjustifiable and cannot be relied by this court to punish the defendant to deposit security.

69. He argued that the defendant receives a lot of support from its Head Office in India, which support has not been shown to have been withdrawn nor is there evidence to show that the Indian office is incapable of satisfying an award if the same will turn in favour of the Plaintiff. He pointed out that in *Safaricom Ltd Ocean View*, the court gave an injunction against demolition of the property for **28** days pending the commencement of the arbitration proceedings so as to avoid encroaching on the tribunal's decision-making power. He submitted that the said prayer encroaches on the tribunal's decision-making power.

70. As for the principles for granting security before judgment, counsel cited *FTG Holland v Afapack Enterprises Limited and Another*[20] in which the Court of Appeal overturned the High Court decision ordering deposit of security on the basis that the appellant was a foreign company and was likely to leave jurisdiction of the court and being domiciled in Netherlands with no attachable assets Kenya. The Court of Appeal held that it was incumbent upon the Respondent to demonstrate by affidavit to the satisfaction of the court that the appellant was about to leave Kenya under circumstances which would lead to reasonable apprehension that it intended to obstruct or delay the execution. He submitted that Order **39** of the Civil Procedure Rules, 2010 expressly provides **2** conditions to be satisfied: - (a) that a defendant is about to dispose the whole or any part of his property, and, (b) that the defendant is about to remove the whole or a part of his property from the local limits of the jurisdiction of the court.

71. Also, counsel submitted that the fact that a defendant is a man of straw and may seem unable and/or incapable of satisfying the decree does not constitute a ground for the orders of security. To buttress his argument, he cited *John Kikemboi Sum v Lavington Security Guards Limited* ***[21]***which held that it is wrong for any court to put fetters on the right of a defendant to be heard and order attachment before judgment. He also relied on *Adan Kassim Hussein and Another v GAPCO Kenya Ltd* [22]which held that there was no evidence that the defendant had absconded or left court's jurisdiction. Also, counsel relied on *Kuria Kanyoto t/a Amigas Bar and Restaurant v Francis Kinuthia Noleni and Others****[23]*** where the court stated that the power to attach before judgment must not be exercised lightly and only upon clear proof of mischief that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.

72. Regarding performance bonds, counsel cited *Sinhydro Corporation Limited v GL Retail and Equity Bank Ltd****[24]*** and submitted that the relevant clause of the performance bond expressly stated that the liability of the Bank to the defendant under the Guarantee shall remain in force notwithstanding the existence of any difference or dispute between the parties and notwithstanding the existence of any instructions or purported instructions by the Plaintiff or any other person to the Bank not to pay or for any cause withhold or delay payment to the defendant. He argued that the party seeking the injunction must show that the demand on the bond or guarantee is fraudulent. He cited *Harbottle****[25]*** for the holding that it is only in exceptional cases where the courts will interfere with the machinery of irrevocable obligations assured by banks.

73. He submitted that the defendant has not demonstrated fraud nor was it pleaded. (Citing *United Trading Corporation S.A. v Allied Arab Bank Ltd* (CA July 17, 1984). He submitted that a performance guarantee does not perform the same function as a documentary letter of credit and relied on *Kamro Agravel Limited v Ceva Sante Animale and Others Kisumu****[26]*** which held that a performance guarantee was similar to a confirmed letter of credit. He also cited *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [27] which held that a Bank which gives a performance guarantee must honor that guarantee according to its terms, and, that the bank must pay according to its guarantee, on demand if so, stipulated without proof or conditions, the only exception being where there is a clear case of fraud of which the bank has notice.

74. On access to information, he submitted that under Article **35** of the Constitution, the right to information is not absolute and pursuant to Article **24** of the Constitution and section 6 of Access to information Act, it can be limited. He argued that the documents sought can only be provided upon the applicant submitting its delays analysis and schedule of reviews in order to have the defendant not only formally grant it an extension of time to carry out its scope of works but also to have the Interested Party consider any further extensions. Counsel submitted that the Plaintiff's refusal to submit the delay analysis amounts to breach of contract which would be the cause of action before the arbitration proceedings. Further, if the court to orders production of the documents, the defendant's defense before the arbitrator will be prejudiced. Counsel argued that *Alnashir Popat and 8 Others Capital Markets authority* (Supra) cited by the Plaintiff is not relevant to this case.

**Interested Party's Advocates submissions**

75. Counsel for the Interested Party submitted that the Interested Party has contractual relations with the defendant only and cited *Zenith Steel Fabricators Limited v Continental Builders Limited & another****[28]*** in which the Court of Appeal held that an employer is not liable to pay a sub-contractor since there is no contractual link between the employer and the sub-contractor, and the subcontractor cannot claim directly from the employer, and that a contract affects only the parties to it and it cannot be enforced by or against a person who is not a party, even if the contract made is for his benefit and purports to give him the right to sue or make him liable upon it. Counsel referred to the exception to the privity of contract doctrine analyzed in *Aineah Liluyani Njirah v Agha Khan Health Services****[29]*** which held *inter alia* that even if a third party is mentioned in the contract, he cannot enforce any of its terms nor are any burdens from that contract enforced against him. He submitted that the Plaintiff, a party to the Subcontract is seeking to enforce the Subcontract against the Interested Party who has no obligations under the contract, either express or implied, nor does the exceptions to privity of contract apply in this case. Counsel submitted that *Dewdrop Enterprises Limited v Renocon****[30]*** cited by the Plaintiff is not binding to this court and also the decision goes against the Court of Appeal case in the *Zenith* case.

76. On the production of documents, counsel maintained that the Interested Party has no connection with the alleged dispute and has no knowledge of the merits or otherwise of the said claims nor does it have any connection with the performance bond under the Subcontract and cannot be held liable for the production of any such documents. He also argued that the application is not premised on Article **35** of the Constitution, hence, it cannot be raised in the submissions. He argued that Article **3**5 cannot avail the Plaintiff the right to information against natural persons. (Citing *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others).****[31]***

77. On the prayer for security, he cited *FTG Holland v Afapack Enterprise Limited & another**[32]*** which held *inter alia* that the power to attach before judgment is not to be exercised lightly and without clear proof of the mischief to be avoided. He submitted that the Plaintiff has not demonstrated that the defendant has absconded or left the local limits of the court's jurisdiction; or is about to abscond or leave the court's jurisdiction, or has disposed or removed his assets from the court's jurisdiction. He reiterated that the Interested Party cannot be ordered to furnish security by holding monies in escrow since it is not a party to the dispute or contractually linked to the disputing parties.

78. On the prayer for interim measures of protection, counsel argued that courts in Kenya have no jurisdiction over the dispute, and that the interim measure of protection contemplated by the Arbitration Act is in the nature of temporary prohibitions and injunctions that are meant to secure the substratum of the arbitration and prevent the arbitration from being rendered an academic exercise. He cited *Moi University Pension Scheme (Registered Trustees) v Stanlib Kenya Limited**[33]***which laid down the considerations for grant of interim measures of protection and submitted that the Plaintiff has not established that the subject matter is under threat.

**Plaintiffs advocates supplementary submissions**

79. The Plaintiff's counsel submitted that under Section **6 (a)** of the Arbitration Act, the court has jurisdiction to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed. He cited *Prime Bank Limited v General Hardware (K) Limited & 2 others**[34]*** which held that filing a Notice of Motion rather than a Chamber Summons does not render an application a nullity. He argued that the defendant has misapprehended and misapplied the *dicta* in *Scope Telematics International Sales Limited v Stoic Company Limited & another**[35]*** in which the Court of Appeal determined that an application seeking relief under Section **7** of the Arbitration Act must be anchored in a suit and not by way of a miscellaneous application.

80. Regarding the arbitration injunction, counsel submitted that the defendant imposed a document that its parent company uses where foreign services are concerned which was not contemplated by the parties in the subject contract regarding international arbitration.

81. On the threshold for re-writing the arbitration clause, counsel argued that an arbitration clause is treated as an agreement independent of the other terms of the contract under the principle of separability of arbitration clauses in agreements and argued that the Plaintiff only asks the court to rectify the arbitral clause in the Conditions of Contract to allow for the dispute to be determined in Kenya by the Nairobi Centre for International Arbitration in accordance with Kenyan law. He maintained that the defendant imposed a standard template used by its parent company in foreign jurisdictions. (*National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (Supra)).*

82. On the security sought, counsel submitted that the defendant admits that it is a Kenyan subsidiary of a listed Indian company. He urged the court to note that the parent company is not a party to the contract and it is not bound to honor any award that may be published against the defendant. He argued that the defendant has not provided proof that the parent company will indemnify it if an award is made against the defendant. He submitted that the question whether a foreign domiciled parent company is liable to meet the liabilities of its overseas based subsidiary was addressed by the Court of Appeal of England and Wales in the case of *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited**[36]*** where it dismissed claims that an English domiciled parent company of an international group owed a duty of care in respect of incidents occurring at its subsidiary's overseas premises. He argued that the defendant is insolvent as confirmed by its own auditor's report dated **5th** February 2021.

83. On the arbitration injunction, counsel argued that the cases cited by the defendant, i.e. *Edward Owen Engineering v Barclays Bank, Kamro Agravel Ltd v Ceva and Harbottle* are "old school" cases that cannot be considered in today's modern interpretation of unconscionable and inequitable conduct of a party who has frustrated a party from fulfilling its obligations under the contract.

84. On access to information, counsel submitted that Order **40** Rule **2** of the Civil Procedure Rules empowers the court to grant an injunction on terms to compel a party to honor its contractual obligations. Further, he argued that a mandatory order directing the defendant to produce the information and documents sought will not prejudice the defendant or Interested Party. He argued that Article **10(2)** of the Constitution obligates parties to act in an equitable manner.

**Determination**

85. Kenya is among **85** states and **118** jurisdictions around the world where legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been adopted. This position is underpinned by Article **159** of the Constitution which explicitly recognizes the need for courts and tribunals to encourage and promote alternative forms of dispute resolution, including arbitration.

86. The Arbitration Act[37] is modelled on the **UNCITRA**L Model Law, and except for the limitations set out in the Act, it applies to both domestic and international arbitrations. The Act is augmented by the Arbitration Rules 1997; and the Nairobi Centre for International Arbitration Act.[38]Section **4(1)** of this Act establishes the Nairobi Centre for International Arbitration whose functions as set out in section **5** of the Act includes to— (a) promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; (b) administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; (c) ensure that arbitration is reserved as the dispute resolution process of choice.

87. The above legislations are complemented by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which Kenya ratified in 1989. The New York Convention is part of domestic law of Kenya by virtue of Article **2(6)** of the Constitution which provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. In addition, section **36(2)** of the Arbitration Act complements the New York Convention by providing that an international arbitration award shall be recognized as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is a signatory.

88. Kenya has also ratified the International Centre for Settlement of Investment Disputes Convention (ICSID or the Centre), which is the legal framework applicable to dispute resolution and conciliation between international investors. Kenya's arbitration legislation does not

depart from the UNCITRAL Model Law in any significant way. The laws reflect most of the UNCITRAL Model Law principles, including finality of arbitral awards, limited court intervention or interference, and principles such as separability and *Kompetenz-kompetenz.* Our arbitration law is not only consistent with, but also in full harmony with, prevailing international best practice in the field.

89. In Kenya, Court intervention in arbitration proceedings is limited only to circumstances expressly permitted by the Arbitration Act. In this regard, section **10** of the Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In peremptory terms, the section restricts the jurisdiction of the court to only such matters as are provided for by the Act. The section exemplifies the recognition of the policy of party's ?autonomy" which underlie the arbitration generally and in particular the Act.

90. Section **10** articulates the necessity to curb the court's role in arbitration so as to give effect to that policy.[39] The principle of party autonomy is recognized as a critical precept for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

91. Section **10** leaves no doubt that it permits two possibilities where the court can intervene 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. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially. As the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)**[40]*** (the *Nyutu case*) observed, this judicial intervention can only be countenanced in exceptional instances. The Supreme Court stressed the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

92. The Supreme Court accentuated that Section **10** of the Act was enacted to ensure predictability and certainty of arbitration proceedings by explicitly providing instances where a court may intrude. It follows that parties who recourse 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, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction or in circumstances provided under section **6** (Stay of legal proceedings) & section **7** (Interim measures).

93. The objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

94. Turning to this case, it is useful to mention that the principal purpose of an arbitration clause is to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties are at liberty to contract to allow to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect. In this regard, the subject arbitration clause reads: -

> ***22.1 Dispute Resolution***
>
> *a. Any controversy or claim ("Dispute") arising out of or in connection with the validity, application or interpretation of the Contract shall be settled by consultation between the Parties initiated by written notice of the Dispute to the other Party. The Parties shall attempt to settle such Disputes by way of negotiation within 30 days of the notice of any Dispute by any Party to the other party in such event, the Parties shall each arrange for an officer or member of management with authority to meet resolve, in good faith, any pending Disputes during such time period.*
>
> *b. In the event the Parties are unable to resolve their Dispute within the aforementioned 30 days, then either party may refer to the Dispute to be finally settled by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Center, by a sole arbitrator appointed in accordance with these rules. The arbitration shall be conducted in English, and the seat and venue of the arbitrator will be Singapore.*
>
> *c. The Parties shall ensure that any arbitrator appointed to act under this Clause 22.1 (Dispute Resolution) will agree to be bound to certain confidentiality obligations with respect to the terms of the Contract and any information obtained during the course of the arbitration proceedings.*
>
> *22.2 Continuation of Performance*
>
> *Performance of the Contract shall continue during any dispute resolution process referred to in this Clause 22 (Dispute Resolution and Arbitration) unless the Employer orders suspension in accordance with the Contract.*

95. A reading of the above arbitration clause leaves no doubt that it provides that Singapore is the preferred seat and place of arbitration. Regarding the seat of arbitration, the Supreme Court of India in *BGS SGS Soma JV v. NHPC Ltd**[41]*** in a dispute which concerned an arbitration agreement stipulating that "*Arbitration Proceedings shall be held at New Delhi/Faridabad, India* prescribed the following bright-line test for determining whether a chosen venue could be treated as the seat of arbitration:-

> *a. If a named place is identified in the arbitration agreement as the "venue" of "arbitration proceedings", the use of the expression "arbitration proceedings" signifies that the entire arbitration proceedings (including the making of the award) is to be*

*conducted at such place, as opposed to certain hearings. In such a case, the choice of venue is actually a choice of the seat of arbitration.*

*b. In contrast, if the arbitration agreement contains language such as "tribunals are to meet or have witnesses, experts or the parties" at a particular venue, this suggests that only hearings are to be conducted at such venue. In this case, with other factors remaining consistent, the chosen venue cannot be treated as the seat of arbitration.*

*c. If the arbitration agreement provides that arbitration proceedings "shall be held" at a particular venue, then that indicates arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration.*

*d. The above tests remain subject to there being no other "significant contrary indicia" which suggest that the named place would be merely the venue for certain proceedings and not the seat of arbitration.*

*e. In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue is actually the seat of arbitration. In the context of domestic arbitration, the choice of the Indian Arbitration and Conciliation Act, 1996 would provide such indication.*

96. The applicant assaults the above clause on several fronts. It argues that the Arbitration clause is unconscionable and inoperative. It claims that it never sought legal advice at the time of signing the contract, and therefore it did not understand its implication. It claims that the defendant used a standard agreement used abroad. Its key argument is that conducting arbitration in Singapore would be expensive, and this makes the clause inoperative. It claims that it was not brought to its attention that the arbitration would be conducted in Singapore. Its position is that the clause is null, void and unconscionable. The applicant urges the court to rectify the said clause to read that the arbitration is domestic as opposed to international.

97. Unconscionability, consists of the two-pronged test that prevails in most jurisdictions today. One, procedural unconscionability which hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print. Two, substantive unconscionability which arises when a term is "overly-harsh" or "one-sided." But more importantly, unconscionability isolates terms to which parties do not assent in any meaningful way. Thus, when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. Indeed, modern unconscionability empowers courts to strike down provisions that "fall outside the 'circle of assent' which constitutes the actual agreement.

98. If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes. Enforcement of a contract is generally refused on grounds of unconscionability where the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.[42] An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice. The foregoing are the standards upon which the applicant's contention will be judged.

99. When a person signs a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document. A three-fold inquiry is suggested as follows: -*Firstly*, was there a misrepresentation as to the one party's intention*; Secondly*, who made that representation; and *thirdly* was the other party misled thereby? The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?

**100.** The applicant's counsel placed heavy reliance on the Canadian Supreme Court decision in ***Uber Technologies Inc. v Heller[43]*** **in which the court addressed both unconscionability and those in vulnerable positions and its effect on bargaining power. I must acknowledge the progressive and highly incisive and persuasive jurisprudence in the said decision. The relevant excerpts are re-produced below:**

*a. Unconscionability was meant to protect those who were vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made. Although other doctrines could provide relief from specific types of oppressive contractual terms, unconscionability allowed courts to fill in gaps between the existing islands of intervention so that the clause that was not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve would fall under the general power, and anomalous distinctions would disappear.*

*b. The Canadian doctrine of unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In many cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.*

*c. A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed; unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances, for example, almost any agreement would be an improvement over the status quo. In those circumstances, the emphasis in assessing improvidence should be on whether the stronger party had been unduly enriched. That could occur where the price of goods or services departed significantly from the usual market price.*

*d. Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable adequately to protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they have equal bargaining power.*

101. However, a decision is an authority for what it decides. It is not meant to be an exposition for the entire law. A little difference in facts can alter the entire scenario. I am unable to fit the above decision in the circumstances of this case. This is because inequality of bargaining power occurs when the terms and provisions of a contract are unfair, unjust and unreasonable. This happens when a term is exceedingly one sided or provides for a provision that is adverse to the other party or where one party is afforded greater protection while the other is defenseless. None of the foregoing has been cited or proved in this case. In determining the bargaining power of the parties, the factors considered by the courts are their educational standards, business/occupation and exposure only to mention but some. The applicant never attempted to explain its level of education or business experience or exposure and why or how this put it into a disadvantage. The subject clause is not one sided nor has it been shown it offers protection to the defendant. The test remains that of a reasonable person. The applicant wants the court to believe that it never noticed the arbitration clause at the time of signing. However, the arbitration clause is clearly worded in simple language and one wonders why it is the only clause the applicant did not notice or understand out of the many clauses and conditions in the General Conditions forming part of the agreement. Using the test of a reasonable man, I am not persuaded that a company involved in transactions of this nature including the economic value can claim that it never understood the agreement or it never sought legal advice. There is nothing to suggest the existence of imbalance of bargaining power. In fact, in cases involving sophisticated commercial agreements or where a contract is a product of prior negotiations or joint drafting the presumption is that parties are of comparable bargaining power.

102. Buttressed by the Canadian decision, the applicant urged the court to find that the cost of conducting arbitration in Singapore is prohibitive and this makes the contract inoperative. However, there is evidence on record showing clear directions issued by the Singapore International Arbitration Center to the effect that owing to COVID 19 challenges, arbitration can be conducted virtually. This extinguishes the argument that the clause is unreasonable on account of costs or inoperative. The reverse is true. Online hearing is cheap, convenient and effective.

103. The other reason upon which the applicant's argument fails is primarily a question of interpreting the impugned clause to get its real meaning and 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*,[44]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.

104. In the 2019 case of *Federal Republic of Nigeria v. JP Morgan Chase Bank NA*,[45] 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.*"

105. 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.'[46] 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;[47] (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.[48] Other that alleging that it was not made aware that the seat of arbitration would be Singapore, the applicant did not demonstrate misrepresentation or fraud nor was it suggested that there were no prior negotiations culminating in the agreement. The applicant is simply inviting this court to either re-write a binding contract or to assist it to evade consequences of a legally binding agreement it voluntarily signed. I decline the said invitation.

106. The other reason why I decline the above invitation is the limited scope under which a court can intervene in matters governed by arbitration. The Supreme Court in the *the Nyutu case* observed that judicial intervention can only be countenanced in exceptional instances. The applicant has not demonstrated any exceptional circumstances for this court to intervene. The Arbitrator, and not the court has authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement including, but not limited to any claim that all or any part of the agreement is void or voidable. In *Rent-A-Center, West, Inc. v Jackson*[49] a 5-4 decision held that unconscionability challenge should go to the arbitrator. A reading of the agreement shows that the parties consented to the seat and place of arbitration and the applicable law. In absence of fraud or misrepresentation, they are bound by their choice. This court cannot re-write their preferred choice. In *Roger Shashoua & 2 others v Sharma*[50]the court held that: -

"*An agreement as to the seat of arbitration bring in the law of that country as to the curial law and is analogous to an exclusive jurisdiction clause. Not only is there an agreement to the curial law of the seat, but also to the courts of the seat having supervisory*

*jurisdiction over the arbitration, so that by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place of designated as the seat of arbitration."(Emphasis added)*

107. 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,*[51] 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).*

108. 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."*

109. Judicial decisions have engraved the extent of court intervention in arbitration, a position best captured in *Ann Mumbi Hinga v Victoria Njoki Gathara*[52] which held that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Act or as previously agreed in advance by the parties.

110. There is an important distinction between the legal place (the seat) of any arbitration and the place where one or more of the hearings or other procedural steps physically take place. Although the two often coincide, in practice, it is the seat which determines the legal framework within which the arbitration takes place, not the location where the parties or the tribunal choose (as a matter of convenience) to meet. When selecting the seat of arbitration, parties should consider, in particular, the effect that this selection might have upon the conduct of the arbitration and the potential enforceability of the ultimate award. In choosing the seat of the arbitration, the parties are selecting the procedural law that applies. The underlined sentence supports my earlier stated position that even as the seat of arbitration remains Singapore, a virtual hearing owing to COVID 19 restrictions can proceed irrespective of the party's physical place.

111. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The arbitration agreement being the product of a consensual contract, I refuse the invitation to "rectify the arbitration clause." The applicant is inviting the court to venture into the forbidden sphere of re-writing contracts willfully signed by consenting parties.

112. The applicant invites this court to find the parties common intention was that the dispute would be resolved in Kenya. This line of thought is premised on the argument that since the contract was wholly performed in Kenya, the construction site was in Malindi and the several other contractors and sub-contractors were wholly Kenyan, the contract provided by implication for arbitration in Kenya. To buttress this line of argument, the applicant argued that the Plaintiff and the defendant have their registered offices for purposes of the contract in Nairobi and both have at all material times being resident in Kenya during the performance of the contract. The Plaintiff also contends that the substantial obligations of the commercial relationship are being performed in Kenya and the place with which the subject-matter of the dispute is most closely connected is Kenya.

113. Reliance was also placed on Clause **4 (c)** of the contract and Clause **5(d)** of the General Conditions of Contract. It was argued that that the Performance Guarantee and counter guarantee respectively created by Absa bank in favour of Sterling and Wilson and counter guaranteed by I & M Bank Limited in favour of the defendant provided at clause **2** that any dispute or difference arising out of or connected with the guarantee would be referred to arbitration conducted in accordance with the rules of arbitration of the International Chamber of Commerce by a sole arbitrator appointed in accordance with those rules and that the arbitration would be conducted in English and the seat and venue of the arbitration would be Kenya.

114. Additionally, it was argued that other than the respective parties' stamps on the individual pages of the General Conditions of Contract, it was not executed by the parties as a legally binding document. The applicant argues that the defendant did not bring to its attention that it

was imposing the General Conditions of Contract for Foreign Services. Lastly, it states that the General Conditions of Contract for Foreign Services contemplates execution and performance of a contract outside Kenya when in actual fact the contract was wholly executed and performed in Kenya and not outside Kenya. To support its argument that the arbitration is domestic by implication, counsel cited Section **3(2)** of the Arbitration Act which provides: -

> *(2) An arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya: and at the time when proceedings are commenced or the arbitration is entered into—*
>
> *(a) where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya;*
>
> *(b) where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya;*
>
> *(c) where the arbitration is between an individual and a body corporate—*
>
> *(i) the party who is an individual is a national of Kenya or is habitually resident in Kenya; and*
>
> *(ii) the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or*
>
> *(d) the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is Kenya.*

115. Counsel urged the court to find that by implication, the arbitration is domestic owing to the reasons cited earlier. Implied contract terms are items that a court will assume are intended to be included in a contract, even though they are not expressly stated. Implied terms occur because all contracts are necessarily incomplete. In *South African Forestry Co Ltd v York Timbers Ltd,* [53]the Supreme Court of Appeal stated: *"To say that terms can be implied if dictated by fairness and good faith does not mean that these abstract values themselves will be imposed as terms of the contract."*In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration**[54]*** explained the distinction between implied terms and tacit terms:

> *"The implied term . . . is essentially a standardized one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. . . . The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term, the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances that an implication necessarily arises that the parties intended to contract on the basis of the suggested term."*

116. The South African Supreme Court of Appeal in *Bredenkamp v Standard Bank of SA Ltd**[55]*** adopted the mantra that "abstract values of fairness and reasonableness" may not directly be relied upon by the courts in the control of private contracts through the instrument of public policy. A court will use its power to invalidate a contract or not enforce it, sparingly, and only in the clearest of cases in which the harm is substantially incontestable and proven. A court will decline to use the power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose. The party who attacks the contract or its enforcement bears the onus to establish the facts. The above principles are derived from a long line of cases. There are, however, two principles which require further elucidation. The first is the principle that public policy demands that contracts freely and consciously entered into must be honored. In general, public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken.

117. The second principle requiring elucidation is that of "perceptive restraint." According to this principle a court must exercise "perceptive restraint" when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a "court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases." This principle follows from the notion that contracts, freely and voluntarily entered into, should be honored.

118. A reading of the agreement leaves no doubt that the party's intention was clear as expressed in the arbitration clause. In any event, the question whether the arbitration is domestic or international touches on the jurisdiction of the arbitrator. The arbitrator's jurisdiction can be challenged by attacking the agreement's validity or on the tribunal's jurisdiction over the subject matters, among other challenges. Section **17** of the Arbitration Act provides for the doctrine of *kompetenz-kompetenz*, a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The doctrine of *kompetenz-kompetenz* is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules.[56] Article **16(1)** of the Model Law and article **23(1)** of the Arbitration Rules both dictate that "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

119. Earlier I did mention that the applicant referred to the Bank Guarantees and Indemnity and argued that they provided for arbitration in Kenya, hence, by implication the subject arbitration is domestic. This argument is attractive. However, the argument ignores the fact that the guarantee and indemnity documents are totally separate instruments from the arbitration agreement. It ignores the fact that an arbitration agreement has a life separate and distinct from the contract and other documents forming part of the subject transaction. The very concept and phrase 'arbitration agreement' itself imports the existence of a separate or at any rate separable agreement, which is or can be divorced from the body of the principal agreement(s) if need be.

120. The other ground raised by the applicant is the plea to the court to "rectify the Arbitration clause" and replace the word "international" with "domestic." The applicant argues that this court has powers under section **6 (1)** of the Arbitration Act to determine the seat and venue of the arbitration to be null and void. Section **6 (1) (a)** & **(b)** applies when 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.

121. The term "inoperative" was considered by Hammerschlag J in *Broken Hill City Council v Unique Urban Built Pty Ltd.* ***[57]***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* ***[58]*** 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."*

122. The phrase 'incapable of being performed' was considered in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors.****[59]*** 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.*

123. In *Dyna-Jet Pte Ltd v Wilson Pte Ltd*,[60] 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.

124. 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.

125. There is nothing before me to show that the arbitration clause is inoperative, null or void. The grounds cited at paragraph **16** of the Plaint do not pass the above tests. I am reminded of the House of Lords decision in *Premium Nafta Products Limited n(20th defendant) and others (Respondents) v Fili Shipping Compamy Limited (14th Claimant) and others (appellants)****[61]*** which stated:-

> "*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."”*

126. Flowing from the jurisprudence discussed above, it is my finding that the invitation to this court to rectify the arbitration clause is legally infirm. The clause clearly demonstrates the party’s intention.

127. I now turn to the prayer for interim measures of protection. One of the permitted interventions under the Arbitration Act therefore, is the High Court’s power to grant interim measures of protection before or during the arbitral proceedings under section **7** of the Act. Interim measures of protection are interim reliefs which are granted before the final award, for the purpose of ensuring that once the final award is rendered, the relief on the disputed matter would still be available.[62]Essentially, these reliefs protect the ability of a party to obtain a final award. Without them, final arbitral awards will be rendered nugatory as they minimize loss, damage, or prejudice during the arbitral process.[63] A party may apply to the High Court for Interim measures of protection and in doing so, will not lose their right to arbitrate as it will not be incompatible with the arbitration agreement. Alternatively, if the parties agree, a party may apply to the arbitral tribunal for interim measure of protection.

128. Section **7** of the Act is silent on types of interim measures, the conditions for granting these measures and the scope of measures that can be granted leaving courts with a wide discretion in determining the tests for allowing applications under the said provision. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*[64] the Court of Appeal laid down the tests to be followed. The court distinguished interim measures from injunctions and went further to state that the factors that the court must take into account before issuing the interim measures of protection are: - (a) the existence of an arbitration agreement, (b) whether the subject matter of arbitration is under threat, (c) what is the appropriate measure of protection after an assessment of the merits of the application? (d) For what period must the measure be given as to avoid encroaching on the tribunal’s decision-making power as intended by the parties? It is important to mention that the Court of Appeal faulted the High Court’s application of Civil Procedure requirements for the grant of injunctions in a matter filed under section **7** of the Act.

129. The High Court in *Futureway Limited v National Oil Corporation of Kenya*[65] appreciated the above cited the principles and added another test in the following words: -

*“…I have no quarrel with the principles stated in Safaricom Ltd case. The prerequisites are sound. I would perhaps add that the grant of an interim order of protection is indeed discretionary and thus the court ought to take into account the factor of urgency with which the applicant has moved to court. The court should also, in my view, look into the risk of substantial (not necessarily irreparable) harm or prejudice in the absence of protection.”*

130. Decided cases are in agreement that the applicable tests as laid down in the above cases are settled. However, in *Safari Plaza Limited v Total Kenya Limited*[66] the court citing *Seven Twenty investments Limited v Sandhoe investments Kenya Limited*[67] was satisfied that in deciding whether to grant interim measure of protection all that a court would be interested in is whether or not there was a valid arbitration agreement. As was appreciated in *Futureway Limited v National Oil Corporation of Kenya,*[68] the court in granting interim measures exercises judicial discretion. This exercise of discretion is meant to further the cause of justice, and to prevent the abuse of the court process.[69] In doing so, the court is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the *status quo* and or the subject matter of the intended arbitration and at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator.[70]

131. An applicant needs to do more and show that he stands to be prejudiced beyond redemption as the entire subject matter of the arbitration would be put to way beyond restitution or reparation. Once this is shown, the court would then assess the merits of the application to determine whether in the circumstances it would be appropriate to order a measure of protection. However, such a determination of the

merits should not encroach on the substantive decision-making power of the arbitrators by venturing into the merits of the dispute. Comparatively, the *Model Law* has created its own conditions which are enumerated under Article **17 A**, which state as follows: -

> *a. The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:*
>
> *i. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
>
> *ii. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*

132. In *CMC Holdings Ltd & Another v Jaguar Land Rover Exports Limited*[71] the court declined to issue interim orders since the contract, which was the subject matter of the dispute, could not be wasted. In *China Young Tai Engineering Co Ltd v L G Mwacharo T/A Mwacharo & Associates & another*[72] the court stated the applicant must satisfy the court that the subject matter of the suit will not be in the same state at the time the arbitral proceedings are concluded unless an injunction is granted. In *Elizabeth Chebet Orchardson v China Sichuan Corporation for International Techno- Economic Corporation & Kenya Commercial Bank*[73] the court stated that in determining an application for interim measure, all that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same and that the injunction or interim measure of protection must be of urgent nature to preserve the subject matter of the dispute so that the proceedings before the arbitral tribunal are not rendered nugatory. The court imputed another criterion that the purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. Put differently, the court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.

133. The interim protection order contemplated under section **7** is granted by the court to protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award passed by Arbitral Tribunal is capable of enforcement. Though the power given to the court under section **7** is very wide such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such adjudication and in executing the Award.

134. Applying the above principles to the facts of the present case, I find that there is no justification for granting the interim reliefs of the nature sought. This becomes evident once we weigh the applicable tests discussed above and the reasons offered by the applicant. As was held *in Portlink Limited v Kenya Railways Corporation*[74] and *Ongata Works Limited v Tatu City Limited*[75] interim measures are granted when the subject-matter of Arbitration is under threat. The applicant has not demonstrated that the subject matter is under threat.

135. The applicant prays for an anti-arbitration injunction. It is basic law that the effectiveness of arbitration proceedings requires that there be minimal interference by the courts in the proceedings. Ideally, civil courts should not intervene in disputes agreed to be resolved via arbitration, except under the limited circumstances permitted by the Arbitration Act. However, for a plethora of reasons, this does not occur. Anti-arbitration injunctions are one such reason. Anti-arbitration injunctions are court orders that specifically prohibit parties from beginning or continuing arbitration proceedings, thereby restoring them to a position wherein the suit is not infructuous. It is important to recall that *Kompetenz-kompetenz*, a key principle of international arbitration, allows arbitral tribunals to determine their own jurisdiction and is most often cited to substantiate the argument against granting anti-arbitration injunctions.

136. The reasons in favour and against granting anti-arbitration injunctions are two-fold. *Firstly*, there is historical evidence of these injunctions being used as a tool for disrupting foreign arbitral proceedings. Courts should be alert and pronounce themselves strongly against being misused to disrupt arbitration. *Secondly*, there also exists circumstances wherein the grant of such injunctions is innately justified. Earlier in this determination I referred to the Supreme Court decision in the *Nyutu case* which permitted judicial intervention in exceptional circumstances. Anti-arbitration injunctions should only be permitted in exceptional circumstances. What is necessary, thus, is evolving a stringent methodology and tests for granting such orders bearing in mind that each case depends on its unique facts and set of circumstances.

137. One of the convincing reasons for condoning anti-arbitration injunctions is the requirement to prevent vexatious or oppressive proceedings. A vexatious litigation is one that is initiated without a good cause. The definition of vexatious litigation in Australian jurisprudence is particularly on point, where they are described as unjustified oppressive proceedings which do not serve any legal purpose. It includes proceedings that are doomed to fail or that amount to an abuse of the process of law. In order to uphold the foundations of arbitration, a proceeding which *prima facie* appears to be oppressive or vexatious should be estopped at the very first instance so that it precludes risk of dragging parties through a process that yields no real results. There was no suggestion that the arbitration would be vexatious or oppressive.

138. English courts have often justified interference in arbitral proceedings based on the fact that continuation of such proceedings would cause gross injustice to one of the parties to the dispute. For instance, in *Excalibur Ventures LLC v. Tex. Keystone Inc*, the court issued an injunction to restrain the arbitral proceedings on the ground that there was strong evidence suggesting that the Gulf companies were not parties to the arbitration agreement and so, forcing them to participate in the arbitration would be unfair and unconscionable. This position has been reiterated in other cases as well, where the court has attempted to balance non-intervention in arbitral processes with preventing abuse of legal processes. There was no suggestion that if the arbitration proceeds, it will occasion the applicant gross injustice.

139. Another circumstance which must be considered is that of parallel proceedings. It is well-settled that such procedures are highly undesirable as they lead to significant waste of resources and run the risk of providing contradictory opinions on the same subject matter. Extrapolating the above to the idea of arbitration, it is obvious that where parallel proceedings occur, the parties to the dispute face prolonged resolution processes as well as inconsistency in decisions, both of which directly contradict the very foundations of the concept of arbitration efficiency and finality. This ground is not present in this case.

140. However, there exists a need to provide an objective test which the court may rely upon when an anti-arbitration injunction is sought. In the formulation of this test, it is necessary to consider the following: - (a) Whether the arbitration proceeding is domestic or has a foreign seat. (b) Whether from the *prima facie* reading of the arbitration agreement, such agreement exists between the parties. (c) Whether the plaintiff has prayed for or claimed certain considerations that would bar or limit the ability of the arbitration tribunal to assess the same. (d) Whether such prayer or considerations put before the court are frivolous and merely for the reason of bypassing arbitration proceedings. (e) Whether there exist circumstances by which it can be reasonably ascertained that if the arbitration proceedings would continue/be instituted, these would amount to vexatious and oppressive proceedings.

141. The above list is not exhaustive but it is illustrative. Each case is to be considered by its peculiar facts and circumstances. It must be shown that the subject matter is under real imminent threat of being put into waste, or that the proceedings are vexatious, oppressive or will cause gross injustice. The grounds/arguments before me only disclose the Plaintiffs grievances which should be tabled before the arbitrator. The prayer for interim measures of protection and or anti-arbitration injunction collapses.

142. I now turn to the prayer for attachment before judgment. The grounds in support of this prayer are that the defendant has refused to pay the contractors on site, that it has no known assets in Kenya, that the intended arbitration will be moot if the defendant winds up its operations and also the defendant's foreign manager may flee the country. It is also contended that the defendant has refused to negotiate settlement and it has threatened to commence arbitration in Singapore and also to en-cash the performance bonds.

143. Granting an order for security for security is an exception rather than the rule. In *Farrell v. Bank of Ireland*[76] 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."*

144. In exercising its discretion to order security for costs, a court will consider the circumstances of each case and in particular whether it is fair and equitable, to both the parties, to require the furnishing of security.[77] When considering the circumstances of each case the court will take into account the financial status of the litigant and whether an order for security for costs may effectively preclude a party from proceeding with his case.[78] The courts will also guard against placing unreasonable barriers in the way of either litigant to the extent that justice may be denied.[79] The court must bear in mind the following :-

> *a. Article **159** of the Constitution vests judicial authority in the judiciary and prescribes the manner in which it should be exercised.*
>
> *b. The Constitution vests the courts with the inherent power to regulate their own proceedings and such discretion should be exercised in order to give effect to fairness and the interests of justice.*
>
> *c. Courts should not adopt a position that forms part of our law, if it would infringe on the Constitution or constitutionally guaranteed rights.*
>
> *d. Section **7 (1**) of the Sixth Schedule to the Constitution provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.*
>
> *e. Courts are required to balance the interests of a plaintiff who is prevented from pursuing a litigant by virtue of an order for security for costs against the injustice that will befall a defendant who is unable to recover costs.*
>
> *f. When developing the common law, courts must promote the spirit, purport and objects of the Bill of Rights in terms of Article **259** of the Constitution.*
>
> *g. Article **50(1)** of the Constitution provides that "every person has the right to have any dispute resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body."*

145. The onus lies on the party seeking security for costs to go beyond merely showing that the other party is unable meet an adverse decree/ costs order. The applicant must satisfy the court that the action or defence is vexatious, reckless or otherwise amounts to an abuse. An action will be vexatious if it is obviously unsustainable. It is not enough to allege that a party is a foreigner or a party or a company is a risk to court's jurisdiction simply because it is a foreign. A person so alleging must demonstrate that the person or company either is planning to cease operating in the country or has no known assets or abode within the jurisdiction. A litigant, whether local or foreign is entitled to the constitutional and procedural safeguards which guarantee a fair trial. It was alleged that the defendant is insolvent. A court decree to that effect could have added weight to the allegation. In absence of a court decree the said allegation remains a mere allegation.

146. The courts' discretion must be exercised in a manner which is not discriminatory. In this context at least, I consider that all persons (whether local or foreign) are equal before the law. It would be both discriminatory and unjustifiable to exercise the courts discretion in a manner that may hinder a citizen or a foreigner from accessing justice just because he is alleged to be poor or a foreigner. Poverty, unemployment or being foreign should not be the sole ground to unleash such a drastic order which has the potential of impinging on a litigant's constitutional rights. The discretion should be exercised in a manner reflecting its rationale, not so as to put a litigant at a disadvantage compared with the defendant.

147. In this connection, I do not consider that one can start with any inflexible assumption that any person who is poor, unemployed or a

foreign company should provide security for costs. Merely because a person is alleged to be unemployed or poor or foreign does not necessarily mean that enforcement will be more difficult in the event the person loses the case. The onus lies on the person alleging to persuade the court that it would be impossible to recover the debt. The Plaintiff has failed to discharge the burden placed upon it by the law to demonstrate that the defendant may not be able to pay any sum or costs payable to the Plaintiff should it lose the case nor did the Plaintiff establish a basis to support their apprehension that the defendant may exit the jurisdiction of this court. The party requesting should furnish evidence to support its claim that the opponent is financially unstable so as to justify its claim that it will experience difficulties in recovering costs should it be successful in the suit. No evidence was tendered to show that the defendant is relocating or disposing its assets.

148. 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. 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 was cited or demonstrated.

149. In so far as impecuniosity may have a continuing relevance it is not the only ground showing that the defendant lacks apparent means to satisfy any decree/cost but on the ground that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement against such assets as do exist or (ii) as a practical matter, to make it more likely that the defendant would take advantage of any available opportunity to avoid or hinder such enforcement. There can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a Plaintiff or wherever his, her or its assets may be. If the discretion is to be exercised in favour of the applicant, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).

150. I now turn to the prayer for documents. *First,* this plea can be made before the arbitrator. I do not think it qualifies as an interim measure of protection. *Second*, before the arbitrator, the parties will exchange documents. I decline the invitation to venture into a dispute potentially falling within the mandate of the arbitrator.

151. Similarly, the prayer directing the interested party to withhold payment is unsustainable. The interested Party is not a party to the arbitration agreement. The applicant likened the Interested Party to a Garnishee. This is appealing. However, Garnishee proceeding are instituted at the execution stage. That is, there must be a decree in favour of the decree holder. The decree must be unsatisfied. Even then, once an order *nisi* is issued, the Garnishee is afforded an opportunity to dispute or confirm the debt. Attaching a debt alleged to be in the hands of a third party prior to obtaining a decree is alien to law. The applicant's attempt to attach funds alleged to be in the hands of a third party using the instant application is legally frail and unsustainable. Since there is a pending application filed by the Interested Party, I say no more.

152. The prayer urging this court to have this suit determined on priority basis is to me unwarranted. Parties can appear before a judge or Registrar for directions as soon as pleadings and pre-trial processes are finalized.

153. Flowing from the analysis and determination of the various issues discussed above, the conclusion becomes irresistible that the applicant's application dated **15th** April 2021 is fit for dismissal. Accordingly, I dismiss the said application with costs to the defendant and the Interested Party. For avoidance of doubt, the interim orders granted on **28th** April 2021 in terms of prayers **(2)** & **(3)** of the application are hereby vacated.

## SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 4TH DAY OF AUGUST 2021.

## JOHN M. MATIVO

## JUDGE

## DELIVERED ELECTRONICALLY VIA E-MAIL AND UPLOADED INTO THE E-FILING SYSTEM

## JOHN M. MATIVO,

## JUDGE

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[1] {2019} EWCA Civ 1219 (12 July 2019).

[2] {1985} e KLR.

[3] (2020 SCC 16)

[4] {2016} e KLR.

[5] {2020} e KLR.

[6] {2017} e KLR.

[7] 2020 SCC 16.

[8] {1985} e KLR.

[9] {2014} e KLR.

[10] LLR No 1176 (CCK).

[11] {2011} EWHC 657 (TCC).

[12] Lloyd’s Maritime and Commercial Law Quarterly, 2000 August.

[13] {2017} e KLR.

[14] {2012} e KLR.

[15] {2014} e KLR.

[16] {2009} EWHC 2130 QB at paragraph 36.

[17] {2011} e KLR

[18] Civil Appeal No, 51 of 2000.

[19] {2010} e KLR.

[20] Civil Appeal No. 171 of 2014.

[21] {1998} e KLR.

[22] {2018} e KLR.

[23] {1988} 2 KAR.

[24] {2016} e KLR.

[25] {1978} QB.

[26] HCCC No. 45 of 2008.

[27] {1978} All ER 976.

[28] {2018} e KLR.

[29] {2013} e KLR.

[30] {2017} e KLR.

[31] {2013} e KLR.

[32] {2013} e KLR.

[33] {2020} e KLR.

[34] {2019} e KLR.

[35] {2017} e KLR.

[36] {2018} EWCA Civ 1532.

[37] Act No. 4 of 1995.

[38]Act No. 26 of 2013.

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

[40] {2019} e KLR.

[41] 2019 SCC OnLine SC 1585.

[42] Haun v. King, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (quoting In re Friedman, 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978)); see also Aquascene, Inc. v. Noritsu Am. Corp., 831 F. Supp. 602 (M.D. Tenn. 1993)

[43] **2020 SCC 16**

[44] Arnold v. Britton [2015] UKSC 36.

[45] 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.

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

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

[48] See Persimmon Homes v. Ove Arup [2017] EWCA Civ 373.

[49] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010).

[50] {2009} EWHC 957.

[51] [2007] UKHL 40; [2007] Bus LR.

[52] {2009} e KLR.

[53] {2004} ZASCA 72; 2005 (3) SA 323 (SCA) (York Timbers) at para 29.

[54] 1974 (3) SA 506 (A) (McAlpine) at 532G-533A, where Corbett JA

[55] {2010} ZASCA 75; 2010 (4) SA 468 (SCA).

[56] Bantekas, Ilias. An introduction to international arbitration. New York. p. 109. ISBN 9781316275696. OCLC 917009113; Croft, Clyde Elliott; Kee, Christopher; Waincymer, Jeff (2013). A guide to the UNCITRAL arbitration rules. Cambridge: Cambridge University Press. p. 249. ISBN 9781107336209. OCLC 842929920.

[57] {2018} NSWSC 825.

[58] {1993} HKCFI 14.

[59] {2019} QSC 173.

[60] {2016} SGHC 238.

[61] {2007}UKHL 4

[62] Moses M, *The Principles and Practice of International Commercial Arbitration*, (Cambridge University Press, 2010).

[63] Gary B. Born, *International Commercial Arbitration: Commentary and Materials* (2$^{nd}$ edition, 2001) 920.

[64] {2010} e KLR**,** para 14.

[65] {2017} e KLR, para 35.

[66] {2018} e KLR

[67] {2013} e KLR.

[68] {2017} e KLR

[69] See Scope Telematics International Sales Limited v Stoic Company Limited & another {2017} e KLR.

[70] See for example *Dimension Data Solutions Limited v Kenyatta International Convention* Centre {2016}e KLR, para 11.

[71] {2013} e KLR.

[72] {2015} e KLR, para 10.

[73] {2013} e KLR.

[74] {2015} e KLR

[75] {2018} e KLR

[76] {2012} IESC 42, at para. 4.17.

[77] See *Magida v Minister of Police* 1987 (1) SA 1 (A) and *Blastrite (Pty) Ltd v Genpaco Ltd*; *In re: Genpaco Ltd v Blastrite (Pty) Ltd* (4530/15) [2015] ZAWCHC).

[78] See Vanda v Mbuqe & Mbuqe; Nomoyi v Mbuqe 1993 (4) SA 93 (TK)).

[79] See Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and Two Other Cases 2009 (5) SA 602 (C)).