REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 18 OF 2019

YES HOUSING CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

KENNETH ONSARE MAINA.....DEFENDANT

RULING

1. The Plaintiff herein instituted this suit against the Defendant for a sum of Kshs 26,500,000/=, interests at the prevailing commercial rate of 14% per annum with effect from 29th September, 2016, general damages for breach of contract and costs of the suit.

2. The cause of action according to the Plaintiff arose from an agreement dated 29th September, 2016 by which the Defendant sold to the Plaintiff land parcel number Donyo Sabuk/Komarock Block 1/65002 for the sum of Kshs 40,164,000/=. Upon the execution of the said agreement the Plaintiff paid to the Defendant a sum of Kshs 8,500,000/= receipt of which the Defendant acknowledged. It was agreed that the balance being Kshs 31,664,000/= would be paid in two instalments the first instalment being in the sum of Kshs 16,000,000/= within 45 days of the date of the execution of the said agreement and Kshs 15,664,000/= upon the successful completion of the registration of the said parcel in the Plaintiff's name which completion date was agreed would be within 120 days.

3. It was a term of the said agreement that if the Plaintiff defaulted in completing the transaction, it would forfeit 10% of the purchase price and the Defendant would be at liberty to re-sell the said property. However, in the event of the default being on the part of the Defendant the Plaintiff would be entitled to rescind the contract and the Defendant would forthwith refund the deposits together with interests and the Plaintiff would also be at liberty to pursue other remedies.

4. It was pleaded that the Defendant warranted in the said agreement that his title was clean and free from any threatened litigation or encumbrances since the Plaintiff was purchasing the same for the purposes of establishing a controlled development and selling the same to its members after conducting due diligence which revealed that the Defendant owned the said property.

5. Pursuant to the said agreement, the Plaintiff paid to the Defendant Kshs 8,500,000/=, Kshs 16,000,000/= and Kshs 2,000,000/= on 5th October, 2016, 25th November, 2-016 and 13th February, 2017 respectively and proceeded to take possession of the suit property based on the terms of the agreement and undertook subdivision of the same as well as value addition such as drilling of a borehole, installation of electricity and improvement of roads.

6. It was pleaded some of the Plaintiff's members committed to the said project by paying deposits for the plots in the property.

7. However, in 2017, the Plaintiff learnt that the Defendant had been joined in Machakos High Court Succession Cause No. 54 of 2010 in which the Defendant was accused of having acquired the said property fraudulently and in a ruling delivered on 18th July, 2018 the court found that the Defendant had indeed obtained title documents to the said property fraudulently and the Defendant's title thereto was cancelled, an action that rendered the said agreement null and void ab initio.

8. The Plaintiff therefore averred that pursuant to the terms of the said agreement the Plaintiff was entitled to a refund of a sum of Kshs 26,5000,000/= being the deposit towards the purchase of the said property together with interest at 14% per annum till payment in full. According to the Plaintiff as a result of the said fraud the sale was rendered a nullity on the part of the Defendant.

9. Together with the appearance, the Defendant filed a Notice of Motion dated 17th June, 2019 in which he sought orders that pending the hearing and determination of the Application, there be a stay all further proceedings and that the proceedings herein be referred to Arbitration.

10. According to the Defendant, the dispute before this Court arises from a Sale Agreement made on the 29th September, 2016 under which

clause 19 there are provisions for dispute resolution mechanisms dictating that disputes arising from the Agreement shall be referred to Arbitration. According to the Defendant the Plaintiff/Respondent is well aware of the existence and contents of the above clause. It was therefore the Defendant's position that having so agreed to resolve all disputes by way of Arbitration in accordance therewith, it is improper for the Plaintiff/Respondent to have instituted these proceedings in complete disregard of the said provisions since the said clause referred to in the preceding paragraphs, is capable of being performed.

11. The Defendant averred that he is ready and willing to have the dispute heard and determined by way of Arbitration as envisaged by the contract and has indicated this to the Plaintiff before. It was his position that the parties are contractually bound to refer any disputes between them, including this one, to Arbitration and that the Court is enjoined to hold parties to the contractual terms agreed upon.

12. While being aware of a ruling dated 18th July, 2018 referred to by the Plaintiff, wherein the subject matter is the same suit property, the Defendant contended that he has since lodged an appeal against the same to the Court of Appeal. Vide supplementary affidavit filed on 23rd October, 2019 the applicant in rejoinder annexed a notice of appeal against the decision in Machakos High Court Succession Case 54 of 2010. To him, this Court has an obligation to promote alternative forms of dispute resolution pursuant to Article 159(2)(c) of the Constitution of Kenya.

13. In its response to the application, the Plaintiff averred that there is no dispute as envisioned in clause 19 of the Sale Agreement as the only issue between the parties is a claim for recovery of the monies advanced to the Defendant on account of the said transaction which did not go through. In the Plaintiff's opinion, the mere existence of an arbitration clause does not warrant express ticket to arbitration up to and until the applicant shows that there is indeed an existence of a dispute that is worth referring to arbitration which has not been shown by the Defendant. The Plaintiff's position was that since the said Sale Agreement was rendered null and void through fraudulent actions of the Defendant, the clauses thereof are incapable of performance.

14. It was therefore the Plaintiff's position that the application is an abuse of the process of the court and a waste of precious judicial time.

15. In his submissions the Defendant contended that according to the aforesaid clause where a dispute arises pursuant to the Sale Agreement, the same should be referred to arbitration and had there been no dispute the suit would not have been filed. According to the Defendant, there is a serious dispute on whether the sale agreement was performed hence an arbitral tribunal ought to be constituted to determine the matter.

16. In support of the submissions the Defendant cited section 6 of the ***Arbitration Act*** as well as the cases of **Niazons (K) Ltd vs. China Road & Bridge [2001] KLR 12** and **Diocese of Marsabit Registered Trustees vs. Technotrade Pavillion Ltd [2014] eKLR**. As for the costs the Defendant elide on section 27 of the ***Civil Procedure Act*** as well as **Republic vs. Rosemary Wairimu Munene, Ex-Parte Applicant vs. Ihururu Dairy Farmers Co-operative Society Ltd and Orix (K) Ltd vs. Paul Kabeu & 2 Others**.

17. For the Plaintiff, it was submitted that from section 6 afore-cited, it is clear that a court may only decline to refer a matter to arbitration after satisfying itself that firstly, the arbitration agreement is null and void, inoperative or incapable of being performed and secondly that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

18. As regards the question whether there is in fact any dispute between parties with regard to matters agreed to be referred to arbitration, the Plaintiff relied on the Court of Appeal decision in the case of **UAP Provincial Insurance Company Ltd versus Michael John Beckett, CA No. 26 of 2007,** where the said Court relied on the English case of **Halki Shipping Corpn vs. Sopex Oils Ltd.**

19. In this case it was submitted that there is no dispute between the parties capable of being referred to an arbitrator. The Plaintiff's claim is a simple matter for the recovery of monies paid pursuant to the agreement for the sale of land herein. The Defendant under paragraph 10 of the Supporting Affidavit acknowledges that title to the suit property is contested and thus he does not and did not have good title to the suit property at the time of contracting. Further, that the Defendant does not deny that monies were paid by the Plaintiff in pursuant to the Agreement for sale. Since the Plaintiff breached a fundamental term of the contract, the contract therefore becomes void ab initio and the clauses therein cannot thus be relied on. The Plaintiff therefore submitted that it is entitled to its monies paid towards purchasing the suit property which transaction did not go through by the omissions and commissions of the Defendant herein. In this regard, it relied on the Court of Appeal decision in **UAP Provincial Insurance Company Ltd versus Michael John Beckett, CA No. 26 of 2007** in which the Court cited with approval the **English case of Ellis Mechanical Services Ltd v Wates Construction Ltd (Note) [1978]** and the case of **Reliable Electrical Engineers Ltd & Another vs. Kenya Petroleum Refinery Ltd [2015] eKLR.**

20. While appreciating the role of alternative dispute resolution in our legal system, it was submitted that the same should not be used by litigants as a delaying tactic where there is an undisputed claim. Indeed, no evidence has been tendered before this court as to the existence of an appeal against the decision of this Court in High Court Succession Cause 54 of 2010 as alleged by the Defendant at all.

21. It was therefore submitted that the instant suit should neither be stayed nor referred to arbitration since there is no dispute capable of being referred to arbitration.

22. As to whether the arbitration agreement herein is null and void, inoperative or incapable of being performed, it was submitted that pursuant to a court decision in **Machakos High Court Succession Cause No. 54 of 2010; In the Matter of the Estate of Kakua Kioko (Deceased)**, it was determined that the Defendant had acquired the title to the land fraudulently. The Plaintiff relied on the 9th Edition of ***Black's Law Dictionary*** as quoted in **Joseph Kamau Kiguoya vs. Rose Wambui Muthike [2016] eKLR** that a contract is void *ab initio* if it seriously offends the law or public policy. In the instant case, the Defendant was found to have acquired title over of the suit property fraudulently. According to the Plaintiff, the doctrine of *Ex turpi causa non oritur action* demands that "no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the Court ought not to assist him" See the case of **Joseph Kamau Kiguoya vs. Rose Wambui Muthike [2016] eKLR.**

23. It was therefore submitted that in the immediate suit, the Agreement dated 29th September, 2016 underscores an illegality, fraud. It is void *ab initio*. The Defendant cannot therefore rely on the contract and more particularly, the arbitration clause for any benefit whatsoever. Therefore, the arbitration agreement sought to be relied on by the Defendant/Applicant herein is thus null and void, inoperative or incapable of being performed.

24. It was the Plaintiff's case that it has proved that the arbitration agreement referred to by the Defendant/Applicant is null and void, inoperative or incapable of being performed. Further that the Plaintiff/ Respondent has also proven before this Honourable Court that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. The Court was urged to find that the Defendant's Application dated 17th June 2019 has no merit, is an abuse of the court process and as such should fall on all its fours and prayed that the Defendant's Application dated 17th June 2019 be dismissed with the costs to the Plaintiff/ Respondent.

Determination

25. Section 6 of ***Arbitration Act*** states as follows:

> ***6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-***
>
> > ***(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or***
> >
> > ***(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.***
>
> ***(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.***
>
> ***(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.***

26. In this case, the clause relied upon by the parties states as follows:

> ***Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation.***
>
> ***Should such negotiations fail to achieve a resolution within Fifteen (15) days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration.***

27. It is clear that any dispute arising between the parties to the said agreement with regard to its interpretation, rights, obligations and/or implementation of any one or more of the provisions thereof was referable to arbitration.

28. The law as I understand it is that when an application under section 6(1) of the ***Arbitration Act, 1995*** is made by a party to an arbitration agreement, it is incumbent upon the court to which such an application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement and if it does, then it is for the opposing party to show cause why effect should not be given to the agreement. I gather support from the case of **Westmont Power Kenya Limited vs. Kenya Oil Company Ltd Civil Appeal No. 154 of 2003 [2011] eKLR.**

29. The plaintiff's contention is that since there is a decision of this court to the effect that the Defendant's title to the suit property was obtained by fraud, there is no longer any dispute capable of being referred to the arbitration since in its view, the matter falls under section 6(1)(a) of the Act as that renders the arbitration agreement null and void, inoperative or incapable of being performed.

30. However, in the case of **Kenya Pipeline Company Limited vs. Datalogix Limited and Another Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193**, **Warsame, J** (as he then was) expressed himself as follows:

> **"The fact that the applicant's case is tainted with fraud does not preclude the matter from being referred to arbitration in terms of the agreement made between the parties. An arbitrator does not lose jurisdiction to handle a matter by the mere allegation of fraud in the pleadings. The arbitrator would be entitled to hear the evidence and determine whether fraud has been established. It would be against public policy to enforce a contract including an arbitration clause, where fraud was established. However, it would defeat the purpose of the legislature if the mere allegation of fraud, no matter how mischievous, was enough to oust the arbitrator's jurisdiction…Section 6(1) of the Arbitration Act gives the court discretion to order stay of proceedings where no sufficient reasons are shown why such order should not be made. It is a pre-requisite factor that before the court can exercise its discretion to make an order for arbitration, the applicant must satisfy the court that it is and was at all times willing to do everything necessary for the proper determination of the dispute. In the court's view, in exercising its discretion the court should take into account the circumstances of the particular case and a mere semblance of a convenience of a particular party is not a credible factor to sway the discretion of the court. The onus of proving that the matter in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for reference to arbitration. And once that burden has been discharged, then the burden shifts to the opposing party to show cause why effect should not be given to the arbitration clause…My understanding of section 6(1) of the Arbitration Act is that stay is not automatic but the court has to satisfy itself that circumstances exist to require parties to arbitration. It is clear**

from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration…Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter."

31. In **Shamji vs. Treasury Registrar Ministry of Finance [2002] 1 EA 173** it was held inter alia that as a matter of general principle, it has been stated that where a dispute between the parties themselves in terms of the agreement to be referred to the decision of the tribunal of their choice, the court would direct that the parties should go before the specified tribunal and should not resort to courts and that "any dispute" should not be read as excluding disputes involving fraud or misrepresentation since it is not the function of the court to rewrite and insert provisions to which parties could have agreed to deal with in a situation which might arise. Likewise, in **Telkom Kenya Limited & Another vs. Kamconsult Limited Nairobi (Milimani) HCCC NOS. 262 & 267 of 2001 [2001] KLR 683; [2001] 2 EA 574** it was held that fraud is something which can only be found after on the evidence after a hearing and an arbitrator cannot be expected to down his tools on the basis of mere allegations in the pleadings and the submissions of counsel, however robust.

32. According to the Plaintiff, there is no dispute between the parties capable of being referred to an arbitrator. The Plaintiff's claim is a simple matter for the recovery of monies paid pursuant to the agreement for the sale of land herein. The Defendant under paragraph 10 of the Supporting Affidavit acknowledges that title to the suit property is contested and thus he does not and did not have good title to the suit property at the time of contracting. Further, that the Defendant does not deny that monies were paid by the Plaintiff in pursuant to the Agreement for sale. Since the Plaintiff breached a fundamental term of the contract, the contract therefore becomes void ab initio and the clauses therein cannot thus be relied on.

33. In other words, it was contended that since the existence of the agreement of 26th January 2011 is not disputed and there is a finding that the title in issue was fraudulently obtained, there is no dispute to be referred to arbitration. In **Zahra S Mohamed & Another vs. Insurance Co. of East Africa Ltd Nairobi (Milimani) HCCC NO. 521 of 2008 (OS), Kimaru, J** held that:

"In the instant case, that there is an arbitration clause in the policy of insurance is not in dispute. Clause 11 of the Policy of Insurance provides that any dispute between the parties to the policy shall be referred for determination by arbitration. The clause envisages that the parties to the policy agreement would agree on a single arbitrator. In the event the parties are unable to agree on a single arbitrator, each party would appoint one arbitrator who would in turn appoint an umpire… According to the applicants, a dispute has arisen between the applicants and the respondents and the dispute was occasioned by the respondent's decision to refuse to pay the costs of repair of the motor vehicle but instead to pay an amount in cash that was not equivalent to the cost of the repair of the motor vehicle. It also apparent that the applicants seek to be paid for the loss which they allege is consequential to the respondent's refusal to repair the said insured motor vehicle in time. On the other hand, the respondent was of the view that it acted in accordance with the terms of the policy of insurance when it offered to pay the applicants cash in lieu of repairing the motor vehicle in light of the assessor's report which was to the effect that the spare parts of the motor vehicle were unavailable in the local market. The respondent is of the view that there is no discernible dispute capable of being referred to arbitration in view of its offer to pay cash to the applicants…It is evident that the respondent's refusal to participate in the appointment of an arbitrator was influenced by its belief that there exists no dispute between itself and the applicants. In its attempt to prove that no such dispute exists, the respondent delved into the evidence that ideally is the province of the arbitrator to determine. The court in determining the application before it cannot enter the arena of considering the merits of the evidence unless such evidence supports the assertion by one of the parties that there exists no clause in the agreement that forms the basis of the relationship between the two disputing parties that provides for resolution of any dispute between them by arbitration. The issue as to whether the applicants have a valid claim in accordance with the terms of the policy of insurance can only be determined by the person who will be appointed as an arbitrator…It appears that the respondent is confusing the validity of the applicants' claim with the question whether there exists a dispute between itself and the applicants that is capable of being referred for determination by arbitration. It is trite that where parties have put in place a mechanism for resolving any dispute that may arise in the course of their business relationship, and which mechanism ousts the jurisdiction of the courts in the first instance, the court has no alternative or option but to give effect to the wishes of such parties. In the present application, it was clear that, notwithstanding the expenses that will be involved in the arbitration that the parties herein agreed to have any dispute that may arise during the period that the policy was in substance be referred for determination by arbitration…Under section 12(4) of the Arbitration Act, 1995, where under procedure agreed by the parties for the appointment of an arbitrator or arbitrators one of the parties failed to act as required under such procedure, the aggrieved party may apply to the High Court to take the necessary measure for securing compliance with the procedure agreed upon by the parties. Therefore, I hold that the applicants have established a case for the court's intervention in compelling the respondent to participate in the appointment of an arbitrator or arbitrators as provided under clause 11 of the Policy of Insurance. The applicants and the respondent are hereby directed to agree, within fourteen (14) days on a single arbitrator to arbitrate on the declared dispute between them and in default thereof, in accordance with the said clause, the applicants and the respondent shall each appoint one arbitrator who in turn shall appoint and umpire to arbitrate over the dispute. Such appointment shall be made within fourteen (14) days after the expiry of the first fourteen (14) days."

34. In **Hercules Insurance Co. Ltd vs. Trivedi & Co. Limited Civil Appeal No. 12 of 1962 [1962] EA 358**, the East African Court of Appeal stated that:

"There is no inherent objection to parties agreeing to submit to arbitration the question whether or not an alleged contract between them is effective. Nor are the appellants helped by the rule that, generally speaking a dispute whether the contract ever existed, as contrasted with the question whether it has been ended, is not within the usual form of submission of

differences arising out of the contract or the like, because if there was never a contract at all, there could never be disputes arising out of it. Ex nihilo nil fit. It is all a question of the scope of the submission. Hence, if the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because it was induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction. The existence of the arbitrator's jurisdiction, as in other cases, is to be determined by the words of the submission. There is no objection to a submission of the question whether there ever was a contract at all, or whether if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question. But in general the submission is limited to questions arising on or under or out of a contract which would, prima facie, include questions whether it has been ended, and if so, whether damages are recoverable, and if recoverable what is the amount. It is essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends on the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises whether they have done so or not, or whether the alleged contract is binding on them, there is no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise whether there had been such fraud, misrepresentation or concealment in the negotiations between them as to make an apparent contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but there is no reason why it should not be done. The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute and (b) what disputes the arbitration clause covers."

35. Similarly, in the case of **Kenya Pipeline Company Limited vs. Datalogix Limited and Another Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193**, **Warsame, J** (as he then was) held:

"It is clear from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration…Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter."

36. Before concluding this issue Article 159(2)(c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

37. It follows that this Court is not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution. In my view it would amount to an abdication of its judicial duty if the court were to shirk that duty and decline to refer a matter to arbitration simply because a party believes that the applicant's case is unmerited and is bound to fail. Whether or not the case is unmerited is for the arbitrator to determine. In this case, it was an express term of the said agreement that if the Vendor fails to comply with the obligations under the Agreement, the Purchaser shall without prejudice to its rights and remedies rescind the said Agreement and the Vendor shall forthwith refund the Deposit to the Purchaser with interest. In this case it is clear that the Vendor has failed, as a result, of the decision in Machakos Succession Cause No. 54 of 2010, to fulfil his obligations under the Sale Agreement. It is that failure or inability on the part of the Defendant that gave rise to the dispute and provoked this suit.

38. Under section 12(4) of the ***Arbitration Act***, where parties fail to reach an agreement as provided for in the arbitration clause mandating that the dispute be referred to arbitration, the High Court is given jurisdiction, upon application by any party, to give effect to the agreement referring the dispute to arbitration. In the present application I hold that the defendant is entitled to have the dispute with the plaintiff determined by arbitration pursuant to the said clause 15 of the Agreement and I therefore direct that all further proceedings in this case are hereby stayed and the dispute herein is hereby referred to Arbitration. The parties do agree on a single arbitrator to determine the dispute between themselves within thirty (30) days or where they fail the arbitrator be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators Kenya Chapter upon the application of either party. The dispute shall be determined by arbitration within sixty (60) days from the date of appointment of the said arbitrator.

39. As the Defendant did not furnish the submissions in soft copy as directed by this Court, there will be no order as to costs.

40. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 28th day of April, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Josephine