



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION- MILIMANI**

**MISC CIVIL APPLICATION NO 304 OF 2018**

**IN THE MATTER OF ARBITRATION ACT, 1995**

**NICOLA FARMS LIMITED.....APPLICANT**

**VS**

**SUMMER MEADOWS LIMITED.....RESPONDENT**

**RULING**

**BACKGROUND OF THE APPLICATION**

The Applicant approached the court through a notice of motion dated 12<sup>th</sup> June 2018 for the orders;

- a. The court stays the arbitral proceedings pending the hearing and determination of the application**
- b. The court to set aside the ruling of Hon. Mr Calvin Nyaboti, Arbitrator dated 21<sup>st</sup> May 2018 striking the Applicant's claim on interest on the balance of the purchase price on the amount of Ksh 247,000,000/- due to the Claimant from the Respondent.**

The application was based on the following grounds;

- a. The Arbitral Tribunal denied the Applicant an opportunity to plead its case as per Article 50 of the Constitution, 2010**
- b. The Ruling of the Arbitral Tribunal is contrary to morality and repugnant to justice since it denies the Applicant the opportunity to access justice under Article 48 of the Constitution, 2010**
- c. The Arbitral Tribunal acted unfairly in finding that the Applicant went beyond the leave granted which had no limit nor was there a specified mode of replying the counterclaim failing to consider the issues presented by the Applicant on jurisdiction, among others.**
- d. The Arbitrator acted against the rule of natural justice by awarding a prayer which was not sought by the Respondent and denying the Applicant the opportunity to reply to the prayer.**
- e. The Arbitrator allowed the Respondent's advocates to plead from the bar and make factual averments not on oath or by way of cross examination hence contravening Article 50(1) of the Constitution**
- f. The Arbitrator acted without jurisdiction in allowing an email correspondence application hence making an error in law.**
- g. The Arbitrator decided on an issue of misrepresentation which was never pleaded hence denying the Applicant an opportunity to respond.**
- h. The Arbitrator changed the dispute as defined in the email of 30<sup>th</sup> November 2017 and the response of 13<sup>th</sup> December 2017 by viewing the dispute as one of striking out a pleading yet it was a dispute for revoking leave which violated the**

**Applicants right to be heard. Pleadings define disputes and in this case there was never an issue on interest.**

**i. The decision of the Arbitrator violated Article 47 of the Constitution and sections 7(2),(a)(v)(k)(i)(n)of Fair Administrative Action Act**

**j. The dispute is for a colossal amount of money and should therefore be decided on its merits taking into account all parties' pleadings.**

The Application was supported by an affidavit of **Mr. John Wahinya Karuga**, a director of the Applicant.

He stated that the Applicant entered into a Sale agreement with the Respondent for land, LR No. Nginda Samar **Block 2/287** situated in Muranga County upon which the Respondent breached by defaulting in payment of the full purchase price. After the Applicant issued the necessary notices, it then wrote to the **Chartered Institute of Arbitrators** which led to the appointment of **Mr. Calvin Nyachoti** as sole Arbitrator. Since the parties were in agreement to the appointment of the said Arbitrator, the Arbitrator went ahead and held the first meeting and issued necessary directions as order for direction no. 1, issued on 13<sup>th</sup> July 2017.

The Arbitrator directed that the pleadings shall close on 25<sup>th</sup> August, 2017 after which the party may only serve or amend its pleadings with the leave of the Arbitrator. The Applicant filed a statement of claim dated 25<sup>th</sup> July 2017 while the Respondent filed statement of defence and counter claim dated 14<sup>th</sup> August 2017 upon which the Applicant responded to via a response to defence and counterclaim dated 30<sup>th</sup> August 2017.

Upon the oral application for leave to reply to the counterclaim on 27<sup>th</sup> November 2017, the Respondent's Counsel indicated she had no instructions on the application as she was merely holding brief. The Arbitrator then allowed leave to file a further response to the statement of defence and counterclaim.

On 30<sup>th</sup> November, 2017 the Respondent sent an email to the Arbitrator requesting leave granted be set aside; the grant of leave to file further affidavit because the Applicant had responded to all the matters.

On 4<sup>th</sup> December 2017, the Applicant filed a further response to the statement of defense and counterclaim in compliance with the leave granted by the Arbitrator via item 4(a) and (b) of orders directions no.5 dated 29<sup>th</sup> November 2017. The Arbitrator gave the Respondent 7 days upon service of the further Response to the Statement of the Defense and counter claim where there was a plea for specific performance.

The Applicant stated that their response was within the law and based on the further response the Applicant, through its advocates, instructed them to enter into negotiation with the Respondent for a consent on the issue of specific performance and interest. The Applicant decided to abandon the 2 prayers in the statement of claim and concentrate on the issue of interest where both parties agreed to file submissions on the same.

On 1<sup>st</sup> March 2018, parties appeared for highlighting of the submissions regarding the issue of interest where the Respondent also requested the Arbitrator to decide on the email application first. The Arbitrator advised the parties to file submissions on the same application.

In a ruling dated 21<sup>st</sup> May 2018 the Arbitrator refused to revoke the leave granted and stated that, the issue of interest was a new matter that leave had not been sought for and therefore should be struck out.

The Applicant believed that the Arbitrator made errors with regard to;

- a. The interest was considered in isolation of the whole paragraph
- b. The Respondents' email application did not have an issue with the interest, but with grant of leave, which it claimed was not proper since the issue on specific performance was responded to
- c. The Arbitral Tribunal chose to strike out only a part of the sentence in the document and left the rest intact.
- d. The Arbitrators decision contravened the consent entered by the parties' which formed conditional concession.
- e. The Arbitrator made a finding on the issue that had not been pleaded nor made an issue for determination by the parties.
- f. The Arbitrator denied the parties an opportunity to plead the case fully based on how the dispute was perceived.
- g. The Arbitrator acted against Applicant's constitutional rights.

The Applicant stated that it felt that it could not get justice without having an opportunity to plead on the issue of interest which had been denied by the Arbitrator. The Applicant also stated that the before the Arbitrator exercised the powers of striking our pleadings he ought to have given parties an opportunity to submit on the same.

The Applicant stated that it had suffered a lot of loss due to the Respondents default including; subdivision expenses, court decree's due to the default on its financial obligations to third parties hence the court should allow the pleadings on record.

## **RESPONDENT 'S GROUNDS OF OPPOSITION**

The Respondents filed grounds of opposition dated 13<sup>th</sup> July 2018 stating that;

1. The High Court is limited by **Section 10 of the Arbitration Act,1995** on matters of arbitration hence it lacks jurisdiction
2. The Applicant failed to disclose any grounds for setting aside the Arbitrators ruling dated 21<sup>st</sup> May 2018 as provided under **Section 35 of the Arbitration Act.**
3. The Applicant did not demonstrate how the Arbitrator acted in a manner inconsistent with the Constitution, Laws of Kenya and justice and morality
4. The Applicant was guilty of misrepresentation of facts as the Applicant failed to disclose that;
  - a. It was given an opportunity to be heard by the Arbitrator and to respond to pleadings
  - b. The Arbitrator's decision was arrived at as a direct consequence of misrepresentation made by the Applicant
  - c. The Applicant did not address the issue of misrepresentation yet it had an opportunity to do so before the Arbitrator's tribunal
5. The Applicants claim that the Arbitrator acted without jurisdiction in allowing an email correspondence was misguided.
6. The Applicant is guilty of laches and unreasonable delay having waited for a month before filing the application.

## **RESPONDENT'S REPLYING AFFIDAVIT**

In response to the application herein, the Respondent's Replying Affidavit dated 21<sup>st</sup> May 2018 stated that leave to file the Further Response was granted based on misrepresentation by the Applicant, which was a finding of fact that the court cannot interfere with.

The Respondent further pointed out that the ruling by the Arbitrator was delivered on 21<sup>st</sup> May 2018 but the Applicant approached the court on 22<sup>nd</sup> June 2018, a month later, without reasons as to the delay.

## **RESPONDENTS SUBMISSIONS**

In submissions dated 4<sup>th</sup> September 2018, the Respondents addressed the issues with regard to the application as follows;

### **1. What are the grounds for setting aside an arbitral award**

The Respondent relied on **Section 35 of the Arbitration Act** which gives stringent conditions under which an arbitral award can be set aside. In address the Applicants issue on public policy, the Respondents referred to the case of **Kenya Shell Ltd vs Kobil Petroleum Ltd [2006] eKLR**, where the court held that;

**“Public policy, which is a favour we may consider in the exercise of our discretion , is of course an indeterminate principle or doctrine. In years of yore, it was branded “an unruly horse, and when you get astride it, you never know where it will carry you”- Richardson vs Mellish [1824] 2 Bing 229. Nevertheless, it clearly has reference to ideas which for the time being prevail in a country as to the conditions necessary to ensure its welfare. It is variable and must fluctuate with the circumstances of time.**

Ringera J (as he then was) examined several authorities in **Christ For All Nationals vs Apollo Insurance Co. Ltd [2002] 2 EA 366** and formed the view that:-

**“although public policy is a most broad concept incapable of precise definition .....an award could be set aside under section 35(2)(b)(ii)of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was;**

- a. Inconsistent with the constitution or other laws if Kenya , whether written or unwritten or
- b. Inimical to the national interest of Kenya or
- c. Contrary to justice and morality ”

### **2. Whether the Applicant herein had laid out proper grounds for setting aside the arbitral award**

The Respondent submitted that the Applicant was never denied a chance to be heard as this could be evidenced by an email correspondence

dated 13<sup>th</sup> December 2017. The Applicant had also filed its submissions before the Arbitrator delivered the ruling. The Respondent relied on the case of Automobile Association of Kenya vs James Jaguga[2005]eKLR, where the court stated that;

**“in the case of Odd Jobs vs Mubias [1970] EA 476 the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision . That decision was followed by the Court of Appeal in the case of Vyas Industries vs Diocese of Meru [1982] KLR 114 in which the Court of Appeal cited with approval the decision in the case of Odd Jobs vs Mubias [1970] EA 476 in the following terms – “ The circumstance in which an unpleaded issue can become an issue in a suit is a question which was considered in Odd Jobs vs Mubias [1970]EA 476 in which the court held that a) a court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue had been left to the court for decision , b)on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.”**

In response to the Applicant’s claim that the Arbitrator granted a prayer that had not been sought, the Respondent stated that the grant of those prayers would lead to the automatic expungement of the claimant’s further response to the Respondents’ statement of defence and counterclaim.

The Respondent’s submission was therefore that the Arbitrator had indeed considered the issue at hand and chose to exercise its discretion in striking out references on the issue of interest as the application was premised under **Rule 18 (1) (d) of the Arbitration rules**. The Arbitrator was therefore well within his rights to disallow the new claim and also within the ambit of the law in striking out the new claim on interest.

The Respondents relied on the case of Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR to illustrate that the civil procedure rules do not apply to Arbitration. In the above case the Court of Appeal held that;

**“a careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states;**

**“Except as provided in this Act no court shall intervene in matters governed by this Act.”**

The Respondent also responded to the Applicants claim that the Arbitrator had acted contrary to the law by accepting an email application which was a mode not recognized by the law, by relying on **Rule 18 and 20 of the Arbitration Rules**. The Respondent further submitted on the same issue that there were no rules or laws stating what form an application should take.

The Respondent also submitted on the issue of misrepresentation by the Arbitrator by stating that, the issue was a matter of fact that the arbitrator arrived at after looking at the evidence before it and the court could not intervene.

### **3. Whether the court has power to stay arbitral proceedings pending determination of an application to set aside an arbitral award.**

The Respondents submitted that since the prayer was not granted, the prayer had been overtaken by events and was therefore spent.

## **APPLICANTS SUBMISSIONS**

In the Applicants submissions dated 2<sup>nd</sup> August 2018, the Applicants submitted their issues as follows;

### **1. The dispute is properly before the High Court**

The Applicant relied on **Section 35 (1)(2) of the Arbitration Act** as much as the case of Kenya Shell Ltd vs Kobil Petroleum Ltd [2006] eKLR (Supra), did not define what public policy was.

The Applicant also submitted that the arbitrators decision lead to a miscarriage of justice since the Applicant was not heard on the issue of interest.

### **2. The dispute raises a constitutional issue**

The Applicants submitted that the right to be heard was infringed and that the power of the court to address violation of the constitution could only be limited by the constitution. The Applicant relied on the case of EPCO Builders Ltd vs Adam S Marjan Arbitrator & another 248 [2005], quoted by the approval of Shree Haree Builders Limited v Bazara Alex Tabulo & another [2016] eKLR, the Court of Appeal held;

**“This does not mean that recourse to a constitutional court during arbitration will ever be appropriate.”**

### **3. The Applicant was denied an opportunity to be heard**

The Applicant relied on the case of Soh Beng Tee & Co Pte Ltd vs Fairmount Development Pte Ltd vs [2007]3 SLR 86 which quoted the

summary of *J Mustill & Stewart C Boyd, The Law and Practice of Commercial Arbitration In England*, pg 312; where the court held that;

**“If the arbitrator decides the case on a point which he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the base which they have to answer. Similarly if he receives evidence outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him.”**

The Applicant held that the arbitrator ought to have requested parties to address him on the new issue of interest as part of his role as the Applicant relied on the principle of natural justice and Articles 10 and 50 of the Constitution.

The Applicant also submitted that parties should not be restricted to the mode in which they wish to respond to a claim and relied on the case of **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & another [2016]eKLR** where the court held that;

**“the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General [1986-1989] EA 456*). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:**

**“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”**

**The Arbitrator erroneously found that there was a misrepresentation yet the issue was never pleaded hence making the proceedings unfair.**

The Applicant submitted that it was trite law that misrepresentation must be pleaded but the Arbitrator decided on an issue which was not particularized and without factual basis hence denying the Applicant an opportunity to rebut the allegation hence making the proceedings procedurally unfair, violating Article 50 of the Constitution.

#### **APPLICANT’S REJOINDER SUBMISSIONS**

The Applicant responded to new issues raised by the Respondents in submissions dated 12<sup>th</sup> September 2018.

The Applicant addressed the issues as follows;

##### **1. The Court should exclude new issues raised in the submissions**

On this issue, the Applicant submitted that the Respondent’s background was misleading and that several factual issues which the Respondent had raised in the body of submissions but were not raised in the Replying affidavit and that it is trite law that issues cannot be raised in submissions and therefore the court should regard that issue. The Applicant relied on the case of **Clips Ltd vs Brands Imports (Africa) Ltd formerly named Brand Imports Ltd [2015]eKLR** where the court held that; “However, it is trite law that new issues cannot be raised in submissions. *Korir, J in the case of Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting And Training Limited & another [2014] eKLR* held that:

**“The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”**

##### **2. Rejoinder to the Respondents submissions, the Application is both a Constitutional Reference and Public Policy Reference under section 35(2)(b)(ii)**

The Applicant submitted that the application was not exclusively subject to **Section 35(2)(b)(ii)** but also brought under **Article 10,48,50(1) and 165 of the Constitution 2010**.

##### **3. The Tribunal granted prayers not sought**

The Applicants submitted that the prayer sought by the Respondent to revoke leave and the granted prayer by the Tribunal to strike out the claims on interest were different.

##### **4. The Arbitrator breached the law**

The Applicant stated that the Arbitrator made fundamental errors of law on allowing an unpleaded claim for misrepresentation and allowing an email application containing evidence from the Bar. The Applicant relied on the case of **PT Prima International Development v Kempinski Hotels SA and other appeals [2012] SGCA 35** where the court held that;

**“It is therefore incorrect for [Prima] to argue that jurisdiction in a particular reference was not limited to the pleadings or that there was no rule of pleading that requires all material facts to be stated and specifically pleaded as would be required in court litigation. An arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a court and before a tribunal. I was therefore surprised that [Prima] argued that it was not required to plead material facts because this dispute was being adjudicated by an arbitrator.”**

## **DETERMINATION**

After taking into account pleadings and submissions presented by parties in this matter, the Court is called upon to determine whether the Arbitrator’s Ruling of 21<sup>st</sup> May 2018 ought to /shall be set aside.

The Applicant’s basis for applying to set aside the said Ruling is on 3 fronts;

- a. That the Applicant was denied right to fair hearing (**Art 50 COK 2010**) **access to justice (Art 48 COK2010) & Fair Administrative Action (Art. 47COK2010) & Section 7 of Fair Administrative Action Act** when the Arbitrator struck off the issue of interest from the pleading filed with leave.
- b. The leave granted was not specific as to the mode of response; the Applicant replied to the issue raised of specific performance by conditional concession of interest and therefore it was not a new issue.
- c. The Arbitrator should not have considered Respondent’s email of 30<sup>th</sup> November 2017 as it was not a proper pleading/application filed with the Arbitrator.
- d. The email did not raise issue with inclusion of **interest** but grant of leave without being heard as Counsel present was only holding brief. So the Arbitrator dealt with matters not brought for determination.
- e. Misrepresentation** was not pleaded, yet the Arbitrator raised and delved into the said issue making it the basis of the impugned Ruling to strike off part of the pleading that related to interest.

### **1. Whether the Arbitrator should have granted leave to Applicant to file further reference to Defence and Counterclaim**

This Court relies on the following provisions of the Arbitration Act 1995;

#### **Section 10, 19& 20 24 & 32 of the Act.**

**“... Except as provided in this Act, no court shall intervene in matters governed by this Act.”**

The Claimant filed statement of claim on 25<sup>th</sup> July 2017, Respondent filed Statement of Defense & Counterclaim on 14<sup>th</sup> August 2017 and the Applicant filed Response to Defense and Counterclaim on 30<sup>th</sup> August 2017.

On 29<sup>th</sup> November 2017, the Claimant sought leave to file a Reply to Defence & Counterclaim specifically the prayer on specific performance.

Counsel holding brief for Counsel for Respondent informed the Tribunal her instructions were limited. The Arbitrator granted leave to the Applicant to file Reply to Defence & Counterclaim and the Respondent was granted 7 days to reply thereafter.

Thereafter, the Respondent vide email sent to the Arbitrator on 30<sup>th</sup> November 2017 challenged grant of leave.

The Claimant filed Further Response to Respondent’s Statement of Defence & Counterclaim on 4<sup>th</sup> December 2017.

The Arbitration proceedings are based on parties choice of forum and choice of law agreements with regard to dispute resolution. The Arbitration Act provides flexibility in procedure; parties are free to agree on procedure on conduct of proceedings. Where there is no agreement the Arbitral Tribunal shall determine the same.

In the instant case, the parties agreed on procedure on 11<sup>th</sup> July 2017 as shown by **paragraph 5 of Order for Directions** annexed to the application. Pleadings were to close on 28<sup>th</sup> August 2017.

While pleadings closed on 30<sup>th</sup> August 2018 when the Reply to Respondent’s Statement of Defence and Counterclaim, was filed the proceedings were shelved as Claimant sought leave to file further Response to Respondent’s Defence & Counterclaim. The Respondent’s Counsel was limited in instructions hence as provided by **Section 20 (2) Arbitration Act** the Arbitrator granted leave to file Further Response to answer to Defence & Counterclaim specifically with regard to specific performance.

### **2. Was the Arbitrator right in finding misrepresentation of facts by Applicant?**

It is the content of the Reply that the Arbitrator considered and found to be at variance from what was sought as the basis for filing further response.

This Court finds that the Claimant/Applicant expressly sought leave to file further response and answer to the claim for specific performance. A look at the Defence & Counterclaim **paragraphs 33-38** the Respondent deponed that the Claimant prematurely terminated the sale contract and in line with the Agreement for Sale would be entitled to specific performance.

Claimant's Response to Respondent's Statement of Defense and Counterclaim **paragraph 5 (j)** the Claimant responded with regard to specific performance as follows;

**“The Respondent’s prayer for specific performance is an unequitable prayer since no efforts have been shown by the Respondent that it is liable to pay off the balance of the purchase price. The Respondent’s prayer for specific performance and based on allegation that the Agreement is still valid, which is denied, should have made unequivocal offer on the balance of the purchase price with interest, additional expenses as a result of delay and costs and having failed to do so, cannot be heard to claim specific performance.”**

This passage confirms that contrary to the Claimant's application for leave to file further reply to the defense and counterclaim and specifically reply to the issue of specific performance was/is misrepresentation. The issue of specific performance was already addressed, as shown by the above paragraph in the reply to Defence and Counterclaim filed on 30<sup>th</sup> August 2017. The Claimant sought to have another bite at the cherry as there was a reply to the Defence and Counterclaim and it addressed specifically on specific performance as confirmed by the above caption. If the Claimant sought to amend the filed Reply to Defence and Counterclaim, then on application before Arbitration Tribunal, the leave to amend would have been granted as prescribed by **Section 24 of Arbitration Act 1995**.

Secondly, when the Arbitrator granted leave to file Further Reply to Respondent's Defense and Counterclaim it was to specifically reply to the counterclaim on specific performance. In Granting leave, the Arbitral Tribunal could/cannot speculate and/or anticipate the content of the said Reply until and unless presented /filed in the Tribunal. Then the Tribunal would assess the content if it is in line with the request made as the basis for leave. It is misplaced to blame the Tribunal on the content of the Reply filed merely because leave was granted, as **Section 20 of the Arbitration Act** allows the Arbitrator to decide on procedure where parties do not agree.

### **3. Did the Arbitrator rightfully/legally expunge the issue of interest from the Further Reply to Defence and Counterclaim filed on 4<sup>th</sup> December 2018?**

The Claimant amplified its reply on specific performance in Claimant's Further Response to the Respondent's statement of Defence and Counterclaim in **paragraphs 2-7**. The Claimant went further to craft the terms and conditions of specific performance wherein **'interest of 14%p.a. from the date of default upto 31<sup>st</sup> December 2017'** was included.

The Claimant sought leave to reply to specific performance claim which was already addressed in the Reply to Defence & Counterclaim filed on 30<sup>th</sup> August 2017. The Claimant replied again on the same claim and introduced a new issue of interest capped at **14%** as one of conditions precedent to specific performance.

The issue of interest was not specifically pleaded in the statement of Claim filed on 25<sup>th</sup> July 2015. The Specific Performance claim as per the agreement of sale **Clause 14.3** does not contain interest. Therefore, including the question of interest for the first time in the pleadings save for cursory mention in **paragraph 5(j)** of the Response to Defence and Counterclaim filed on 30<sup>th</sup> August 2018 put the Respondent in a disadvantaged position. The Respondent did not have opportunity to revisit the Defence and Counterclaim now that interest was introduced as a claim for the 1<sup>st</sup> time in the Further Reply to the Defence & Counterclaim. The Arbitral Tribunal granted the Respondent the 7 days after the Claimant filed Reply File Further Response to Defence and Counterclaim, assuming that it was on matters already pleaded and not new issue(s) raised for the 1<sup>st</sup> time. The Applicant did not disclose to the Tribunal that there was reply to the claim for specific performance and they were taking opportunity to further dwell on the same issue and in the process introduced the new issue of interest and went further to fix the rate of interest.

These factors disclose the fact that the Respondent was/would be prejudiced by raising the issue of interest for the 1<sup>st</sup> time as it was not pleaded. They also had a second chance to reply on the same issue of specific performance unlike the Respondent to also file further affidavit(s). At the proceedings the Respondent's Advocate was present and did not submit on the issue of granting leave to the Applicant, as she had no instructions and the Applicant was granted leave. All these factors confirmed that the parties did not enjoy equal treatment if new issues were raised; as envisaged by **Section 19 of Arbitration Act** which provides;

**“The parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present his case.”**

From the totality of these facts and applicable law, this Court finds and upholds that the removal of **'interest of 14%p.a. from the date of default upto 31<sup>st</sup> December 2017'** even if there was/is no application to strike out. The striking out of interest at 14% p.a imposed without hearing and determination was legal and justified so as to restore parties to the Arbitration proceedings to a position where they enjoy equal treatment as provided by **Section 19 of the Arbitration Act**.

### **4. Whether Applicant's constitutional right(s) were/are violated?**

The Applicant's claim that it was denied **right to fair hearing (Art 50 COK 2010) access to justice (Art 48 COK2010) & Fair Administrative Action (Art. 47COK2010) & Section 7 of Fair Administrative Action Act** (which relates to judicial review) when the

Arbitrator struck off the issue of interest is not borne out by the Arbitration Tribunal's pleadings and Directions 1-5 and the impugned Ruling of 21<sup>st</sup> May 2018. All these documents confirm each party's attendance and participation and exercise of the Tribunal's mandate under the Arbitration Act 1995.

The fact that the Applicant is aggrieved by the Ruling of 21<sup>st</sup> May 2018 is not legal basis under the above Articles of the **Constitution 2010** because, the Applicant could/may apply and invoke **Section 24 of Arbitration Act 1995** to amend pleadings and include the issue of interest, submit before the Tribunal and the issue be determined as required by **Section 32C of Arbitration Act**. Conversely, if the leave to amend is granted the Respondent shall also have ample opportunity to canvass the issue and amend their pleadings accordingly.

**a. Should the Arbitrator have considered the Respondent's email first?**

With regard to the Arbitrator's consideration of Respondent's email of 30<sup>th</sup> November 2017, the Applicant contended it was not a proper pleading/application filed with the Arbitrator. This Court is of the view that Arbitration is a complimentary dispute resolution process to the Court system. It is meant to allow parties choice of an alternative dispute process that may expedite resolution of disputes mainly in technical and/or specialized areas of commerce. Therefore, the rules of procedure are not as stringent as the Court rules. That is why **Section 20 of Arbitration Act 1995** facilitates parties to the Arbitration process to choose and agree with the Arbitration Procedure and in default of agreement or consensus, the Tribunal determines the procedure.

The Applicant conceded in the Application specifically paragraph 9 of the Supporting Affidavit; during the hearing of the contested application, Counsel holding brief for Counsel for the Respondent indicated she had no instructions on the application by the Applicant for leave to file Reply to Defence and Counterclaim and reply on specific performance. Naturally, on reporting back to Counsel for the Respondent, Counsel communicated with and to the Arbitration Tribunal as was agreed in **Order for Directions1 paragraph 9 (b) & (c)** which reads;

**“Apart from sealed offers, any communications by a party to the Tribunal shall be by email, post or hand delivery and must be copied to the other party and indication given that such copy has been sent.**

**Neither party shall make phone calls directly to the Tribunal unless it is an emergency and in which case, then the same will be made through the office and not to the Arbitrator in person.”**

The Respondent communicated within the required and agreed parameters with and to the Tribunal on the issue of leave application via e-mail and hence the proceedings that culminated to the impugned Ruling. In the directions, by the Tribunal in the presence of parties this was the agreed mode of communicating with the Tribunal. Secondly, the Applicant did not raise/object to the hearing and determination of the email application on the basis that there was no formal application when the said matter was scheduled by the Arbitrator to be heard first.

Further, there was no prescribed and/or agreed procedure of filing an objection that the Respondent may now be held to have failed to comply with. With these reasons, the Arbitrator ought and did receive and act on the email appropriately.

The Applicant submitted that misrepresentation was not pleaded, yet the Arbitrator raised and delved into the said issue making it the basis of the impugned Ruling to strike off part of the pleading that related to interest. The Applicant also contended that the email did not raise issue with inclusion of interest but grant of leave without being heard as Counsel present was only holding brief. So, the Arbitrator dealt with matters not brought before the Tribunal/pleaded for determination. The Applicant's assertion is true, that the issue in question in the proceedings that culminated to the impugned Ruling hinged on Respondent's Objection to grant of leave to the Applicant to file Reply to Defence & Counterclaim for the 2<sup>nd</sup> time and that the Tribunal found that the Claimant misrepresented facts to the Tribunal.

The Arbitrator had this to say in Paragraph 43 of the Ruling on this issue;

**“Strictly speaking therefore, The Claimant sought leave to file a further response to address the specific averment of specific performance. In its further response, it did not limit itself to addressing the issue of specific performance but also introduced, for the 1<sup>st</sup> time, a claim of interest. To that extent, the Claimant is culpable of misrepresentation of facts before the Tribunal or conversely, in its further response, the Claimant addressed/introduced items beyond the remit of leave granted.”**

Pleadings are based on the circumstances that exist as at the time pleadings are prepared. Surely, the issue of misrepresentation and expungement of interest in pleadings arose upon evaluation of the facts at the time of hearing and determining the Respondent's Objection. The issue of expunging the issue of interest in the pleading and disclosure of misrepresentation of facts are findings by the Tribunal after evaluation and analysis of facts as presented during hearing of the Respondent's objection and application of the law. Therefore the question of misrepresentation and/or striking out could not be anticipated/contemplated before the hearing of the application. These arose after assessment of submissions before the Tribunal.

This Court considered at great length the issue of inclusion and expungement of interest above and reiterate the same view herein above. On the issue of misrepresentation of facts, the Court finds that Applicant's application for leave to reply on specific performance to the Tribunal was on the assumption that the Response to Defense and Counterclaim filed on 30<sup>th</sup> August 2017 did not address specific performance. On the contrary, The Applicant replied to specific performance at paragraph 5(j) yet on this presentation the Tribunal granted leave.

Secondly, upon filing the Claimant's Further Response to Respondent's Statement of Defense & Counterclaim filed on 4<sup>th</sup> December 2017, although the Applicant replied to the claim for specific performance in detail, there was/is inclusion of interest fixed at 14% which was intimated as basis for leave granted. It was raised for the 1<sup>st</sup> time in pleadings and hence put the Respondent in a disadvantaged position, unlike the Applicant the Respondent did not answer any pleading twice and more so a new issue was raised without leave. It is not sufficient

that the Respondent was granted 7 days to file a reply; the period was appropriate to answer to pleaded issue(s) and not a new fact/issue.

After pleadings closed, the Tribunal record confirms that parties to the Tribunal reached a Consent on 25<sup>th</sup> January 2018 which by the time the matter was canvassed was enforced. To set aside a consent different legal standards prevail and key among them a party to the consent ought to apply to have it set aside. The consent was arrived at taking into account pleadings already on record.

Finally, the Court finds that the impugned Ruling granted parties liberty to add/supplement their submissions on twin issues of interest and costs within 14 days thereof. Surely, no prejudice was occasioned to the Applicant by expungement of interest fixed at 14% in the Claimant's Further Response to Respondent's Statement of Defense & Counterclaim filed on 4<sup>th</sup> December 2017. It was to prevent prejudice against the Respondent by raising a new issue not envisaged in granting of leave by Tribunal. The Tribunal was/is ready and willing to hear and determine the issue of interest either as mentioned in **paragraph 5(j)** of Response to Defense and Counterclaim filed on 30<sup>th</sup> August 2017 or the further response filed on 4<sup>th</sup> December 2018. Better still, the Claimant may invoke **Section 24 of Arbitration Act** on amendment of pleadings. In fact; interest is an issue to be determined by the Arbitration Tribunal as provided by **Section 32C Arbitration Act 1995**, which provides;

**“Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award.”**

#### **DISPOSITION**

- 1. In consideration of the pleadings filed of the application filed on 22<sup>nd</sup> June 2018 to set aside the Ruling of 21<sup>st</sup> May 2018,**
- 2. From the reasons above, I find no basis to set aside the impugned Ruling of 21<sup>st</sup> May 2018 but to uphold it.**
- 3. The Application is dismissed with costs.**
- 4. The Arbitration proceedings shall proceed before the same forum and any applications be lodged therein.**

**DELIVERED SIGNED& DATED IN OPEN COURT ON 27<sup>TH</sup> JUNE 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**ADVOCATE FOR CLAIMANT**

**ADVOCATE FOR RESPONDENT**

**COURT ASSISTANT**