REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO.466 OF 2016

IN THE MATTER OF AN APPLICATION BY PARAGON LTD FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF ARBITRATION ACT NO. 4 OF 1995.

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015

BETWEEN

REPUBLIC ……..…….....……..……APPLICANT

VERSUS

ARCHITECTURAL ASSOCIATION OF KENYA .....…1ST RESPONDENT

STEVEN OUNDO……..…..…….....….…2ND RESPONDENT

SAGAR BUILDERS LTD…….....…3RD RESPONDENT

PATRICK KISIA T/A STEG CONSULTANTS….....….4TH RESPONDENT

EX PARTE:PARAGON LTD

JUDGEMENT

Introduction

1. By a Notice of Motion dated 12th October, 2016, the applicant herein, **Paragon Ltd**, seeks the following orders:

> **1. That an Order of Certiorari do issue to remove into this Court and quash the decision of the 1st Respondent to appoint an arbitrator as contained in its letter dated 18th May 2016 addressed to the 4th Respondent purporting to appoint the 2nd Respondent to act as an**

arbitrator in a dispute between the *Ex Parte* Applicant and the 3rd Respondent.

2. That an Order of Prohibition do issue to prohibit the 2nd Respondent from proceeding with the arbitration between the *Ex Parte* Applicant and the 3rd Respondent.

3.That the Court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.

4. That the costs of this application be provided for.

Applicant's Case

2. The application was supported by a verifying affidavit sworn by one **David Gatende** on 3rd October, 2016. However, apart from exhibiting copies of the documents relied upon the said affidavit was devoid of factual averments. This Court and the Court of Appeal has stated time without a number that such an affidavit is not the one contemplated under Order 53 of the ***Civil Procedure Rules***.

3. According to the facts contained in the Statement filed herein, the Applicant undertook a construction project on Land Reference 209/390/1 which involved the erection and completion of 22 no. 3 and 4 bedroom apartments in two blocks together with associated site works and contracted the 3rd Respondent herein, **Sagar Builders Limited** (hereinafter referred to as "the Contractor"), to construct the said apartments and the site works. Accordingly the applicant and the Contractor entered into a contract dated 12th September, 2005 for purposes of the aforesaid construction which construction was completed and a certificate of practical completion issued on 14th January, 2008.

4. It was averred that on 31st March, 2016 the 4th Respondent herein, **Patrick Kisia T/A Steg Consultants** (hereinafter referred to as "the Consultants") purporting to act on behalf of the Contractor wrote a letter claiming a sum of Kshs.23,120,099.98 allegedly on account of non-payment of the sum of Kshs.8,475,493.00 that was to be paid to the Contractor after completion of the works. The Applicant's Advocates on record wrote to the Consultants in response indicating that they were seeking instructions and would revert. Thereafter the applicant was shocked to receive a letter dated 25th May, 2016 from the 2nd Respondent herein **Steven Oundo** (hereinafter referred to as "the Arbitrator") indicating that the 1st Respondent herein, **Architectural Association of Kenya** (hereinafter referred to as "the Association") had vide its letter dated 18th May, 2016 proceeded to appoint the 2nd Respondent as the arbitrator to determine the dispute between the Applicant and the Contractor. The said letter dated 18th May, 2016 indicated that the Consultants had unilaterally written to the Association seeking for the appointment of an arbitrator. No input whatsoever was sought from the Applicant by the Association which did not bother to find out whether a dispute had indeed arisen between the Applicant and the Contractor before proceeding to appoint an arbitrator. Indeed, the Applicant never received the letter dated 18th May, 2016 from the Association.

5. It was averred that on 9th June, 2016 the Applicant's Advocates on record wrote to the Association raising concerns over how the purported dispute between it and the Contractor had been handled which letter was copied to the 2nd, 3rd and 4th Respondents. The Consultants then wrote a letter dated 13th June, 2016 to the Association urging the Association to ignore the Applicant's Advocates letter dated 13th June, 2016 and on 14th June, 2016 the Association wrote to the Applicant's Advocates and copied the 2nd, 3rd and 4th Respondents indicating that it was "functus officio" and directing the Applicant to address its communication to the Arbitrator. It was averred that the Applicant filed applications dated 28th June, 2016 with the Arbitrator contesting both his impartiality and jurisdiction on *inter alia* the grounds indicated in its letter dated 9th June, 2016 to which the Contractor through the Consultants filed a response. Thereafter parties filed submissions and a date for highlighting of the submissions was fixed for 26th July, 2016 but could not proceed on that day and was adjourned to 22nd August 2016. On 2nd August, 2016 the Consultants purported to produce a communication from the Association dated 25th

July, 2016 indicating that the President of the Association was the successor in title to the Chairman of the Architectural Association of Kenya. To the applicant, the contents of the said communication were shocking as was the attempt by the Consultants to introduce new evidence after parties had already filed submissions. One of the grounds of the applications dated 28th June, 2016 before the Arbitrator was that the appointment had been made by a stranger being the "President" of the 1st Respondent who was not mentioned in the agreement dated 12th September, 2005 between the Applicant and the Contractor. The communication dated 25th July, 2016 therefore sought to steal a match from the Applicant in a prejudicial, unfair and unprocedural manner.

6. It was averred that on 5th August, 2016, the Applicant's Advocates wrote to the Arbitrator voicing concerns over the said communication as well as the manner of introduction of new evidence by the Consultant and sought very precise information from the Consultant on how it had obtained the said communication and the Consultants responded vide its letter dated 8th August, 2016 giving very vague information. The Applicant's Advocates therefore wrote to the Arbitrator vide their letter dated 10th August, 2016 indicating that the information they sought from the Consultant had not been availed.

7. It was disclosed that on 22nd August, 2016, at a meeting in the offices of the Arbitrator, the Applicant sought for clear information on how the Consultants had contacted the Association and the former confirmed that it was vide a phone call to the President of the Association and that the Consultants followed up this confirmation with a letter dated 30th August, 2016 indicating that it had indeed contacted the President of the Association by telephone.

8. It was the applicant's case that with the confirmation that the Consultants were in direct *ex parte* communication with the Association on telephone, it is clear that the Association as an appointing authority was not fair towards the Applicant. According to the applicant, the Association failed to accord the Applicant fair administrative action and actually continued to improperly relate with one of the parties as the arbitration was pending and conspired to defeat the Applicant's applications before the Arbitrator. The applicant further contended that with the confirmation by the Consultants vide its letter dated 30th August, 2016 all the Applicant's doubts as to the impartiality of the Association and Arbitrators was confirmed. Further, the Association has shown outright bias in dealing with one of the parties (the 3rd and 4th Respondents) to the exclusion of the Applicant and since the Arbitrator is an appointee of the Association, and it is only reasonable to conclude that the Arbitrator is not expected to be fair when the appointing authority has shown outright bias.

9. It was further averred that the same President of the Association who refused to communicate with the Applicant vide his letter dated 14th June, 2016 was very comfortable communicating with the Consultants on telephone, a mode of communication of which no record of the conversation can be availed.

10. It was the applicant's case that the Association also acted on the Consultant's communication with exceptional speed as compared to the Applicant's. It was noted that the Consultant sought for the appointment of an arbitrator on 17th May, 2016 and by 18th May, 2016 the appointment had been done. Similarly when the Applicant's Advocates wrote to the Association on 9th June, 2016 the Association only responded to their letter on 14th June, 2016 after the Consultant had written on 13th June, 2016 urging the Association to ignore the Applicant.

11. In its submissions the applicant relied on Article 47 of the Constitution provides that:-

> ***(1). Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

12. The applicant further relied on section 2 of the ***Fair Administrative Action Act 2015*** which defines

administrative action to include:

> ***(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
>
> ***(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

13. To the applicant, section 3 of the ***Fair Administrative Action Act 2015*** is also instrumental as it provides that the Act applies to all state and non-state agencies, including any person

> ***(a) Exercising administrative authority***
>
> ***(b) Performing a judicial or quasi-judicial function under the constitution or any written law;***
>
> ***(c) Whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates***

14. The applicant also relied on section 4(3) of the ***Fair Administrative Actions Act*** which provides that:-

> ***"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> > ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
> >
> > ***(b) an opportunity to be heard and to make representations in that regard;***
> >
> > ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
> >
> > ***(d) a statement of reasons pursuant to section 6;***
> >
> > ***(e) notice of the right to legal representation, where applicable;***
> >
> > ***(f) notice of the right to cross-examine or where applicable; or***
> >
> > ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

15. Based on the foregoing it was submitted by the applicant that the actions of an arbitrator can specifically be subjected to review and reliance was placed on **Sylvana Mpabwanayo vs. Allen Waiyaki Gichuhi & Another [2016] eKLR** where the court rendered itself as follows:

> **"That an arbitrator is a non-state agency whose action, omission or decision affects the legal rights or interests of the parties before him to whom the arbitral proceedings relate cannot be doubted. It is therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the provisions of the Fair administrative Action Act, 2015 judicial review orders may where appropriate issue against the decisions of an arbitrator."**

16. It was the applicant's submission that section 10 of the ***Arbitration Act No. 4 of 1995*** is therefore contrary to article 47 of the Constitution and cannot be used to lock a party out of the altar of justice in judicial review proceedings since the Constitution of Kenya, 2010 is the supreme law of the Country and under article 2(4) of the aforesaid constitution, any law that is inconsistent with the Constitution is void.

17. It was further submitted that although judicial review orders should ***ordinarily*** not issue where other remedies exist, where the remedies are not convenient, or have been exhausted then judicial review orders

must issue and reliance was placed on **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where the Court held that an applicant for judicial review orders will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate as well as the Court of Appeal decision in **Republic vs. National Environmental Management Authority [2011] eKLR** that the existence of alternative remedies were not in themselves a bar to the issuing of judicial review orders. The Applicant only had to show that it has to be exempted from the alternative remedies.

18. In this case I was submitted that the alternative remedies available to the *ex parte* Applicant were to file an application under sections 13, 14 and 17 of the ***Arbitration Act*** and that this it did and was waiting for determination of the same from the 2nd Respondent. However, the 3rd and 4th Respondents got into communication with the 1st Respondent that clearly pointed to bias on the part of the 1st and 2nd Respondents. Further, it gave credence and justification to the *ex parte* Applicant's apprehension that the Respondents had all conspired to ensure it did not get justice in the arbitral proceedings. To the applicant, the communication between the 1st Respondent and the 3rd and 4th Respondents was illegal and in bad faith as the matter was already pending before the 2nd Respondent and was further made with the sole intention of derailing the *ex parte* Applicant's case before the 2nd Respondent The 1st Respondent knew of the *ex parte* Applicant's challenge to its appointment of the 2nd Respondent as an Arbitrator which had been communicated to the 1st Respondent. The 1st Respondent cannot therefore feign impartiality as it knew that the 4th Respondent was acting for one of the parties in the dispute and the clarification it sought was meant to steal a match from the *ex parte* Applicant. It was therefore submitted that the only alternative remedies open to the *ex parte* Applicant were firmly shut to the *ex parte* Applicant by the actions of the Respondents. It was therefore the *ex parte* Applicant's submission that any other remedy that may have been available to the ex parte Applicant apart from judicial review is not convenient or appropriate taking into account the actions of the Respondents herein and the whole circumstances of this case hence Judicial Review Orders sought by the *ex parte* Applicant can indeed be issued by this Honourable Court.

19. According to the applicant, the following acts of the Respondents amounted to a failure to accord the *ex parte* Applicant fair administrative action as enumerated below:-.

a) The 1st Respondent denied the *ex parte* Applicant an opportunity to be heard and to make representations as regards the appointment of an arbitrator. It is not in dispute that the 1st Respondent appointed the 2nd Respondent without giving notice to the Applicant that the 4th Respondent had sought for the appointment of an arbitrator. This was blatant disregard of section 4(3) (a) of the ***Fair Administrative action Act, 2015***. The ideal action would have been for the 1st Respondent to notify the *ex parte* Applicant that the 3rd and 4th Respondents had sought for the appointment of an arbitrator giving the *ex parte* Applicant a chance to raise any concerns it had before the 1st Respondent could appoint an arbitrator.

b) Moreover, the 1st Respondent did not even bother to satisfy itself as to whether there was a valid arbitration agreement between the parties and if the same had any pre conditions that had to be complied with prior to appointment of an arbitrator. Upon receipt of the 4th Respondent's letter dated 17/05/2016 it just went ahead to appoint the 2nd Respondent as the Arbitrator. This demonstrated the 1st Respondent's pre conceived mind about the whole dispute. If the 1st Respondent had bothered to fairly deal with the matter by giving the *ex parte* Applicant a chance to be heard, the *ex parte* Applicant would have demonstrated that no dispute had arisen in terms of the arbitration agreement between the parties as the pre conditions to be met before a dispute could be said to have arisen and before such dispute could be referred to arbitration had not been met.

c) The 1st Respondent failed to give the *ex parte* Applicant prior and adequate notice of the nature and reasons for the administrative action it took of appointing an Arbitrator. The 1st Respondent acted in blatant disregard of section 4(3) (b) of the ***Fair Administrative action Act, 2015*** and

further demonstrated bias against the *ex parte* Applicant when it failed to respond to the *ex parte* Applicant's concerns over the appointment of an arbitrator raised vide its Advocates letter dated 09/06/2016 only derisively indicating that it was *"functus officio"*. It did this in clear disregard of the fact that it had not accorded the ex parte Applicant a fair chance to be heard on the application for appointment of an arbitrator by the 3rd and 4th Respondents. However, the 1st Respondent shockingly had no qualms engaging in correspondence with the 3rd and 4th Respondents during the pendency of arbitration proceedings and at a crucial stage when the ex parte Applicant had filed challenges on the appointment of an arbitrator.

d) The 1st Respondent is clearly biased against the *ex parte* Applicant in favour of the 3rd and 4th Respondents. The 1st Respondent has been taking inordinately wrong to respond to the ex parte Applicant's letter while responding to the 3rd and 4th Respondents communication promptly. Further, it has clearly been giving the 3rd and 4th Respondents a chance to be heard on any issues pertaining to the matters on hand while denying the *ex parte* Applicant a similar chance.

e) The 1st Respondent has been in direct communication with the 3rd and 4th Respondents during the pendency of the arbitral proceedings. This was expressly admitted to by the 3rd and 4th Respondents vide their letter dated 30/08/2016. The 2nd Respondent is a member of the 1st Respondent and it is highly likely that it has been party to this communication that was not copied to the *ex parte* Applicant. This is therefore a case where the Respondents have conspired to deny the ex Parte Applicant fair administrative action.

f) The 1st Respondent had the weighty responsibility of appointing an arbitrator. It had an obligation, a duty to act fairly to all parties. As demonstrated, it breached this duty by its actions. It breached this duty to the detriment of the *ex parte* Applicant by failing to give it prior notice and reasons and an opportunity to be heard and to make representations.

g) The 1st Respondent descended into the arena of dispute and thus proved itself to be impartial. As such, the administrative acts it rendered whilst impartial cannot be allowed to stand. They should be subjected to judicial review orders as sought by the *ex parte* Applicant.

20. It was therefore submitted that the *ex parte* Applicant had shown that the judicial review orders it seeks can be issued as the Respondents have firmly shut and/or mounted huge roadblocks on its doors to alternative remedies. The Respondents actions are also contrary to the guarantee of fair administrative action as enshrined in the Constitution of Kenya, 2010 and the ***Fair Administrative Action Act, 2015***. As such the only remedy that will be fair, just and lawful is for this Honourable Court to grant the judicial review orders sought by the *ex parte* Applicant

1st Respondent's Case

21. The application was however opposed by the 1st Respondent Association which relied on the following grounds of opposition:

1. That the Notice of Motion application dated 12th October, 2016, and filed in court on 13th October, 2016 as drawn and taken out is misconceived, bad in law and is devoid of merit as against the 1st Respondent.

2. That that the Application grossly fails to meet the threshold for grant of Judicial review orders, is incurably defective and ought to be dismissed in that the applicant has merely cited the Judicial review orders in general terms but have not established any nexus between the 1st Respondents actions and the disputes in issue to warrant the grant of the Judicial review orders.

3. That the Applicants' are on a "fishing expedition" their assertions are farfetched and their Judicial Review Application fraught with unsubstantiated assertions and misplaced apprehensions.

4. That the appointment of an arbitrator was rightly done by the President as he is the successor in title to the Chairman as the 1st Respondents amended its act and a reference to the title which is changed shall be deemed to have been amended by substituting for that reference to the new title and that it is always desirable that the appointment is done within a reasonable time since great delay may otherwise be caused.

5. That the Arbitration Act at Section 17 provides that the Arbitrator has the Jurisdiction to deal with issues of his appointment including whether it was properly made and that any person dissatisfied by the decisions of the arbitrator can challenge the decision in the High Court.

6. That the Arbitration Act at Section 10, restricts ways in which the courts can intervene in issues of arbitration and that the courts are restricted in the manner of intervention in arbitration proceedings and control of arbitrators.

7. That intervention other than as provided for in the Arbitration Act would open a Pandora's Box in arbitration that would delay arbitration proceedings and defeat the letter and spirit of Article 159 of the Constitution.

8. That further the appointment of an arbitrator does not involve a hearing by the appointing authority as its role is limited to appointments and not to hearing of the dispute.

9. That the grant of the orders sought as framed would be against public interest and harmful to the efficient workings of Arbitral bodies, proceedings and/or law enforcement.

10. That the Applicants' Motion is otherwise an afterthought frivolous, vexatious and an abuse of the process of this Honourable Court.

22. It was submitted on behalf of the 1st Respondent that it is now settled law that an applicant for judicial review ought to exhaust available mechanisms for redress before approaching the Court. This is clear from a reading of section 9(2) of the ***Fair Administrative Actions Act, 2015*** provides that:

> ***The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

23. According to the 1st Respondent, the Ex parte Applicant's application for Judicial Review Orders of Prohibition and Certiorari emanates from contractual agreement between the Applicant and 3rd Respondent and the terms and conditions therein. The contract contained a Dispute Resolution Mechanism under clause 45 of the contract upon which legally bounding either party was at liberty to invoke the clause if any dispute arose in connection with the contract. The abovementioned clause clearly shows the intention of the parties that if any dispute arose under the contract, the dispute resolution mechanism should be by arbitration and in accordance with the ***Arbitration Act***.

24. It was submitted that the ***Arbitration Act*** in its entirety and more specifically Part IV provides for the conduct of arbitral proceedings that the parties to the Arbitration process adhere to. The 1st Respondent relied on section 10 of the ***Arbitration Act*** which limits court intervention and states as follows:

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

25. The 1st Respondent submitted that the ***Unictral Model law of International Commercial Arbitration***

1985 which many countries, including Kenya, used to formulate their respective arbitration statutes provides at article 5 that:

> ***In matters governed by this Law, no court shall intervene except where so provided in this Law.***

26. To the 1st Respondent, the ***Explanatory Notes on the UNCITRAL Model Law*** explain that this provision was designed to protect the arbitration process from delays that may be occasioned by reference to the court process and although not a binding on this Honourable Court, the reasoning of the Explanatory Notes is sound and this Court was urged to be persuaded by the same. Reliance was also laced on **Kenya Shell Limited versus Kobil Petroleum Limited [2006] eKLR**.

27. The said Respondent similarly relied on **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR.**

28. According to the 1st Respondent, sections 14 and 17 of the ***Arbitration Act*** provide for the procedure for challenging of an arbitrator and competence of the Arbitral tribunal to rule on its jurisdiction.

29. To the 1st Respondent, the ***Arbitration Act*** under sections 14 and 17 provides for adequate procedures and reliefs sought by any party applying for the same. It was submitted that the 2nd Respondent who was appointed arbitrator by the 1st Respondent has the powers and jurisdiction to hear applications concerning challenging of their jurisdiction, impartiality, unfairness, bias and procedural matters arising from any dispute before the 2nd Respondent for determination. Indeed the parties are already before the 2nd Respondent canvassing the application. Accordingly, it was contended that the Ex-parte Applicant has not exhausted the remedies available under the Contract and ***Arbitration Act*** and hence the Ex-parte Applicant's application an abuse of the court process and should be dismissed with costs to the 1st Respondent.

30. It was further submitted that the appointment of the Arbitrator by the 1st Respondent was in accordance with the provision of the Contact. The only function of the 1st Respondent was to appoint a competent Arbitrator upon whom jurisdiction is vested by the contract and the ***Arbitration Act*** to hear all matters in relation to the dispute. In this respect the 1st Respondent relied on the decision of the Malaysian Court of Appeal in **Sebiro Holdings Sdn Bhd vs. Bhag Singh & Another Civil Appeal no q-01-338-10/2013.**

31. In compliance with the provision of the contract in referring the matter to arbitration, the 1st Respondent acted as agreed by both parties and hence the 1st Respondent would have acted *ultra vires* in entertaining the applicants pleas in the letter dated 9th June 2016 after the appointment of an arbitrator was made.

32. It was therefore submitted that the *ex parte* applicant's application lacks merit and should be dismissed with costs to the 1st Respondent.

3rd and 4th Respondents' Case

33. On the part of the 3rd and the 4th Respondent the following grounds of opposition were filed:

> **1. The Applicant's Application for Judicial Review Orders of Prohibition and Certiorari emanates from a private law contractual relations between the Applicant and the 3rd Respondent. The foundation of the relationship is a Joint Building Council Contact; the Agreement and Conditions of Contract for Building Works dated the 12th of September 2005 (hereinafter referred to as "the Contract"). The contract was entered into freely with full knowledge and with intent to be legally bound by the parties on.**

2. The terms of the aforesaid Contract, as is customary of construction contracts generally, contained a Dispute Resolution mechanism. Clause 45 of the Contract provided for arbitration. Clause 45.1 states as follows:

"In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of The Architectural Association of Kenya, on the request of the applying party." **(Emphasis provided).**

3. It is therefore patently clear that the relationship of the parties, as far as dispute resolution mechanisms are concerned, were to be resolved, primarily, in accordance with the Arbitration Act Cap 49, of the Laws of Kenya.

4. The Applicant's Application for the Judicial Review Orders of Prohibition and Certiorari are brought under statutory provisions of the Fair Administrative Action Act, 2015 (hereinafter referred to as "the FAA ACT").

5. The Applicant reveals a dispute that should be solely determined under Arbitration.

6. The applicable Statute to this dispute; the Arbitration Act amply provides adequate procedure and the reliefs sought, namely under Section 14 of the Arbitration Act.

7. The Court lacks jurisdiction to hear the Application on the grounds that there exists statutory dispute resolution mechanism under the Arbitration Act to which the Applicant chose and to which the relevant Parties, being the Applicant and the 3rd Respondent, mutually subjected themselves of free will.

8. Section 9(2) of the FAA Act limits the jurisdiction of this court in reviewing an administrative action/decision, in explicit and mandatory language. The section requires applicants of judicial review to initially exhaust applicable and available internal mechanisms for appeal or review that may be provided under any applicable/ relevant other written law.

9. The applicable statute, governing the relations of the Parties, in this reference, is the Arbitration Act Cap 49, of Laws of Kenya (hereinafter referred to as "Arbitration Act"). The Court is required in mandatory terms to enquire whether any mechanisms for review, appeal and whether any reliefs/ remedies as sought in the present Application are available, and whether they have been exhausted.

10.Section 10 of the Arbitration Act provides the extent of court intervention in arbitration matters in Kenya, except as provided in this Act, no court shall intervene in matters governed by this Act.

11. Section 10 of the Arbitration Act read together with Section 9 of the FAA Act clearly stipulate the jurisdiction of courts in judicial review of arbitral proceedings.

12. For the aforementioned reasons the Application is not maintainable before this Court.

34. On behalf of the said Respondents it was submitted that the 4th Respondent is not a necessary Party to the Judicial Review proceedings herein since he is a representative of Parties, acting as Counsel in arbitral Proceedings. There is no relevance in joining him as Respondent as no Orders, even if given, could affect him. Therefore, it is specifically prayed that the 4th Respondent be awarded costs for misjoinder by the

Applicant. Apart from reiterating the submissions made on behalf of the 1st Respondent, these Respondents relied on the decision of **Aburili, J** in **Shree Haree Builders Limited versus Bazara Alex Tabulo & Another [2016] eKLR**.

35. It was submitted that the Applicant having filed their submissions in respect to the Applicant's Application challenging the jurisdiction, impartiality, unfairness and bias before the 2nd Respondent, the 2nd Respondent as mandated by law ought to have heard the parties and give a ruling/decision on the Applicant's Application challenging the jurisdiction, impartiality, unfairness and bias.

36. Based on **Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR**, it was submitted that as the Applicant did not exhaust all the available internal mechanisms for appeal or review and all remedies available, under agreement to which the Applicant was the main Party, and as provided in section 14 and 17 of the ***Arbitration Act*** as mandated by section 9(2) of the ***Fair Administrative Action Act*** which by law, the Applicant ought to have done, hence, Section 9(2) limits the jurisdiction of this Honourable Court to hear the Application by the Applicant herein for Judicial Review Orders for Certiorari and Prohibition.

Determination

37. I have considered the issues raised in this application.

38. Sections 14 and 17 of the ***Arbitration Act*** provide as follows:

> ***14. (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.***
>
> ***(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.***
>
> ***(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.***
>
> ***(4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.***
>
> ***(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.***
>
> ***(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.***
>
> ***(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.***
>
> ***(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.***
>
> **17.** ***(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections***

with respect to the existence or validity of the arbitration agreement, and for that purpose—

> ***a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and***
>
> ***b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.***

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3) admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitration award on the merits.

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.

39. In this case it is clear that the first issue in contention is the manner in which the Arbitrator herein was appointed by the Association. According to the applicant the Arbitrator ought not to have been unilaterally appointed without recourse to him. In my view this issue goes to the mode of appointment of the arbitrator. In other words it is a challenge to the arbitrator. Under section 14(2) of the Arbitration Act, such challenge is to be directed to the arbitral tribunal. Accordingly, the 1st Respondent was properly seised of the jurisdiction to determine whether or not his appointment was proper. This Court has had to deal with the same issue in **Sylvana Mpabwanayo vs. Allen Waiyaki Gichuhi & Another [2016] eKLR** where the Court expressed itself as hereunder:

> **"In this case, there is no dispute that the agreement had an arbitration clause. The only issue raised by the applicant is the manner in which the Respondent was appointed an arbitrator. That is a matter which falls squarely within section 14 above. It follows that the applicant herein, if he felt aggrieved by the decision to appoint the Respondent as an arbitrator by whatever reason ought to have moved the Court within 30 days after being notified of the decision to reject the challenge. In this respect I agree with the decision of Nyamu, J (as he then was) in Anne Mumbi Hinga vs. Victoria Njoki Gathara Civil Appeal No. 8 of 2009 [2009] KLR 698 where the learned Judge expressed himself as follows:**
>
> > **"The concept of the finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modelled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of this Act are wholly exclusive except where a**

particular provision invites the court's intervention or facilitation. Where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the policy of allowing flexibility to the parties, clashes with the equally important policies of finality and efficiency in arbitration. Permitting enhanced court review of arbitration awards opens the door to the full-bore evidentiary appeals that render the informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process which is an unacceptable process. The goal of flexibility must yield to a national policy favouring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straightaway… By entering into an arbitration agreement a party necessarily gives up most rights of appeal and challenge to the award in exchange for the virtue of finality of the award."

In my view a person who has willingly entered into an agreement with an arbitration clause ought not to be permitted to fall back on the Constitution in order to avoid his obligation to refer the disputes which properly fall within the arbitration clause to the agreed alternative dispute resolution mechanism. Where a party challenges the manner in which the arbitral proceedings are being conducted the same ought to be in accordance with the terms of the arbitration or the legislation guiding the arbitration process and he ought not to resort to judicial review proceedings as the first port of call."

40. The other issue goes to the jurisdiction of the Arbitral Tribunal in light of lack a finding that there was a dispute referable to arbitration. It is clear that under section 17 the Arbitral Tribunal has the power to rule on its jurisdiction. I associate myself with **Aburili, J** in **Shree Haree Builders Limited vs. Bazara Alex Tabulo & Another** (supra) that:

"…there is no discretion in matters of jurisdiction and the matter of jurisdiction must in the first instance be considered by the court or tribunal hearing a matter before parties can approach a higher authority to intervene. This court is therefore for the foregoing reasons reluctant to exercise any discretion to stay arbitral proceedings considering the real issues that are pending before the arbitrator that is the issues of whether or not the arbitrator had jurisdiction to hear and determine the dispute, before he can decide on the issue of his recusal from hearing the proceedings on account of his alleged perceived bias or lack of independence."

41. The other issues revolved around the impartiality of the arbitral process. Again as was held in the above matter:

"…that the arbitrator in the instant case had the discretion to determine the relevance and materiality of the respondent's submissions on jurisdiction of the arbitrator to hear and determine the dispute before hearing the challenge to his independence and in the event that the applicant was dissatisfied with the decision of the Arbitrator, it would be free to apply to the High Court to determine the matter there is no evidence that the applicant herein has followed that procedure which is clearly set out in the Arbitration Act."

42. What in effect the Learned Judge was saying is that apart from jurisdiction the Arbitrator has the power to decide on his independence.

43. It is however contended that the only alternative remedies open to the *ex parte* Applicant is less convenient or otherwise less appropriate and was firmly shut to the *ex parte* Applicant by the actions of the Respondents. It is however clear that the applicant had taken a challenge to the arbitral proceedings and the matter was yet to be rules upon by the Arbitrator. While it may well be that an attempt was made by the other Respondents to scuttle the applicant's objection, the Arbitrator was yet to rule on the matter and to find that the Arbitrator was going to rule one way or the other would be premature and speculative at this stage.

44. Although the applicant questioned the constitutionality of section 10 of the Arbitration Act, that

prayer is not expressly sought in these proceedings hence this Court is barred from dealing with the same.

45. In my view whereas the jurisdiction of the High Court with regard to violation human rights and fundamental rights as well as violation of the Constitution cannot be ousted, it is perfectly in order for Parliament to restrict access to the Court without completely ousting the Court's jurisdiction. In this case the Court's jurisdiction has not been ousted. What Parliament has done is to restrict access to the High Court while reserving the High Court's jurisdiction in respect of appellate jurisdiction unless the matter falls within the recognized exceptions. Ti this extent I agree with the expressions of the Court of Appeal in **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR**, that:

> **"…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 Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act".**

46. Apart from that it was held by the Court of Appeal in **Kangethe & Co. Advocates vs. Kenya Pipeline Company Limited Civil Appeal No. 211 of 2006 [2011] eKLR**, that:

> **"In Kenya the Role of the court is limited by section 10 of the Arbitration Act and its role or intervention must remain as specified in the Arbitration Act. Indeed the aim of the Act is to drastically reduce the extent of the Court intervention in the arbitral process. In practice this must in turn involve balancing the right of party autonomy against abuse of process which may occur in the hands of the arbitral tribunals. Courts and arbitration must of necessity remain close partners in the situation such as those described in this matter for reasons which include, inter alia, the observation by Lord Mustill in the Kenyan originated case of *Coppee Lavalin S A NV Ren Ken Chemicals and Fertilizers Ltd [1995] 1 AC 38 at 64*:- "It is only a court with coercive powers that would rescue an arbitration which is in danger of foundering".**

47. It must be noted that the court's role in an arbitration process is supportive and that of giving guidance to it rather than to obstruct the process. To that end I adopt the reasoning of the Court of Appeal in **Kenya Shell Limited versus Kobil Petroleum Limited [2006] eKLR**, that:

> **"…section 10 is so clear as to discourage intervention of the courts even at the appellate level…Court's intervention in decisions under section 35, that could only be if conditions under section 39(3) were satisfied…that when parties choose to resolve their disputes under the Act, by way of arbitral proceedings, the courts take a back seat. That the arbitral proceedings bestow the finality on disputes whereby a severe limitation is imposed on access to the courts, thereby as a matter of public policy, litigation is brought to an end**."

48. With respect to the issue whether the powers of appointment of an arbitrator are susceptible to challenge, I largely agree with the position adopted in **Sebiro Holdings Sdn Bhd versus Bhag Singh & Another Civil Appeal no q- 01-338-10/2013** as expressing the general legal position. I however wish to say no more on that issue since that is one of the issues pending determination before the Arbitrator and possibly before the High Court at a later stage. In that case however it was held that:

> **"It should be noted that the power exercised by the director of the KLRCA under subsections 13(4) and (5) of the act 646 is an administrative power. The Director of the KRCRA is not required to determine the question of the validity of the arbitration agreement, the maintainability and arbitrability of the claim and other jurisdictional matters…the directors function is not a judicial function where he has to afford a right to be heard to the parties before an arbitrator(s) is appointed…In our view, the court cannot interpose and interdict the appointment of an arbitrator whom parties have agreed to be appointed by the named appointing authority under the terms of the contract."**

49. It is therefore my view that there alternative remedies available to the applicant to ventilate its grievances. This has been the position since the Court of Appeal decision in **Speaker of the National Assembly –vs- Njenga Karume's Nrb. C.A.C.A. No. 92 of 1992** where it was held that:

> **"There is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure."**

50. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute."**

51. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. See **Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike& 4 Others (2008) 3 KLR (EP) 291,** and **Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012.**

52. This position has now acquired statutory underpinning vide section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, 2015 which provides:

> ***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

53. In **Republic vs. National Environment Management Authority Civil Appeal No. 84 of 2010** the Court of Appeal expressed itself as follows:

> **"...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come**

to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge."

54. Having considered the issues raised before me in these proceedings, I am not satisfied that this is a matter in which an exemption ought to be considered since the applicant even if the Arbitrator rules against it has the right to challenge the decision before the High Court and raise the same issues it is raising in these proceedings.

55. Judicial review, it ought to be remembered, is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.

56. In the premises, it is my view that the applicant ought to pursue its grievances before the Arbitrator as it had, and rightly in my view, set out to do. Let the procedure provided for the challenge of arbitral proceedings be allowed to take its course as contemplated under the law.

57. Accordingly, the Notice of Motion dated 12th October, 2016 is disallowed but in the spirit of Article 159(2)(c) of the Constitution there will be no order as to costs.

58. Orde rs accordingly.

Dated at Nairobi this 29th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musigwa for 3rd and 4th Respondents

CA Mwangi