REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 32 OF 2016

IN THE MATER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE AN ARBITRATION AWARD

BETWEEN

VICTORIA FURNITURES LIMITED ……..…….....APPLICANT

VERSUS

ZADOCK FURNITURE SYSTEMS LIMITED .....RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 10th February, 2016 brought under the provisions of Section 35(2) (a) (iii), (iv) & (vi) and (b) (ii) of the Arbitration Act, 1995, Article 47 and 159 (2) (d) (e), 165(6) of the Constitution of Kenya and all other enabling provisions of the Law. The Application is based on the grounds on the face of it and supported by affidavit sworn by Pankal Shah, a director of the Applicant

2. The Applicant is seeking for orders;

a. spent

b. spent

c. spent

d. That the Arbitral Award of Stanley Kebathi dated and signed on 6th December 2015 pending the hearing and in the Arbitration between the Applicant and the Respondent be set aside.

e. That the Court grants any other or further relief as this Honourable Court may deem fit.

f. That the costs of this Application be borne by the Respondent.

3. The background facts of the matter are that, the Applicant entered into a contract with the Respondent

on the 4th July, 2006, under which the Applicant contracted the Respondent to "supply and install furniture and demountable partitions at Kenya Pipeline Complex Industrial Area" (hereinafter "the Subject Contract") .

4. Subsequently, the Respondent declared a dispute against the Applicant arising from the subject contract and appointed an Arbitrator to determine it. However before the Arbitrator commenced the hearing of the matter, the Applicant filed a, High Court Civil Suit Number 445 0f 2010, Originating Summon (O.S), seeking to set aside the appointment of the Arbitrator. At the same time the Respondent, filed an Application seeking for an Arbitrator to be appointed by the Court. The Application was heard and Mr. Stanley Kebathi (hereinafter "the Arbitrator") was appointed as the sole arbitrator to determine the alleged dispute.

5. Further and pursuant to the directions of the Court, the Respondent filed its statement of claim dated 21st October, 2013, seeking for the following prayers:-

(i) The sum of Kshs. 206,135,283.31

(ii) Interest on (a) above at commercial rates

(iii) Costs of the suit

(iv) Any other order the arbitrator will be pleased to grant

6. The Applicant in response to the claim filed its statement of Defence and a Counter Claim dated 28th February, 2014 and denied the Respondent's claim. The counter claim contained the following prayers:-

(i) The sum of Kshs. 230,337,399.62

(ii) Interest of (a) above at the rate of 25% with effect from 1/03/2014 until payment in full;

(iii) Storage charges at the rate of Kshs. 300,000/- per month from 1/03/2014 until such date as the Claimant will have taken delivery of its consignment of goods; and

(iv) Costs of the Arbitration

7. The Arbitration proceeding commenced and concluded with the Parties filing their respective written submissions, subsequently the Award (hereinafter called "the Arbitral Award") dated 6th December 2015, was rendered.

8. The Applicant is aggrieved by the said Arbitral Award on the ground mainly that; it contains decisions on matters beyond the scope of the reference to arbitration, deals with a dispute not falling within the terms of the reference to arbitration, and it is against the public policy.

9. The Applicant averred that, prior to the dispute being referred to arbitration, the Parties had executed several Agreements under which they expressly settled and compromised all claims arising from the subject contract against each other and barred either Party from initiating claims against the other in relation to the subject contract. That both Parties agreed to make a joint claim against the defaulting Party in the transaction; Kenya Pipeline Company Limited. The Applicant argued that in its opinion, there was no dispute capable of Arbitration by virtue of the various Compromise Agreements.

10. Further that, despite the Arbitrator noting that the joint claim by the Parties herein was outside his scope of his jurisdiction, he awarded the Respondent a sum of Kshs. 118, 467, 835. 56 and interests based on calculations from the joint claim by the Parties, which was beyond the scope of the dispute contemplated in the Agreements. That the Arbitrator was also biased by being influenced by the proceedings still pending between the Applicant and Kenya Pipeline Company Limited in which the

Respondent is not a party and failed to take into account his own figures of calculations in the final account despite clear and unambiguous admissions by both parties that the pending arbitration between the Applicant and the Kenya Pipeline Company Limited is a separate claim. That the Arbitrator also acted *ultra vires* by conferring on himself the jurisdiction to tax the costs emanating from the Arbitral proceedings.

11. The Applicant averred that from the outset of the proceedings, the Parties disagreed on whether or not the Respondent performed its contractual obligations, which was one of the issues for determination. However the Arbitrator without applying an independent and impartial approach on the issue, relied on the findings of the Rulings made herein by Courts and arrived at the erroneous decision that the Respondent had performed its part of the contract.

12. The Applicant further argued that, at the time of the hearing of the matter, it was prevented from fully presenting its case by the Arbitrator refusing to allow it to lodge a Reply to the Respondent's Defence to the Counter Claim. That the Tribunal also did not decide the reference; in accordance with the terms of the contract between the Parties, did not take into account the usages of trade applicable to the transaction between the parties, nor applied the relevant substantive law on the interpretation of written contracts. That the Arbitrator failed to appreciate the provisions of section 12 of the Arbitration Act, specifically that a decision of the High Court in respect of matters touching on the appointment of an Arbitrator is final and not be subject to appeal and went ahead and held that the Appellant has not appealed against the two decisions of the High Court touching on the appointment.

13. Finally the Applicant argued that the Arbitrator showed partiality and unfairness from the onset when he insisted on proceeding with the matter knowing very well that he has personal differences with the Applicant's main witness one QS Hussein Were.

14. The Applicant therefore argued that, from the foregoing, it is crystal clear that the Arbitrator relied "on reverse reasoning, intentionally hand picking the favorable facts and evidence to the Respondent and ignoring credible and admissible evidence tabled by the Applicant thus rendering the said Award as tainted with gross *mala fides* and gratuitous manipulation". Therefore in light of the findings of the Arbitrator and the gist of the final Arbitral Award, the Honourable Court has a constitutional duty to set aside the Award,

15. However, the Application was opposed based on a Replying Affidavit sworn by Victor Swanya Ogeto, the Managing Director of the Respondent's Company. He averred that, the entire application is incompetent and bad in law, based on the following grounds:-

> *(i) That the application is incompetent and runs foul Rule 7 of the Arbitration Rules, 1997 and the rules of Natural justice.*
>
> *(ii) That the Application is bad in law for want of compliance with Section 36(3) of the Arbitration Act 1995.*
>
> *(iii) That the Application does not raise any other grounds specified in Section 35 of the Arbitration Act and cannot therefore be entertained by this Court*

16. The Respondent further argued that, on a without prejudice basis, it is incumbent upon a Party who wishes to challenge an Arbitrator on the ground of bias to do so within fifteen (15) days of the accrual of such right under section 14(2) of the Arbitration Act, upon becoming aware of the circumstances raising doubt as to the Arbitrator's partiality. That failure to raise an objection on account of any real or perceived bias as now alleged constitutes a waiver of the right as provided for under section 5 of the Arbitration Act 1995. Therefore this allegation is by the operation of section 14(2) of the Arbitration Act, statute barred, as statutory time lines are not capable of expansion. That, the QS Were, all along and as early as 19th November, 2013, appeared in the Arbitration, first as Party representative, then as a witness.

17. The Respondent refuted the allegation that the Applicant was denied the right to file its pleadings

before the tribunal, that the Applicant filed all its relevant pleadings. That the timelines agreed on by counsels of the Parties during the preliminary Arbitration meetings included a right for the Applicant to file a Defence and Counter Claim. The Pleadings closed after the filing and service of a Defence to Counter Claim. Therefore the Applicant's allegation that it was denied the right to file a document which was unknown to the consent directions agreed on in the preliminary meetings and which document is not known in the realm of either civil litigation or the Chartered Institute Arbitration Rules adopted by the Parties *"is quite irresponsible to say the least"*.

18. That in any event, the Applicant by way of consent recorded on the 24th day of April 2014, agreed to proceed and make any other comments it may have during submissions yet, the Applicant has deliberately failed to enclose or produce the pertinent order.

19. The Respondent further argued that the Applicant cannot fault the Arbitrator on his evaluation of the evidence, as the Court does not look at the evaluation of evidence by the arbitrator in an Application challenging an award, since this is not an appeal. That the Court is only concerned with is the propriety of the process and the grounds relied on as restricted in section 35 of the Arbitration Act 1995. The Applicant is therefore inviting the Court to exceed its mandate under the Act.

20. The Respondent denied the Applicant' argument to the effect argued that the Arbitrator looked at evidence which the Parties had agreed not to be relied upon, and averred that that there was no such Agreement captured in any of the consent orders for directions nor is there such Agreement or Consent produced by the Applicant. In any event, no objection was raised when the joint claim signed by both parties and which contained damning admissions by the Applicant, was referred to. That in fact the Applicant too heavily relied on the said joint claim, cross-examined the deponent on the same, and led its witnesses on it. That it is therefore e*stopped* by operation of section 5 of the Arbitration Act, from raising an objection at this belated hour.

21. The Respondent argued that the Applicant misapprehends the import of its own documents in that, the joint claim is not a document prepared pursuant to the Agreement of 6th February, 2008. That it was admitted to by the author of the joint claim, Qs Were and the joint Claim is a product of the Contract entered into between the Applicant and Respondent on the one hand and QS Were on the other. The said Agreement will show the Court that no Agreement was ever contained therein, to restrict the use of certain documents in proceedings between the parties.

22. The Respondent further argued that the Applicant's complaint that the Arbitrator relied on documents authored by the project Architect and Quantity Surveyor is self-defeatist in three respects: First, the Applicant of its own, in its own bundle presented relied on the documents authored by such consultants. Secondly, the Applicant through its counsel cross examined the Respondent's witness, the deponent of the Replying Affidavit on the said documents and allowed the same to be admitted into evidence. Lastly, the Applicant itself had listed Arch. Allan Simuyu of Mutiso Menezes Architects, the project Architect, as one of its witness, and who prepared and filed a witness statement in which reference to the documents it now seeks to impugn was extensively made.

23. That by the Parties agreeing to Arbitration as the mode of resolution of their disputes, implicit in such a decision is the finality of the Arbitral Award as provided for under section 32A of the Arbitration Act 1995. Therefore the current Applicant is a further attempt to derail and delay the Respondent from realizing the fruits of its labour for work undertaken ten (10) years ago.

24. The Respondent argued that the Arbitrator's Arbitral Award is based on sums which were admitted by the Applicant in writing, the project consultants, and the Respondent's witnesses before the Arbitral tribunal and from the evidence tendered before the tribunal. The Respondent dismissed the alleged differences between the Arbitrator and the QS Were, as most frivolous on the face of it,as no details were supplied by the Applicant before the Arbitrator nor has any been supplied before the Court "except for some passing remarks". That the differences between QS Were and the Arbitrator are a "work of fiction" and indeed, the Arbitrator says as much in the Arbitral Award. Neither did the Arbitrator "insist" on proceeding in the face of any challenge. That this complaint is the "proverbial crying wolf" by a

dissatisfied party.

25. The Parties agreed to dispose of the application by filing submissions which they did and I have considered them alongside the arguments advanced and I find that the following issues require determination:

> *(i) Whether the Application complies with Rule 7 of the Arbitration Rules, 1997 and the Rules of Natural Justice,*
>
> *(ii) Whether the Application is in breach of section 36 (3) of the Arbitration Act 1995 (as amended).*
>
> *(iii) Whether the Application raises any grounds specified in Section 35 of the Arbitration Act*
>
> *(iv) Whether the Arbitrator dealt with matters beyond the scope of the reference;*
>
> *(v) Whether the arbitral award is in conflict with the public policy in Kenya.*

26. I shall first deal with the issue relating to Rule 7 of the Arbitration submitted that the entire Application is incompetent and bad in law, due to non-compliance with Rule 7 of the Arbitration Rules, 1997 and the Rules of Natural Justice. That the said provision is succinct in mandatory terms whereby the Arbitrator must be impleaded as a party and should be served, as it is a cardinal principle of natural justice that one cannot be condemned unheard. Therefore an Arbitrator whose integrity, competence and exercise of mandate are under challenge should, as a matter of natural justice be heard.

27. However the Applicant submitted that the Arbitration Act and/or the Arbitration Rules do not require that that the Arbitrator must be joined or named as a Party in an Application to set aside an Arbitral award. Even then the Application as well as the supporting Affidavit thereto were both served upon the Learned Arbitrator as evidenced by paragraph 3 of the Supplementary Affidavit of Pankaj Shah filed herein on 16th March 2016 and annexture "PKS1" thereto being a copy of the first page of the Application and bears the "Received" stamp of the Arbitrator's office (S. K. Archplans).

28. That the pleadings and documents filed in the Arbitration also bear the same stamp (S. K. Archplans), and there is no evidence produced by the Respondent to dispute this service, therefore the service of the Application and Supporting Affidavit upon the Arbitrator has been sufficiently proved and the Applicant has duly complied with the requirements of Rule 7 of the Arbitration Rules and therefore the Respondent's contention that the Arbitrator "must be impleaded" in the Application is erroneous, it is not supported by any legal authority and is without any merit.

29. I have considered the provision of Rule 7 of the Arbitration Rules 1997. It provides that:

> ***"An Application under Section 35 of the Act shall be supported by an Affidavit specifying the grounds on which the Party seeking to set aside the arbitral award and <u>both the application and affidavit</u> shall be served on the other party and the arbitrator (mine).***

30. I find that there is no requirement that the Arbitrator be made a Party or named as such in the Application as herein. If the Application and the Supporting Affidavit were served then the Applicant has complied with Rule 7. But the arguments by the Respondent are not in vain. The rules of natural justice require that a person should not be condemned unheard. Neither can a Court issue any orders against a person not a Party to a suit. It is also a matter of practice that an Arbitrator is usually made a Party for the aforesaid reasons. However as regards Rule 7 aforesaid I uphold the Applicant's submissions.

31. The next issue raised by the Respondent is the non- compliance with Section 36(3) of the Arbitration Act, 1995 (as amended), which requires that the Application be filed with the original or certified copies of the award or Arbitration agreement, if the Applicant is relying on it.

32. The Applicant however submitted that they are not relying on the Arbitral award or applying for its enforcement but are applying to set it aside which does not require that the applicant furnish the original or certified copy of the Award or arbitration agreement. The Applicant relied on the case of **David Chabeda& Another Vs Francis Ingosi (2007) eKLR,** where it was held that an Application brought without first filing the Award and Agreement or certified copies thereof was incompetent and was struck out.

33. I have considered the provisions of section 36(3) which provides as follows:-

> "***Unless the High Court otherwise orders the party relying on an arbitral award or applying for its enforcement must furnish***
>
> ***(a) The original arbitral award or duly certified copies of its.***
>
> ***(b)The original arbitration agreement or a duly certified copy if it"***

34. Based on the above provisions I concur with the submissions of the Applicant that these provisions relate to enforcement of an Arbitral Award and not an Application to set aside the Arbitral Award, even then I shall revert back to this issue.

35. The other issue raised by the Respondent is in relation to section 35 of the Act. The Respondent argued that the Applicant has not cited any of the grounds recognized under Section 35(2) of the Arbitration Act and as such the entire Application is therefore incurably defective and fatally incompetent.

36. However, the Applicant submitted that the Arbitral Award contains decisions on matters beyond the scope of the reference to Abitration; it deals with a dispute not falling within the terms of the reference to Arbitration and was affected by undue influence.

37. The provisions of section 35 of the Arbitration Act No. 4 of 1995, stipulates the grounds for setting aside of an award as follows:-

> *(a)The party making the application furnishes proof;-*
>
> *i) That a party to the arbitration agreement was under some incapacity; or*
>
> *ii) The arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication of that law, the laws of Kenya; or*
>
> *iii) The Party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
>
> *iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference or contains decisions on matters beyond the scope of the reference to arbitration, provided that it the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or*
>
> *v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with provisions of this Act from which the parties cannot derogate; or failing such agreement was not in accordance with this Act; or*
>
> *vi) The making of the award was induced or affected by fraud, bribery, undue influence or corruption*

(b)The High court finds that;-

i) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii) The Award is in conflict with the public policy of Kenya.

38. I shall consider the issues raised in connection with Section 35 alongside the grounds relied on by the Applicants in support of this Application. The Applicant as aforesaid avers that the Arbitrator dealt with matters outside the scope of the reference and the Award is against Public Policy and therefore acted without jurisdiction. The Applicant cites the following grounds in support of this argument:

(a) The arbitrator did not decide the reference in accordance with the terms of the contract between the parties and contemplated and relied upon matters not provided for by the contract and which were beyond the scope of the arbitration;

(b) The arbitrator failed to consider that all disputes between the parties arising from the subject contract having been fully and finally settled and compromised by the parties, there was no dispute capable of being arbitrated and that he therefore had no jurisdiction to make the Arbitral Award in the manner that he did;

(c) The arbitrator wrongly conferred jurisdiction upon himself by ignoring the compromise agreement thereby handled matters beyond his scope;

(d) The Arbitrator wrongly extrapolated the two High Court Rulings to mean that he had jurisdiction to entertain the Respondent's claim when in fact the said rulings held that the issue of the Arbitrator's jurisdiction was one that should be deal with by the Arbitrator himself, and in so doing the Arbitrator arrogated to himself a jurisdiction which he did not have;

(e) The Arbitrator abdicated his duty to investigate the issue of performance (or lack thereof) of the subject contract by the Respondent, jurisdiction and time bar of the Respondent's claim by solely basing his findings thereon on obiter dicta of the High Court and thereby dealt with matters beyond the scope of the reference;

(f) The arbitrator exceeded his jurisdiction and the scope of the reference by equating the Project consultants' advice to Kenya Pipeline Company Limited regarding the variations and omissions effected by Kenya Pipeline Company Limited in respect of the Applicant's contract with Don Woods Company Limited to a confirmation that the Respondent was not in default in its contract with the Applicant;

(g) The Arbitrator failed to recognize that the issue that had been before the High Court was only the appointment of an Arbitrator and not performance of the subject contract by the Respondent, and he already had a biased opinion basing his decision from the obiter dicta;

(h) The arbitrator was unduly influenced by the obiter dicta of the High Court to the extent of solely basing his principal finding that the Respondent performed the subject contract thereon and ignoring all other evidence before him to the contrary;

(i) The Arbitrator was unduly influenced by and wrongly relied upon the Applicant's failure to appeal against the two High Court Rulings when in fact such appeal is expressly prohibited under the Arbitration Act 1995, and by so doing he also exceeded the scope of the reference;

(j) The arbitrator having correctly noted that the joint claim prepared by the parties herein was outside his scope nevertheless proceeded to base his Arbitral Award of Kshs. 118,467,835.56 on the very same joint claim which he had already found was outside his scope;

(k) The Arbitrator relied upon and was unduly influenced by the alleged strength of the Applicant's pending claim against Don Woods Company Limited and thereby also dealt with and considered matters which were beyond the reference;

(l) The Arbitrator failed to limit the scope of the Arbitration to the subject contract between the Applicant and the Respondent and based the Arbitral Award on the Applicant's contract with Don Woods Company Limited;

(m) It was not open for the Arbitrator to make an Award, in a dispute predicated on separate agreements by the parties herein and in which the same is still pending before another Arbitrator;

(n) The Arbitrator's Award of interest at the rate of 25% was based not on the contract between the Applicant and the Defendant but on the joint claim prepared jointly by them against Kenya Pipeline Company Limited and was therefore beyond the scope of the reference;

(o) The Arbitrator applied reversed reasoning by accepting the terms in the joint claim and even using the calculations in the joint claim to come up with the final Award but selectively ignored the compromise Agreements that were entered into by the Parties;

(p) The parties having expressly agreed with and undertaken to each other that the contents of their joint claim would not be used by any of them against the other in any legal proceedings between them, the Arbitrator exceeded the scope of the reference by using and considering the contents of the joint claim as an admission by the Applicant of the Respondent's claim;

(q) The Arbitrator could not reasonably conclude the matter and grant the Award without referring to a completely different on-going arbitration, powers which he did not have and without referring to or considering the effect, performance, content and execution of the contract between the Applicant and the Respondent which was the only subject of the arbitration.

39. The Respondent however argued that the Applicant's aforesaid averments on Jurisdiction are misconceived in the following respects:-

(i) The Arbitrator did not confer upon himself jurisdiction but his jurisdiction is circumscribed in Article 159 of the Constitution of Kenya, the Arbitration Act 1995, Rule 16 and 17 of the Chartered Institute of Arbitration (Kenya Branch) Rules, 1998 (adopted by the Parties),and the contract entered into by the Parties. It has not been suggested or demonstrated with any of specificity which of these instruments has been breached by the Arbitrator and in what manner.

(ii) It is not open to the Applicant to allege the Applicant cannot be allowed to engage in the inequitable conduct of the approbation and reprobation and cannot in one breathe state that the Arbitrator lacked jurisdictions to entertain the Applicant's claim and on the same breathe present a Counter Claim for adjudication by the very same tribunal, or raise a challenge on jurisdiction of the tribunal merely because its Counter claim was dismissed as lacking in merit.

(iii) The question of the arbitral tribunal's jurisdiction has been determined at least twice by the High Court and the question as to whether the arbitral tribunal had jurisdiction to entertain the claims and Counter Claim has been settled with finality. The same is therefore res judicata and by dint of Sections 14(6) and 17(7) of the Arbitration Act 1995 and cannot be revisited. Two Courts found that all claims between the Parties with regard to the subject contract were the proper subject of arbitration and as such referred the matter to arbitration despite the applicant's ardent opposition not only to arbitration but also to any form of dispute resolution.

(iv) That Justice J. Havelock in his judgment delivered on 31st day of July, 2013, in HCCC NO. 445 of 2010 (O.S.) Victoria Furniture's Systems Limited VS Zadock Furniture Systems Limited at page 18 paragraph 14 thereof, succinctly described the conduct of the Applicant as one of an "ardent desire to avoid the arbitration process, come what may, as its knows very well that such may end

up with an award against it to pay the monies due to the Applicant (Zadock) under the sub-contract".

(v) That Odunga J in an application filed by the Applicant challenging the Arbitral proceedings also unequivocally found that "there is no dispute that the defendant (Zadock) performed its part of the contract and that it is entitled to payment".

40. On the allegation that the Arbitrator conferred upon himself Jurisdiction when the dispute between the Parties had been compromised by Agreements including the ones dated 31st August, 2006 and 6th February 2008, and Respondent argued that the Applicant is yet again engaged in approbation and reprobation. The Respondent questioned why the Applicant presented a Counter Claim before the Arbitral Tribunal if the disputes between the parties had been settled by way of a variation Agreement.

41. That the status and evidentiary value of the said compromise or variation or settlement Agreement have been determined with finality by the High Court, a Court of equal competence with this Court, and the same cannot be re-opened. That the matter is res judicata as Justice Odunga at page 3 of the aforesaid decision stated as follows on the compromise agreement;-

"as the Parties to the said contract were the main contractor and the plaintiff herein (Applicant), but the defendant was interested in the outcome of the said dispute, it was initially decided that both Parties herein would join forces in pushing for the said claim but under the umbrella of the plaintiff herein and details of such joint venture was to be agreed between the plaintiff and the defendant. However, there was no such agreement and the defendant eventually pulled out of the dispute and decided to lodge its own claim against the Plaintiff by declaring a dispute and as it was entitled to do under the subcontract".

42. That the Court having found that the Respondent herein was entitled to declare a dispute and go into Arbitration proceedings against the Applicant under their sub contract, the learned Arbitrator in his Arbitral Award simply reiterated what the Court had found to the effect that there was a dispute for Arbitration between the Parties which the High Court had enjoined him to determine.

43. Similarly that Hon.Mr. Justice Havelock (Rtd) weighed into the matter of the compromise Agreement and reiterated Hon. Justice Odunga's holding that found that the compromise Agreement ("or variation agreement" as the Judge called it) did not invalidate the Arbitration clause in the sub contract. Justice Havelock reiterated Hon.Odunga J's findings and held as follows;-

"the Judge found that the compromise Agreement (or variation Agreement as the Judge called it) did not invalidate the arbitration Clause in the sub contract…As a result, the Respondent's (applicant herein) submission as regards the compromise Agreement as well as the validity and extension of the Arbitration Clause under the sub-contract have already been determined and are res judicata" (emphasis added).

44. The Respondent argued that the Applicant withheld pertinent material facts from the Court, namely that the "compromise" Agreement relied upon includes a default clause which came into effect upon failure by the Applicant to pursue the contents of the Agreement within the period stipulated therein or at all. That the relevant page of the said Agreement is deliberately and ominously omitted by the Applicant from its bundle. The said clause 7 thereof reads:-

"in the event the claimant fails to lodge the claim within the time stipulated in this Agreement (14 days) then this agreement shall become inoperative, null and void and either Party may seek any other remedies available to him and/or them under the subcontract".

45. Further, the attempt by the Applicant to revisit matters determined by this Court smacks of abuse of the process of the Court and is a poorly conceived attempt to either Appeal or seek for review the decision of both Justices Havelock and Odunga, which options which are untenable under Section 14(6) and 17(7) of the Arbitration Act 1995, which states that such decisions are final and binding. The Arbitrator was

therefore right in reaching the conclusion, as he did, to the effect that he had jurisdiction to entertain both the claim and Counter Claim.

46. I wish to address the 2nd ground relied on by the Applicant namely that the Arbitral award is in conflict with public policy before I make a decision on the issue of jurisdiction. To support this ground, the Applicant relied on the following matters;

(a) It enables the Respondent to unjustly enrich itself at the Applicant's expense and therefore promotes unjust enrichment;

(b) It allows the Respondent to ignore and escape its legal obligations under the various compromise and settlements it executed compromising and settling all its claims against the Applicant;

(c) It discourages the compromise and settlement of disputes by parties;

(d) It encourages a party to ignore its legal and contractual obligations with impunity and in fact rewards the same;

(e) It is a violation of the Applicant's constitution right to fair administrative and judicial action;

(f) It is a gross miscarriage of justice;

(g) It is unjust and contravenes Article 159(2) (a) of the Constitution;

(h) It is injurious to the national and economic interest of Kenya as it discourages the creation of a conductive environment for investment in Kenya;

(i) Each party has a right to fair hearing as a principal of natural justice and failure to allow the Applicant file its reply to the Respondent's Defence to Counter Claim taints the Arbitral Award which therefore is contrary to established principles of law and justice which allows parties to represent their cases adequately before unbiased arbitrator;

(j) Public policy dictates that when making the final award, the arbitrator must take into account the usages of trade practices applicable to the transaction between the parties.

(k) It ignores the parties' express compromise and settlement of all disputes between them arising from the contract between them which was the subject of the arbitration.

(l) It ignores the parties' express undertaking to each other that the contents of the joint claim would not be used by any one party against the other in any legal proceedings between them.

47. I have noted from the submissions filed by the Parties, that the Respondent did not make any submissions on this issue of Public policy. Therefore the submissions by the Applicant on the same remain unchallenged.

48. The other issues raised by the Applicant include but are not limited to the issues of: bias and/or alleged differences between the Arbitrator and the QS Mr. Were, failure by the Arbitrator to fully appreciate evidential matters and the failure to give the Applicant an opportunity to present its case. I shall consider these issues against the materials placed before the Court and in the light of the main prayer which is basically to set aside the Arbitral Award.

49. The Respondent has submitted that this Application is incompetent and bad in law on the ground that it is in breach of section 36(3) of the Act. That the said provisions are mandatory and require that a person relying on the Arbitral Award or an Arbitration Agreement should annex and/or provide an original or certified copies thereof, which the Applicant herein have not complied with. The Court was

invited to strike out the Application.

50. However, the Applicant held a contrary view submitting that they are not relying on the Arbitral Award nor applying for its enforcement. Therefore they need not annex a copy of the Arbitral Award or the Arbitration Agreement. They further argued that there is no legal requirement to provide the same.

51. I have already ruled on this issue by observing that, indeed there is no legal requirement under Section 36(3) of the Arbitration Act to provide the subject documents. This is based on the fact that the section 36 cited relates to recognition and enforcement of Arbitral Award and not the setting aside. However, the key question is this: how will the Applicant prove all the allegations and/or matters deposed of or averred to, in the Affidavit in support of this application, in the absence of the original and /or at least a certified copy of the Arbitral Award?.

52. Similarly how will the Applicant prove all the issues raised, which include but are not limited to, allegations that the Arbitrator relied heavily on the contents of the joint claim executed by the Parties when he awarded the Respondent a sum of Kshs. 118,467,835.56, and/or interest rate of 25%. And further that the Award was based on the Applicant's contract with Don Woods Company Limited.

53. In the same vein how will the Court be able to determine whether indeed the Arbitral Award is in conflict with Public Policy or that the Arbitrator was biased or showed partiality and unfairness and/or relied heavily on the decisions of the High Court to assume jurisdiction.

54. It is trite law that he who alleges proves. The burden of prove in Latin (onus probandi) is to a Party in a trial to produce evidence that will prove the claims they have made against the other Party. In a legal dispute one Party is initially presumed to be correct and gets the benefit of doubt. While the other side bears the burden of prove. When a Party bearing the burden discharges it, the burden switches the other side. Thus, the burden of prove is usually on the person who brings the claim and is associated with the latin maxim "semper necessitas proband iincumbitie qui agit – which translates as, "the necessity of proof always lies with the person who lays charges". On the contrary, a Party who does not carry the burden of proof carries the benefit of the assumption of being correct until the burden shifts to them.

55. The term burden of proof entails two things:-

(i) the burden of production (evidential burden); and

(ii) the burden of persuasion

56. In Civil cases, the burden of proof requires the Plaintiff to convince the Court of his/her/it's entitlement to the relief sought. This means the Plaintiff must prove each element of claim or cause of action in order to recover. This requirement is based on preponderance of evidence also known as balance of probabilities. The standard is met if the proposition is more likely to be true than not true. As Lord Denning in the case of; ***Miller vs Minister of Pension 1947- All ER 372*** described it as "more probable than not."

> *"If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged but if the probabilities are equal it is not."*

57. In a family case of; ***(Re B (2008) UKHL 35),*** Lord Hoffman answered that question using a mathematical analogy:

> *"if a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the Party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is*

returned and the fact is treated as having happened."

58. In the text of J. Strong McCormick on evidence 5th Edition 1999, the author states that

> *"the burden of pleading and proof with regard to most facts have been and should be assigned to the Plaintiff who generally seek to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."*

59. In the instant case, I note from the record that the Application herein was filed in Court on 11th February 2016. On the 25th February 2016, the Respondent filed a Replying Affidavit to the Application. I have had the benefit of the same and I note that under paragraph 3 of the Replying Affidavit, the Respondent raised the issue of the entire Application being incompetent and bad in law for want of compliance with the Section 36(3) of the Arbitration Act 1995 as Amended. It is at this point that the issue of provision of the Arbitral Award and/or certified copy thereof was brought to the knowledge of the Applicant. Subsequently the Applicant filed submissions and even made reference to the Replying Affidavit herein but did not seem to have addressed this issue in the said submissions. The Respondent then filed their submissions on 28th April, 2016 and canvassed the subject issue under paragraph 1(c) of the submissions. This again brought to the Applicant's knowledge the issue of provision of a copy of the Arbitral Award. Indeed the Applicant's filed submissions in response to the Respondent's submissions maintaining their position that there is no legal requirement that they should furnish the original or certified copy of the Arbitral Award. That may be correct, but what was the evidential burden the Applicant had to discharge as aforesaid and has the Applicant discharged it in the absence of provision of a copy of the Arbitral Award. In my considered opinion, the Applicant had an opportunity to avail critical evidence before the Court to enable the Court to consider the matter on merit but did not utilize it.

60. I note from the submissions of the Respondent that the Court was invited to strike out the Application. I am of the opinion that the Application can only be struck out if the Applicant failed to comply with a legal requirement of law. That is not the case herein. The question that arises is : Is the failure to provide the original and/or a copy of the Arbitral Award a technical issue that can be cured by Article 159(2)(d) of the Constitution that impresses upon the Court to uphold substantive justice as against technicalities. In my opinion the contents of the said Arbitral Award is a matter of evidence which goes to the substance of the Application and is not a mere technical matter.

61. Regrettably, the Court has to arrive at a decision that the Applicant has not proved its case on merit as required under the law. As already stated the allegations and/or averments made by the Applicant against the Respondent and/or the Arbitrator have not been proved. It is not therefore possible for this Court to evaluate the factual matters before it on merit. The Applicant bore the burden of proof.

62. The upshot of all this is that the Notice of Motion Application dated 10th February, 2016, is hereby dismissed for lack of merit with costs to the Respondent.

63. Before I pen off, I wish to apologize to the Parties that it has taken rather too long for the Court to render this decision. I offer my profound apology for any inconvenience that may have been caused. This was informed partly by the fact that the Application and the documents annexed thereto ran into a total of 1,258 pages and I went through the entire document. In addition the Respondent filed a Replying Affidavit and annexured thereto submissions that ran into 76 and 70 pages respectively. The Applicants on the other hand filed two sets of submissions and authorities running into over 100 pages. I have gone through all these documents. I also hope that my update to the Parties as and when I was not able to deliver the ruling eased the situation. Once again my profound apologies.

Dated, delivered and signed in an open Court this 18thday of October, 2017.

G.L. NZIOKA

JUDGE

In the presence of:

Mr Mugogo holding brief for Mr Kazungu……for the Applicant

Mr Lusiola holding for Mr Lubulela…… for the Respondent

Teresia …… Court Assistant