REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO.489 OF 2015

SHREE HAREE BUILDERS LIMITED.....APPLICANT

VERSUS

BAZARA ALEX TABULO.....1ST RESPONDENT

WALTER ODUNDO.....2ND RESPONDENT/ARBITRATOR

RULING

1. By a notice of motion dated 4th November 2015 and filed on the same day, the applicant **SHREE HAREE BUILDERS LIMITED** seeks from this court orders:

1. Spent

2. Spent

3. That pending the hearing and determination of the Originating Summons there be a stay of any further proceedings in the arbitration between the applicant herein and the 1st respondent.

2. The application is brought under the provisions of Section 15(1) (a) and (2) of the Arbitration Act, 1995, Rules 17(10) of the Arbitration Rules Articles 50(1) and 165(8) of the Constitution of Kenya and all other enabling legislation.

3. The application is predicated on 12 grounds on the face of the application and the annexed affidavit sworn by Sailesh Kerai sworn on 4th November 2015 and several annextures/exhibits.

4. In Mr Kerai's supporting affidavit which mirrors the grounds in support of the application, it is deposed that the applicant herein has sought the recusal of the sole arbitrator **Mr WALTER ODUNDO** from arbitrating over the dispute but that the Arbitrator has refused to hear the application for recusal. That the Arbitrator has been very slow in setting down the hearing of the dispute which has also escalated the costs and that there is reasonable apprehension that the arbitrator is not impartial and or independent in view of the manner in which he has conducted himself. ***That instead of hearing the objection to his arbitrating over the dispute, the arbitrator directed that the objection to jurisdiction be heard and determined first***. That the Arbitrator who is the 2nd respondent hereto has by his conduct descended into the arena of the dispute and been clouded by the dust therein and therefore unable to perform his cardinal role of an independent and impartial arbitrator which has created a stalemate due to the antagonism and therefore the applicant does not expect to get any justice from the

2nd respondent sole arbitrator. Finally, that unless the arbitral proceedings are stayed, in view of the applicant, it shall be compelled to take part in the proceedings thereby waiving their right to challenge the 2nd respondent's impartiality with the undesirable result that the applicant shall suffer substantial injustice.

5. The application is opposed by the 1st respondent **BAZARA ALEX TABULO** who filed his replying affidavit sworn on 23rd November 2015. In the said affidavit, the 1st respondent contends that he did vide an application dated 23rd July 2015 expressed his intention to challenge the jurisdiction of the arbitral tribunal to hear and determine the dispute pending before it which application was served upon the applicants herein.

6. That the Arbitrator also did write to the applicant's advocates seeking their views on the application and the advocate promised to respond and indeed did respond vide a replying affidavit sworn by Sailesh Kerai filed on 7th August 2015. That on 25th August 2015 the Arbitrator asked the parties to file and exchange written submission for a ruling to be delivered on 30th September 2015.

7. That instead, the applicant requested for a mention date yet the jurisdictional application was still pending determination and therefore the arbitrator did on 4th September 2015 write to the applicant's advocates seeking clarification on the purpose of the mention proposed to enable him consider the request and that is when the applicant on 7th September 2015 expressed their intention to challenge the arbitral tribunal's independence.

8. That despite the parties' filing their submissions on the question of jurisdiction of the tribunal, the applicant herein filed an application before the arbitral tribunal challenging the independence of the Arbitrator and demanded that the said application be heard first before the one challenging jurisdiction of the arbitral tribunal could be heard.

9. That the arbitrator issued some peremptory order after the applicant failed to file submissions in compliance with those peremptory orders and that it instead rushed to the High Court to file an Originating Summons seeking to remove the Arbitrator and to stay arbitral proceedings which is a sign of bad faith.

10. That the alleged delay has been occasioned by the applicant to obey the orders of the arbitrator. That since the Arbitrator has the power to direct proceedings before him; this court is being asked to interfere with that power of the Arbitrator. That since a similar application for stay of arbitral proceedings is pending before the arbitral tribunal; it is un procedural for this court to entertain this application for stay of arbitral proceedings.

11. That the application herein does not meet the conditions for this court to intervene in the arbitral tribunal proceedings and that it is an abuse of the court process. That the applicant is a rebel and a forum shopper who has refused to comply with the directions of the arbitrator and instead it has been unsuccessfully seeking the audience of the chairpersons of Architectural Association of Kenya and the Chartered Institute of Arbitrators hence this court should not fall prey to such forum shopping exercise by the applicant.

12. That to grant the prayers sought by the applicant would amount to amending the provisions of the Arbitration Act hence the application is incompetent, pre-emptive, mischievous, vexatious, frivolous, premature and fatally defective.

13. The parties' advocates agreed and filed written submissions. The applicant filed its submissions on 4th February 2016 whereas the respondents filed their submissions on 26th February 2016 and now this court is called upon to consider those two rival positions and make a determination on the application dated 4th November 2015.

14. In their submissions, the applicant's counsel Mr Odera contended that the 2nd respondent Arbitrator has lost the control of the arbitration proceedings to the detriment of the parties and especially the applicant; that the Arbitrator is not interested in determining the dispute with expedition; that since June 2013, simple housekeeping issues like close of proceedings (pleadings) had to wait until December 2014, a period of over one and a half years which is unreasonable delay; that the applicant has complied with Section 14(1) of the Arbitration Act in that on 7th September 2015 it filed notification of its intention to file a formal application for recusal of the 2nd respondent Arbitrator as the sole arbitrator and the applicant also invited the 1st respondent's advocate to concur on a suitable procedure for the challenge and having failed to receive the response, on 25th September 2015 it filed a formal statement of the reasons for the challenge and on 30th September 2015 it wrote to the said Arbitrator seeking directions on the hearing of the challenge; that instead of the Arbitrator dealing with the matter of the challenge on his independence and impartiality, he instead issued directions to the effect that the tribunal would first deal with the point of jurisdiction earlier raised but the 1st respondent, before dealing with the challenge on independence or impartiality and that after a series of correspondence exchanged between the Arbitrator and the applicant, the Arbitrator failed to address the applicant's plea and that is when the applicant moved to this court seeking for termination of the Arbitrator's mandate. The applicant's counsel submitted that in view of the above position, it is clear that the arbitrator had failed to control the proceedings and that he had instead ceded the control to the 1st respondent; that the arbitrator had become antagonistic, biased and cannot be fair against the applicant.

15. That the insistence of the arbitrator to hear the issue of jurisdiction prior to the matter of bias and or independence raised by the applicant is a clear breach of Article 50 of the Constitution and that even with leave of this court, he has refused to file any affidavit to rebut the allegations leveled against him by the applicant. That the impugned acts of the arbitrator benefit the 1st respondent and that is the reason why the 1st respondent opposes this application despite the clear delay and possible escalation of costs.

16. On the alleged dilatory conduct of the arbitrator, it is submitted by Mr Odera that an arbitrator can be removed for failure to conclude the proceedings with reasonable dispatch and failure to take control of arbitration proceedings in that in this case, the Arbitrator was at the mercy of the 1st respondent as to time frames and dates. Reliance was placed on **Russel on Arbitration 23rd Edition.** On the alleged risk of possibility of bias reliance was placed on **Alliance Media (K) Ltd Vs Monier 2000 Limited HCC 370/2007** where Warsame J (as he then was) set the test applicable for apparent bias being objective and which has to be addressed from circumstances of the case that right minded persons would conclude that there was/is a real danger of possibility of bias.

17. It was further submitted that in this case, the Arbitrator has not been fair to both parties. That he has unilaterally charged the applicant with the responsibility of booking a venue for arbitration which is a biased directive which has no logic and amounts to unfair treatment. And that for the arbitrator to penalize the applicant for failure to secure the premises for the arbitrator, the 2nd respondent is acting with naked partiality.

18. That the 2nd respondent arbitrator had not adhered to his own time frames for the filing of various pleadings and hearing. Reliance was placed on excerpts from **Arbitration Practice and Procedure by Professor D. Mark Cato** that the arbitrator's actions are tantamount to misconduct and bias against the applicant.

19. On antagonism of the arbitrator, it is submitted that the arbitrator has become unnecessarily antagonistic therefore the applicant is apprehensive that no justice to the applicant can be expected from the 2nd respondent as shown by his letters dated 2nd September 2015. Reliance was placed on **Howell V Lees Mcllias** where **Sir Anthony Clarke MR** recognized the possibility of bias where there is animosity between the judge and any member of the public involved in the case. That in this case, the Arbitrator despite the purpose of the mention being clear, he feigned ignorance of the purpose of the requested mention by his letter dated 4th September 2015.

20. On independence and impartiality of the Arbitrator versus jurisdiction, it was submitted that there is no way a tribunal whose independence and or impartiality has been questioned can rule on a point, including a point of jurisdiction.

21. The applicant prayed for temporary stay of arbitral proceedings and contends that the 1st respondent is party to some of the short comings of the 2nd respondent particularly as to delay in concluding the arbitration proceedings.

22. In the opposing submission filed on 26th February 2016, the 1st respondent submitted on three issues. The first issue is whether the court has the jurisdiction to entertain or interfere with matters that are pending before an Arbitral Tribunal. It was submitted that Article 159 (2) of the Constitution promotes and protects alternative means of dispute resolution. Further, that Section 10 of the Arbitration Act,1995 expressly prohibits the intervention by the courts in matters that are subject of the arbitral process, except as provided for under the Act.

23. In addition, it was submitted that Section 14 of the Arbitration Act,1995 provides for the procedure for challenging the independence of the Arbitrator- that the ***first instance forum is the tribunal itself and that the High Court can only intervene in its appellate jurisdiction to entertain issues arising from the tribunal's decision.***

24. That despite the 1st respondent challenging jurisdiction of the Arbitral Tribunal, by virtue of the purported agreement, the parties herein subjected themselves to the process of Arbitration and must therefore deal with the matter in accordance with the legal provisions of the Arbitration Act, 1995 and that until the tribunal makes s a decision on the applications pending before it, this court is barred from interfering with the arbitral process. It was submitted that in view of the above, ***it is an abuse of court process to bring this application yet there is a similar application pending before the tribunal for determination.***

25. I have carefully considered the application by the applicant seeking for stay of proceedings pending before the Arbitral Tribunal chaired by the sole Arbitrator Mr Walter Odundo who is also the 2nd respondent herein. I have also considered the serious opposition raised by the 1st respondent and the parties' advocates' rival respective submissions as supported by case law and statutory law. I note that the application herein for stay is interlocutory, in the main Originating Summons dated 4th November 2015 which seeks for termination of the mandate of Walter Odundo as the sole Arbitrator and appointment of another Arbitrator by the Chairman of Architectural Association of Kenya. That Originating Summons is filed pursuant to Section 15(1) (a) and (2) and 19 of the Arbitration Act, No. 4 of 1995 and all other enabling laws.

26. I further note that in urging this court to stay proceedings before the Arbitral Tribunal, parties' advocates have delved into the merits of the Originating Summons and therefore the justifying reasons why the sole Arbitrator Mr Walter Odundo's mandate should or should not be terminated, with the 1st respondent giving a very detailed history of the events leading to the present scenario.

27. The issue for determination in this application in my humble view is whether this court can intervene in arbitral proceedings particularly when a similar application for the arbitrator to cease arbitrating over the material dispute for alleged bias and on account that he has no jurisdiction to hear and determine the dispute is pending before him.

28. The background to the dispute herein is that by an agreement between the parties hereto dated 20th May 2010, the applicant agreed to build for the respondent apartments on plot No.1102/XXV1/M1-KIZINGO Mombasa. However, it is alleged that the respondent breached the terms of the agreement by filing to pay as per the agreement and payment certificates issued by the contractor to the employer/respondent. The applicant therefore was aggrieved by the breach and declared a dispute leading to the appointment of the Arbitrator.

29. In **Prof Lawrence Gumbe & Another V Honourable Mwai Kibaki & Others HC Miscellaneous 1025/2004,** it was held that by dint of Section 10 of the Arbitration Act, where a party was not invoking the powers donated by Section 39 of the Act, no court would intervene in matters governed by the Act. **In Kenya Shell Ltd Vs Kobil Petroleum Ltd CAPP No. Nairobi 57/2006** it was held that Section 10 is so clear as to discourage intervention of the courts even at the appellate stage/level. Onyango Otieno JA in the Kenya Shell Ltd case stated that the court's intervention under Section 35 could only be if conditions under Section 39(3) were satisfied that when parties agree and choose to resolve their disputes under the Act, by way of arbitral proceedings, the courts take a back seat. further, 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.

30. Whether Section 10 excludes applications for stay of awards/judgments/proceedings. In **CIVIL APPEAL (APPLICATION) NO.61 OF 2012 Nyutu Agrovet Ltd V AIRTEL NETWORKS LIMITED,** citing the case of **Chief Lesapo Vs North West Agricultural Bank,** the Constitutional Court of South Africa expressed very strong sentiments that the right of access to court is fundamental and central to the stability of an orderly society to ensure that litigants do not resort to self help means to resolve their disputes and that therefore as a result very powerful considerations would be required to its limitation(access) to be reasonable and justifiable.

31. Arbitration is considered, as modeled under UNCITRAL Model Rules, to be a useful tool as a matter of public policy, to settle disputes among contracting parties and hence the arbitration Act No. 4/1995 and Article 159(2) (c of the Constitution.

32. Section 35(1) gives situations for recourse to the High Court. The court is prevented by Section 10 of the Act from intervening or interfering in arbitral process in any manner except as set out in the cases cited or circumstances cited in Section 39 of the Act.

33. From the above exposition, this court notes that the issue of jurisdiction of the arbitrator to hear and determine the dispute as filed and his alleged bias and lack of independence are pending before the arbitrator, with the issue of jurisdiction having been raised first by the 1st respondent, with the issue of the recusal of the Arbitrator having been raised by the applicant later. Under Section 17(6) of the Arbitration Act this court has the jurisdiction to entertain an appeal. the section provides that:

> ***"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."***

34. Rule 33 of the Chartered Institute of Arbitrators, **CIArb Arbitration Rules 2012** enjoins the parties to ensure and do all they can to aid an expeditious and cost effective disposal of the Arbitration cause. Expeditious determination of the disputes is an attribute that attracts the parties to arbitration in the first place. It therefore follows that the issue of jurisdiction being paramount must be determined first before any other issue is considered and any party aggrieved by the arbitrator's decision will have an opportunity to challenge it in the High Court. In **Owners of Motor Vessel Lillian 'S' Vs Caltex Oil (K) Ltd** ***[1989] KLR 1*** it was held that:

> ***"Jurisdiction is everything, without it, a court of law (or tribunal) has no power to make one more step. Where a court (or tribunal) has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law or tribunal downs its tools in respect of the matter before it the moment it holds opinion that it is without jurisdiction ….."***

35. In **Re the matter of the IIEC [2011] e KLR** the Supreme Court stated that:-

> ***"Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel Lillian 'S' V Caltex Oil (K) Ltd [1989] KLR 1 which bears the following passage (Nyarangi) JA at page 14)***

" I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it….

The Lillian's" ease establishes that jurisdiction flows from the law, and the recipient court is to apply the same, with any limitation embodied therein, such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity , in the case of the Supreme Court, Court of Appeal and HC their respective jurisdictions are donated by the Constitution."

36. In the persuasive case of **Eldoret Municipal Council v Rural Housing Estate Ltd Civil Suit No. 255 of 2001 (OS) KLR (2002) 1 KLR 589** Tunya J held that:

*"**1. The applicant's application is competently before the court under section 17 of Arbitration Act which is the appropriate provision.***

2. Jurisdiction cannot be conferred or waived by consent or the parties.

3. The issue of jurisdiction was fundamental. Once a tribunal lacks jurisdiction, any proceedings held before it must be null and void, therefore the issue of jurisdiction must be determined first before the arbitrator may conduct any proceeding."

37. In **Anne Mumbi Hinga Vs Victoria Njoki Gathara [2009] e KLR** the Court Appeal stated that:

" We therefore reiterate that there is no right for any court to intervene in the arbitral process or on the award except in the situation 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 Arbitral Act…..

38. Section 10 of the Arbitration Act, 1995 is clear that: ***" Except as provided in this Act, no court shall intervene in matters governed by this Act."*** It follows that courts are expressly forbidden by Section 10 of the Act from intervening other than as provided in the Act and as stated above, where there are issues involving violation of the constitutional provisions.

39. Section 7 of the Act empowers the courts to grant interim measures of protection pending hearing and determination of arbitral proceedings, in addition to the court's interventions as per Sections 35 and 39 of the Act. Section 39 provides that parties to the Arbitration can agree that the court can determine any question of law arising in the course of Arbitration or that the court may entertain an appeal on questions of law that arises. Section 35 provides much more instances that would enable the court to intervene. It provides inter alia that r**ecourse to the High Court against an arbitral is award only not against a ruling as defined under Section 3 as " Arbitral award"** means any award of an arbitral tribunal and includes an interim arbitral award." **Black's Law Dictionary 8th Edition defines 'award'** as final judgment or decision , especially one by an arbitrator……" **'Ruling'** is defined as " the outcome of the courts' decision either on some point of law or on the case as a whole."

40. In the instant case, the Arbitrator gave directions that he wished to determine the issue of jurisdiction before him first as raised by the 1st respondent before he could deal with the issue of his recusal on allegations of his perceived bias or lack of independence. It is those directions that provoked the applicant herein to seek to challenge the mandate of the arbitrator and an allegation that he was being controlled by the 1st respondent.

41. In my humble view, since the Arbitrator has the jurisdiction to hear and determine issues of his jurisdiction to hear and determine whether or not he has the jurisdiction to hear and determine the dispute as filed, and as the arbitrator has the power to hear and determine whether he should recuse himself from

the proceedings, and as the fact that an application for stay of arbitral proceedings is pending before the arbitrator is not denied, this court, in my humble view would be usurping the tribunal's powers if it was to order for stay of the arbitral proceedings wherein the arbitrator was poised to hear and determine whether or not he had jurisdiction to hear and determine the dispute as objected to by the 1st respondent. this, however, is not to say that the Originating Summons is wrongly before this court but that the issue of stay should have been sought and determined in the first instance before the arbitrator before coming to court. In the Court of **Appeal 248/2005 EPCO Builders Ltd V Adam S Marjan Arbitrator & Another**, the Court of Appeal held that:

> ***" Such recourse to the court should not become common place (practice)." If it were allowed to become common practice for parties dissatisfied with procedure adopted by the Arbitrator (s) to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of ADR whether Arbitration or mediation would dwindle with adverse effects on the pressure of the courts.***
>
> ***This does not mean that recourse to a constitutional court during arbitration will never be appropriate equally, it does not mean that a party wishing to delay an Arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the trial when the Arbitration Act 1995 itself has a specific provision in Section 19 stipulating that the parties shall be treated with equality and each party shall be given full opportunity of presenting his case." In order to secure substantial delay. It is to become common, commercial parties would be discouraged from using ADR."***

42. From the above decision of the Court of Appeal, whereas a party can raise a constitutional issue arising from arbitration proceedings for consideration, the applicant, in this case, in my view simply plucked out a constitutional provision of Article 50 of the Constitution but has not applied it to the directions of the arbitrator that he wished to hear the issue of jurisdiction first. In my view, the applicant is by these proceedings seeking to oust the power of the arbitrator to determine whether or not he has jurisdiction to hear and determine the dispute. In my view, the issue of bias or lack of independence of the Arbitrator can only be determined by the arbitrator himself and if it is found that he has no jurisdiction to hear and determine the dispute, he will no doubt have to down his tools and say no more one thing. In that regard, the arbitrator would not decide on whether or not he should recuse himself and not otherwise. In my humble view, to stay the arbitral proceedings would, in the instant case, be preemptive and tantamount to barring the arbitrator from hearing the preliminary objection on his jurisdiction to hear and determine the dispute which is unacceptable.

43. In my humble view, the applicant has not satisfied this court why this court should be moved to stay arbitral proceedings and therefore intervene to supervise the arbitrator as provided in Article 165(6) of the Constitution. It has also not been demonstrated that the arbitrator in directing that the preliminary objection on jurisdiction be heard first, acted outside the law and the law in this case is the Arbitration Act and the Constitution of Kenya. I see nothing in the arbitrator's directions that would attract supervisory powers of this court Article 16(6) and (7) of the Constitution. I am equally not seized of any evidence that the sole arbitrator in directing that he hears the Preliminary Objection first, he failed to ensure that the applicant received fair administration of justice as stipulated in Article 165(7) of the Constitution. I do not find that the insistence on the part of the Arbitrator to hear the issue of his jurisdiction first before considering the allegation of bias and or independence raised by the applicant is a clear breach of Article 50 of the Constitution on fair hearing since determining the issue of jurisdiction first before proceeding with any other hearing is a prerequisite or that he had therefore ceded the control of the proceedings to the 2nd respondent or that he had become antagonistic.

44. Furthermore, Section 20(1) of the Act empowers the Arbitrator to determine the rules of procedure to be used by the arbitral tribunal in the conduct of proceedings. The Arbitrator has the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submissions in respect of any matter has been fairly and adequately made.

45. The Arbitration Act, 1995 too has an elaborate procedure for challenging the powers of the Arbitrator. Section 14(1) empowers parties to agree on a procedure for challenging an arbitrator. Otherwise, the procedure for challenging an arbitrator is as follows: i. Under Section 14(2) the party who intends to challenge an arbitrator sends a written statement of the reasons for the challenge to the arbitral tribunal 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). 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. ii. Section 14(3) provides that if a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party, within 30 days after being notified of the decision to reject the challenge, applies to the High Court to determine the matter. Under Section 14(5), the High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

46. It therefore follows, in my humble view, 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.

47. In my view, the Arbitrator was alive to the fact that jurisdiction is everything without which a tribunal ought not to make one more step and hence this court should not be seen to be capping that power of the arbitrator to determine whether or not he has jurisdiction to hear and determine the dispute before him, before he can make any one more step of considering the complaint by the applicant that he appears to be biased, partial and therefore not independent and that he had become antagonistic and descended into the arena of the disputants which matters can only be determined in the first instance by the Arbitrator and subsequently by the High Court.

48. In my view, 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.

49. With the above in mind, the fact that the arbitrator did not file a response to this application for stay of proceedings pending before him until the Originating Summons filed herein is heard and determined will not prejudice the outcome of the application as it must be heard on merits and not on the fact of absence of a response by the arbitrator. Such applications under the Arbitration Act are never considered unopposed given the nature of arbitration as a consensual process in the resolution of disputes.

50. For the foregoing reasons, and for reasons that situations where the High court can intervene in arbitral proceedings (see sections 14 and 39 of the Arbitration Act, 1995) are limited; and as no consent between the parties is filed allowing this court to intervene in the pending arbitral proceedings, I decline to grant the prayers sought herein. I emphasize that I would only intervene in the pending arbitral process if there was evidence of violation of the law or the Constitution, and or where an arbitral award is issued as provided for under Section 33 of the Arbitration Act.

51. I find that there is a deliberate attempt to duplicate proceedings both in the Arbitral Tribunal and before this Court which in my humble view is an abuse of the legal process which must be frowned upon as it encourages forum shopping exercise. In my humble view, and as it is not denied that there is pending before the Arbitrator an application on whether or not he has jurisdiction to hear and determine the matter, there is absolutely no reason why the Arbitrator cannot be allowed to hear that application first before considering any other procedural issue. The law is clear that whoever is dissatisfied with the outcome, either way, can approach the High Court through the established procedure.

52. I have in this ruling endeavoured not to delve into the merits of the Originating Summons as was submitted on by both parties' advocates as that can only be dealt with by the trial judge hearing the Originating Summons. Thus, I would not attempt to discuss the alleged conduct of the Arbitrator as that would be intervening when the substantive Originating Summons touching on his conduct is pending. I note that the authorities cited by the applicant's counsel all relate to termination of the Arbitrator's mandate which the Judge hearing the Originating Summons will no doubt examine.

53. In the end, I find that the intended stay will only aggravate the delay in determining the substantive pending issues in this matter. It will not serve any useful purpose in this matter and neither will a refusal of stay prejudice the applicant in any way. Accordingly, the applicant's Notice of Motion dated 4th November 2015 is hereby dismissed with costs to the 1st respondent.

Dated, signed and Delivered in open Court at NAIROBI this 17th day of May, 2016

R.E.ABURILI

JUDGE

In the presence of:

Mr Odera for the applicant

Mr Mwenesi h/b for Mr Muturi for the 1st Respondent

N/A for the 2nd Respondent

Henry: Court Assistant