



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO 443 OF 2011

AFTRACO LIMITED.....PLAINTIFF

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT

AND

EXCLUSIVE ESTATES LTD.....1ST PROPOSED INTERESTED PARTY

POSTEL HOUSING CO-OPERATIVE SOCIETY

LIMITED.....2ND PROPOSED INTERESTED PARTY

RULING

[1] The Notice of Motion that is the subject of this Ruling is the one dated **15 August 2016**. It was filed by the Defendant pursuant to **Article 159** of the **Constitution, Sections 1A, 1B, 3A, 59C and 63(e)** of the **Civil Procedure Act and Order 46 Rule 20 of the Civil Procedure Rules, 2010**, for orders that:

[1] Spent

[2] There be a stay of the arbitral proceedings before Ms. Z.Janmohamed, Arbitrator, in the Matter of an Arbitration between Exclusive Estates Limited and Telkom Kenya Limited, Postel Housing Co-operative Society Limited and Afraco Limited pending the hearing and determination of this application.

[3] There be a stay of the arbitral proceedings before **Mr. A.F. Gross**, Arbitrator, in the Matter of an Arbitration between Afraco Limited and Telkom Kenya Limited pending the hearing and determination of this application.

[4] The arbitral proceedings before **Ms. Z.Janmohamed**, Arbitrator in the Matter of an Arbitration between Exclusive Estates Limited and Telkom Kenya Limited, Postel Housing Co-operative Society Limited and Afraco Limited and the arbitral proceedings before Mr. A.F. Gross, Arbitrator, in the matter of an Arbitration between Afraco Limited and Telkom Kenya Limited be consolidated and heard together and a single award published.

[5] An order directing **Ms. Z. Janmohamed**, Arbitrator and **Mr. A.F. Gross**, Arbitrator to appoint an umpire within 30 days who will form part of the arbitral tribunal hearing the consolidated arbitration.

[6] In the alternative to prayer (5) above, this court appoint an umpire who will form part of the arbitral tribunal hearing the consolidated arbitration.

[7] The costs of the application be provided for.

[2] The grounds upon which the application was predicated are set out in the Notice of Motion, namely: that the issues raised in the two arbitrations that are going on concurrently are similar and affect the ownership of the piece of land known as LR No. 7656 (the suit property); and that there is a likelihood of the two arbitrators reaching conflicting decisions on the issues before them if the arbitral proceedings are not consolidated, with the result that there is likely to be absurdity and confusion and including compliance challenges. The Defendant also averred that it is an unnecessary duplication of work and misuse of resources to address the arbitral tribunals on the same issues and to have the arbitral tribunals determine the same issues in two separate arbitrations. Thus, it was the case of the Defendant that it is in the interests of justice that the application be allowed to pave way for a harmonized, expeditious, efficient, proportionate and economical disposal of the dispute amongst the parties hereto.

[3] The application is premised on the affidavit of **Wangechi Gichuki**, the acting Chief Legal and Regulatory Affairs Officer of the Defendant, **Telkom Kenya Limited**, sworn on **16 August 2016**. The case of the Defendant, as can be gleaned from that affidavit, is that it is the owner of all that property known as **LR No. 7656**, which property was transferred to it in 1998 from the defunct **Kenya Posts and Telecommunication Corporation (KPTC)**. That on or about **19 January 1993**, the **Postel Housing Co-operative Society Limited (Postel)** allegedly entered into an agreement with **KPTC** for the sale of **60 acres** of the suit property, but that the sale was never completed because **Postel** never performed its obligations under the sale agreement. It was further averred that **Postel** thereafter signed a Deed of Assignment with **Exclusive Estates Limited (Exclusive Estates)** whereby it purported to transfer all its rights, title and interest in the suit property to **Exclusive Estates**. On the basis thereof, **Exclusive Estates** filed **High Court Civil Case No. 1158 of 2001: Exclusive Estates Limited vs. Telkom Kenya Limited and Postel Housing Co-operative Society Limited** seeking, *inter alia*, and order for specific performance to have the property transferred into its name. This is the dispute that was, by consent, referred to arbitration before **Z. Janmohamed** on **27 May 2011**.

[4] It was further deposed on behalf of the Defendant that on **5 July 2011**, the Defendant entered into an agreement with the Plaintiff herein for the sale of the property, and after executing the sale agreement, but before completion of the sale, the Defendant became aware of an order of the High Court made *ex parte* on **19 July 2011** upon an application by **Exclusive Estates** to commence judicial review proceedings in **JR Miscellaneous Civil Application No. 69 of 2011: Registrar of Titles and Others ex parte Exclusive Estates Limited**. That the judicial review proceedings were instituted to *inter alia* quash the decision of the Registrar of Titles contained in the letter dated **27 June 2011** to remove the caveat registered by **Exclusive Estates**. Consequently, the Plaintiff filed this suit seeking and order of Specific Performance to compel the Defendant to transfer the property into its name. Thereafter, on **10 October 2012**, the parties herein recorded a consent to refer this matter to arbitration, and **A.F. Gross** was appointed as the Arbitrator.

[5] In the course of time, the Plaintiff herein, having joined the **Janmohamed** Arbitral Proceedings as an Interested Party, applied before **Z. Janmohamed**, Arbitrator, to have the two arbitral proceedings consolidated, on the ground that they both dealt with the same property. In her Ruling dated **2 September 2014**, **Ms. Janmohamed** dismissed the application on the ground that she lacked the jurisdiction to give the orders sought. Thus, save for delays occasioned by the **JR Proceedings** and the Appeal arising therefrom, the two arbitral proceedings have been going on concurrently, as the parties have been unable to agree on consolidation. It was thus the contention of the Defendant, as the Respondent in both arbitral proceedings, that it would be a terrible waste of resources for it to present the same set of evidence in the proceedings, hence the application.

[6] The application was opposed not only by the Plaintiff, but also by the two proposed Interested Parties herein, namely, **Exclusive Estates Limited** and **Postel Housing Co-operative Society Limited**. The Plaintiff relied on the Grounds of Opposition and the Replying Affidavit sworn by **Salim Sadru**, both of which were filed herein on **25 August 2016**. The main grounds set forth therein are as hereunder:

[a] That the instant application as framed is legally untenable, frivolous, vexatious, a classic abuse of the court process and an affront to the central tenets and principles of arbitration;

[b] That the Court lacks the requisite jurisdiction by dint of **Section 10** of the **Arbitration Act** which restricts the role of the court in matters pertaining to arbitration;

[c] That the issue of consolidation has already been determined by **Ms. Janmohamed**, Arbitrator in her Ruling delivered on **2 September 2014** and is therefore *res judicata*.

[d] That the 1st proposed Interested Party has no legally tenable claim over the suit property and therefore consolidating the two arbitrations will only obfuscate and confuse the issues to be determined by the Arbitrators;

[e] That the cause of action pending before the two Arbitrators are distinct and separate; and

[f] That **Clause 16(1)** of the **Sale Agreement** specifically provides that all claims and disputes whatsoever arising under the said agreement shall be referred to arbitration in accordance with the provisions of the **Arbitration Act, 1995** by a single arbitrator to be appointed.

[7] The foregoing grounds were explicated in the Replying Affidavit of **Salim Sadru**, wherein, aside from reiterating the background information provided herein above, it was deponed that, as of **2012**, the Defendant herein was well aware of the pending arbitration between themselves and **Exclusive Estates Limited** before **Ms. Janmohamed** and made no attempt whatsoever to seek consolidation, and that to do so now is merely an attempt to scuttle and further delay the matter; and that, in any event the issue of consolidation is *res judicata*.

[8] The response of the 1st proposed Interested Party is in the Replying Affidavit sworn by one of its Directors, **Francis MburuMungai** on **17 August 2016** and filed herein on 18 August 2016, in which it was deponed that so far, the 1st proposed Interested Party is not a party to this suit. Accordingly, it was averred that a Preliminary Objection on this point would be raised *in limine*, for the Court to determine whether it had jurisdiction under the **Arbitration Act, 1995** to hear and determine the instant Notice of Motion. The deponent then went on to give a narration of the backdrop to their dispute with the Defendant and the events leading to the Janmohamed Arbitration, including the proceedings held thus far and the challenges thereto. **Francis MburuMungai** further set out the result of the various applications that have been filed in respect of the Janmohamed Arbitration and related cases, including the Appeal ensuing therefrom; the effect of which was that the Janmohamed Arbitration could not be proceeded with until after **11 March 2016** when the Court of Appeal delivered its decision, allowing the Appeal of the 1st proposed Interested Party. It was thus the contention of the 1st proposed Interested Party that the Defendant, in filing the instant application, is merely intent on frustrating the hearing and determination of the Janmohamed Arbitration.

[9] It was further deponed on behalf of the 1st proposed Interested Party that in the Order for Directions issued on **21st July 2016** by **Mr. A.F. Gross**, Arbitrator, it was stated that the Plaintiff and the Defendant should consider the pragmatism of allowing the Janmohamed Arbitration to be concluded before continuing with the Gross Arbitration, granted that the parties were against consolidation; that the Defendant has not shown or demonstrated which difficulty it has or what prejudice it will suffer by pursuing the aforementioned direction by **Mr. Gross**.

[10] In a nutshell, the 1st proposed Interested Party is opposed to the consolidation of the two arbitral proceedings and set out the reasons therefor to in Paragraph 18 of its Replying Affidavit thus:

[a] That the 1st and 2nd proposed Interested Parties are not parties to this suit and have no interest at all in this suit;

[b] That Ms. Janmohamed was appointed an Arbitrator by a Consent Order in **HCCC No. 1158 of 2001**, which order has not been vacated;

[c] That the causes of action this case and **HCCC No. 1158 of 2001** are different;

[d] That the Court of Appeal decision reinstating the caveat by the 1st proposed Interested Party vitiated the purported agreement between the Plaintiff and the Defendant, rendering it unenforceable *ab initio*;

[e] That it would be unjust to compel the 1st proposed Interested Party to participate in an arbitration based on a contract tainted with illegality as confirmed by the decision of the Court of Appeal.

For the foregoing reasons, the 1st proposed Interested Party opposed the Defendant's application and urged for its dismissal with costs.

[11] The 2nd proposed Interested Party, **Postel Housing Co-operative Society Ltd** also opposed the application, to which end it filed Grounds of Opposition herein on **18 August 2016** to the effect that:

[a] It is not a party to this suit or dispute.

[b] That the consent order of **27 May 2011** appointed the Arbitrator in **HCCC No. 1158 of 2001: Exclusive Estates Ltd vs. Telkom Kenya Ltd and Postal Housing Co-operative Society Ltd** has not been set aside.

[c] That there is no jurisdiction under **Sec. 10 of the Arbitration Act, Cap 49 of the Laws of Kenya** for the Court to consolidate 2 different arbitrations.

[d] The causes of action in the 2 arbitrations are different.

[e] The issue of consolidation having been raised before **Ms. Janmohamed**, Arbitrator, and ruled upon, is *res judicata*.

[f] The Notice of Motion has been filed with mala fides, with an ulterior motive of scuttling the hearing that had been scheduled for **20 to 22 September 2016**

The 2nd proposed Interested Party therefore joined the Plaintiff and 1st proposed Interested Party in urging for the dismissal of the instant Notice of Motion application with costs.

[12] The application was canvassed by way of written and oral submissions. The Defendant's written submissions were filed herein on **31 August 2016** together with their Digest of Authorities. The submissions were highlighted by **Mr. Murugara** on **31 August 2016**. For the Plaintiff, **Ms. Hananmade** oral submission and relied on their Grounds of Opposition, Replying Affidavit and List of Authorities filed. **Messrs Gichuhi** and **Anzala** made their oral submissions on behalf of the proposed Interested Parties. **Mr. Gichuhi** relied on their Notice of Preliminary Objection dated **17 August 2016** as well as the Replying Affidavit sworn by **Mr. Francis Mburu** on behalf of the 1st proposed Interested Party as well as the two Lists of Authorities filed on **18 and 29 August 2016**, respectively. It is manifest that the historical background to this application is not in contest. It is not in dispute that there are two separate and parallel arbitral proceedings that are ongoing in respect of the suit property. Having given due consideration to the application, the affidavits filed as well as the submissions made by Learned Counsel, the issues for determination can be narrowed down to the following:

[a] Whether the Court has jurisdiction to grant the orders sought herein for the consolidation of the Janmohamed and Gross arbitral proceedings; and if so,

[b] Whether the issue of consolidation of the two arbitral proceedings is *res judicata*; and if not

[c] Whether a good case has been made for the consolidation of the two arbitral proceedings.

[13] The Courts jurisdiction in respect of the Defendant's Notice of Motion dated **15 August 2016** was challenged by the Plaintiff and the proposed Interested Parties on the basis of **Section 10 of the Arbitration Act**, which provides thus:

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

It was thus submitted that since the instant application is neither for interim relief pending arbitration nor setting aside an arbitral award, the Court has no jurisdiction to entertain the same by dint of **Section 10 of the Arbitration Act** aforementioned. It cannot be gainsaid that the dispute that is the subject matter of this suit is presently undergoing arbitration and that what is before the court is the question of consolidation. Accordingly, the question to be posed is whether consolidation of arbitral proceedings is a matter **governed** by the Arbitration Act.

[14] A careful perusal of the Arbitration Act shows that it is silent on the issue of consolidation of arbitral proceedings either at the instance of an Arbitral Tribunal or by the Court. The work, **A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary by Howard M. Holtzmann and Joseph E. Neuhaus**, was cited by Counsel for the Defendant, to explain why the apparent omission in the **UNCITRAL Model Law**, the basis of which the Arbitration Act is fashioned. The authors stated thus:

"...This would also help to make clear that there are special aspects of arbitration which are not regulated in the model law. Such aspects include, inter alia, definitions of arbitrability, the capacity of parties to conclude an arbitration agreement, concepts of sovereign immunity, consolidation of arbitration proceedings..."

[15] The authors, thus, expressed the view that whereas the model law would prevail in matters and questions covered by the model law, other provisions of the national law remain applicable if they deal with issues which have been left outside the model law, such as consolidation of arbitral proceedings. The Court was therefore urged, pursuant to **Articles 159 and 165(6) of the Constitution, as read with Sections 1A, 1B, 3A, 59C and 63(e) of the Civil Procedure Act**, to venture outside the Arbitration Act and exercise its supervisory jurisdiction with a view of furthering the Overriding Objective of the Civil Procedure Act and the Rules thereunder.

[16] It is common ground herein that the issue of consolidation of arbitral proceedings is not specifically covered either by the **UNCITRAL Model Law** or the national law, namely the **Arbitration Act**. Consequently, I would agree with the Defence Counsel that consolidation is a matter that falls outside the ambit of **Section 10** of the Act. That being the case, the Court has the jurisdiction pursuant to **Articles 159(2)(d) and 165(6) of the Constitution, as well as Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act**, to entertain the application and, and if merited, grant orders that would meet the ends of justice in this matter. I have no doubt that the Court has the residual power under the aforementioned provisions to ensure, not only that the ends of justice are attained, but to also facilitate the expeditious, proportionate and affordable resolution of civil disputes, in furtherance of the Overriding Objective of the Civil Procedure Act. This is the same viewpoint that was taken by the Court in the case of **Songa Ogoda & Associates vs. University of Nairobi [2014] eKLR**, concerning an application for stay of arbitral proceedings, a matter not specifically provided for in the **Arbitration Act**. I therefore find no merit in the argument that the Court's jurisdiction to entertain the application is ousted by **Section 10** of the **Arbitration Act**, granted that consolidation of arbitral proceedings is not, strictly speaking provided for in the said Act.

[17] Ancillary to the issue of jurisdiction is the argument by Counsel for the Defendant that **Section 10 of the Arbitration Act** is unconstitutional in so far as it amounts to a restriction of the supervisory jurisdiction of court as provided for in **Article 165(6) of the Constitution**. I however have no hesitation in rejecting this argument on the basis of the decision of the Court of Appeal in **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR** in which the Court held (albeit from the standpoint of Article 164(3) of the Constitution) that **Section 10 of the Arbitration Act** is not unconstitutional. The Court expressed itself thus:

"When parties expressly exclude court intervention in their arbitration agreement, then they should honour it and embrace the consequences. They cannot turn round and claim that the very law they have freely chosen to govern their business is unconstitutional..." (per Karanja, JA)

Thus, I am satisfied that the Court has the requisite jurisdiction to entertain the instant application and that the same is competently before the Court. As to whether the consolidation sought is merited is another matter altogether, which I will revert to shortly.

[18] The second preliminary issue that was raised in opposition to the application is that of *res judicata*, for the reason that the same issue of consolidation fell for determination before **Ms. Janmohamed** who, in her Ruling dated **2 September 2014**, dismissed the same. In this regard, **Section 7 of the Civil Procedure Act** provides thus:

"No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court."

[19] The foregoing provision has received attention in various judicial precedents such as the case of **DSV Silo Vs The Owners of Sennar [1985] 2 ALLER 104** an English authority that has been adopted in various similar Kenyan decisions, such as **Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others [2010] eKLR**, in which the Court laid down the following parameters which an applicant alleging *res judicata* must prove:

- a) That the matter in issue is identical in both suits.
- b) That the parties in the suit are substantially the same.
- c) That there is concurrence of jurisdiction of the Court.
- d) That the subject matter is the same and finally,
- e) That there is a final determination as far as the previous decision is concerned.

[20] Applying these requirements to the instant application, it can be seen that conditions (a) to (d) have been met. However, a question was posed by the Defendant as to whether a final determination had been made on the issue of consolidation by **Ms. Janmohamed**. At paragraph 17 of her Ruling dated **2 September 2014**, she stated thus:

"The proposition that the two arbitrations be consolidated is an attractive idea but unfortunately

1. There are two different causes of action.
2. Two different arbitrations involved in this matter and I have no jurisdiction to issue such orders unless the parties agree to the same.

As we are all aware an arbitration is a process which is party driven..."

Clearly therefore, since no final determination was made on the merits by **Ms. Janmohamed**, it is my finding that the application is competently before the Court and that the *res judicata* doctrine is, in the circumstance, inapplicable herein (see **Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd & 2 Others [2014] eKLR.**

[21] Turning now to the merits of the application, there appears to be a dearth of authorities in the area of consolidation of arbitral proceedings in Kenya, for which reason Learned Counsel for the Defendant drew my attention to persuasive authorities from outside our jurisdiction, namely **Illinois Farmers Insurance Co. vs. Glass Service Company 683 N.W.2d 792,** and **Litton Bionetics, Inc. vs. Glen Constr. Co. 292 Md. 34,437 A.2d 208 (1981)** in which the respective US courts had occasion to consider an application for consolidation of arbitral proceedings, in situations where the parties failed to agree on the matter. Whereas the two decisions support the argument that the courts should consider the efficiencies of consolidation and the danger of inconsistent judgments if disputes are arbitrated separately in respect of the same subject matter, and weigh these against the prejudice that parties may suffer as a result of consolidation, it is evident that even in the USA, the law is not settled. For instance, in **the Illinois Farmers Insurance case,** the Court observed thus:

"...The No-Fault Act and our Rules of No-Fault Arbitration are silent on the ability of courts to consolidate arbitration proceedings...two competing views on consolidation have emerged in other jurisdictions [in the USA]. Some courts follow the rationale we adopted in Grover - Dimond and have allowed consolidation when it will increase the efficiency of the arbitration...In contrast, several circuit courts have considered the issue of consolidation under the Federal Arbitration Act (FAA). The majority of these courts have refused to allow consolidation absent an explicit contractual or statutory mandate...These courts have taken the view that their sole duty under arbitration agreements is to ensure that agreements are enforced in accordance with their terms. Accordingly, the courts taking this view seek to protect the right of the parties to receive their bargained-for dispute settlement mechanism, regardless of any inefficiencies that may result..."

The two decisions further underscore the fact that a court may find that that consolidation is inappropriate if it would prejudice the rights of one of the parties to the dispute. Thus, unlike the **English Arbitration Act**, in which consolidation is expressly permitted if the parties provide for it in their agreement, the two USA authorities appear to suggest that the situation in the USA is, more or less, the same as in Kenya, the bottom-line being that each case would turn on its own facts.

[22] Be that as it may, the Court of Appeal, in a five-judge bench, has provided invaluable guidance in the case of **Nyutu Agrovat Limited vs. Airtel Networks Limited [2015] eKLR,** by re-stating the limited role of the Courts in arbitral proceedings and the importance of consent of the parties to arbitral proceedings thus:

"...it is not disputed that the mode to resolve disputes and particularly commercial ones by way of arbitration, is entirely the disputants' own choice. The State has set up the court system to resolve disputes but the larger commercial community has decided, for various reasons that it will in a consensual manner, take the resolution of whatever disputes that may arise in their transactions in their own way. And so by agreements duly executed and therefore binding on them, the business people and merchants place their disputes before a single or whatever number of arbitrators, again, selected, appointed in their own way or in the way they agree on, to settle their disputes...And because the commercial community desired to keep clear of the courts as far as possible, through Parliament, business people included in the Arbitration Act, only limited instances to allow for court intervention when engaged in arbitration..." (per Mwera, JA)

The Court, thus, re-affirmed its earlier decision in **Anne Mumbi Hinga vs. Victoria Njoki Gathara** in which it was categorically stated thus:

"We therefore reiterate 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..."

[23] In the instant matter, the Plaintiff and the proposed Interested Parties were categorical that the two arbitrations are disparate in that whereas the Janmohamed arbitration is in respect of 60 acres of land, the Gross arbitration is in respect 79 acres thereof; that the arbitrations are in respect of different contracts between parties and that there is no privity of contract between some of them; and that the parties agreed on who their arbitrators were and should therefore not be overruled in that regard. Thus, the only commonality appears to be the Defendant, noting that the proposed Interested Parties have come on board in protest. In particular, Counsel for the 1st proposed Interested Party referred the Court to their letter dated **26 July 2016** in support of their position and added that a consolidation would give credence to the alleged sale agreement between the Plaintiff and the Defendant, which was impugned by the Court of Appeal; while the 2nd proposed Interested Party urged the position that the Defendant should not be allowed to force the parties to sit over a non-existent dispute between them.

[24] In the foregoing circumstances, it is my considered view that it would neither be expedient, nor in the interests of the parties for the court to force a consolidation as well as an umpire on them. The same view was expressed by **Kamau, J** in **Hanif Sheikh vs. Alliance Nominees Limited & 17 Others [2014] eKLR**, in which the Learned Judge held that the court could not intervene and order consolidation of the disputes therein for determination by a single arbitral tribunal in view of the consensual nature of arbitral proceedings. In the premises, and on the basis of the decision of the Court of Appeal in **the Nyutu Agrovat Case**, it is my considered view that unless consented to by the parties, an order of consolidation would not meet the ends of justice in this matter.

[25] I note that an attempt was made by the Defence Counsel to distinguish the authority as well as the case of **Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR**, on which the decision was based. Counsel specifically pointed out that:

[a] Both cases involved parties who sought to appeal decisions of the High Court on applications to set aside arbitral awards;

[b] that both cases involved the issue of setting aside an arbitral award which is an issue governed by the Arbitration Act;

[c] That in both cases, the Arbitration Act had set out the rights of the parties and the role of the courts and therefore it could not be said that the issue of setting aside an arbitral award is not governed by the Arbitration Act;

[d] That the issue the court has been asked to determine herein is not an issue governed by the Arbitration Act.

[26] It is noteworthy however, that the Court of Appeal in **the Nyutu Agrovat case** was alive to the overall significance of their decision on arbitration law in general, for which reason, **Karanja, JA** observed thus:

"This notice of motion is not just about Nyutu Agrovat (respondent) and Airtel Networks Kenya Ltd (applicant). It is not a simple application arising from their contractual obligations *per se*. Rather, it raises an issue that transcends the contractual agreement creating the cause of action before the High Court and the appeal to this court...The fact that it has been heard by a bench of five judges underscores its importance. Its outcome will impact on how arbitration as an important alternative mechanism of dispute settlement is conducted in this nation..."

It is on the basis of the foregoing and, of course on the basis of the other relevant findings of the Court of Appeal therein, particularly in respect of the principle of party autonomy in arbitration, that I find the

decisions relevant to the facts of the instant application and therefore binding .

[27] In the premises, whereas the Court has powers under **Articles 159 and 165(6)** of the **Constitution** as read with **Sections 1A, 1B and 3A of the Civil Procedure Act** to entertain the application for consolidation and grant the orders sought, it is my considered finding that such an order would not be apt, granted the peculiar circumstances of this case. That being my view of the matter, I would dismiss the Notice of Motion dated **15 August 2016** with costs and vacate the stay order issued herein on **23 September 2016**.

It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28th DAY OF SEPTEMBER 2016.

OLGA SEWE

JUDGE