REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPL. NO. 538 OF 2015

GRAIN BULK HANDLERS LIMITED ……..……..……APPLICANT

VERSUS

MISTRY JADVA PARBAT & COMPANY LIMITED ……..RESPONDENT

IN THE MATTER OF AN APPLICATION UNDER SECTION 14 OF THE ARBITRATION ACT TO DETERMINE THE MATTER OF A CHALLENGE TO THE ARBITRATOR

AND

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ACT 1995(AS AMENDED BY THE ARBITRATION (AMENDMENT)

ACT NO. 11 OF 2009)

AND

IN THE MATTER OF AN ARBITRATION UNDER THE 2012 RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH)

("THE RULES")

BETWEEN

MISTRY JADVA PARBAT & COMPANY LIMITED …….CLAIMANT

AND

GRAIN BULK HANDLERS LIMITED …….…..……RESPONDENT

RULING OF THE COURT

The Originating Motion Application

1. The Originating Motion the basis of this Ruling is dated and filed herein on **11th December, 2015** by the Applicant/Respondent hereinafter **Grain Bulk Handlers Limited** *(hereinafter called "GBH") against* the respondent/claimant **Mistry Jadva Parbat & Company Limited** *(hereinafter called "MJP").* The Originating Motion is filed pursuant to **Section 14(3), (5) (7) and 8 of the Arbitration Act, No. 4 of 1995** and prays for the orders that;

a. This honourable court be pleased to uphold the challenge lodged by the applicant Grain Bulk Handlers

Limited before Philip Bliss Aliker, sole Arbitrator ("the Arbitrator") on 21st October, 2015 and remove the Arbitrator from the arbitration between Mistry Jadva Parbat & Company Limited and the Applicant.

b. This honourable court be pleased to order that the arbitral award dated 30th September, 2015 and issued by the Arbitrator on 21st October, 2015, is void.

c. This honourable court be pleased to order and direct that the Arbitrator do refund fees and expenses paid to him by the applicant herein, in the arbitration.

d. The costs of this application be provided for.

2. The Originating Motion is founded on the grounds set out therein, namely that;

a. The Arbitrator conducted himself in such a manner that exhibited bias and was contrary to the rules of natural justice.

b. The Arbitrator failed and/or neglected to treat the parties to the arbitration equally and fairly.

c. The Arbitrator failed to give the applicant herein a fair and reasonable opportunity to present its case.

d. The Arbitrator failed to hear and determined the applicant's challenge lodged on 21st October, 2015.

e. The Arbitrator failed to follow the procedure agreed to by both parties.

f. The applicant has lost total confidence in the Arbitrator's ability to fairly determine the arbitration.

g. The Arbitrator acted contrary to the issue of party autonomy which is a guiding principle.

3. The Originating Motion is supported by the following documents.

i. Affidavit sworn by Shazeen Chatur on 11th December, 2015.

ii. Further Affidavit sworn by Shazeen Chatur on 8th March, 2016.

iii. Affidavit sworn by Shazeen Chatur on 8th March, 2016.

iv. Supplementary Affidavit sworn by Shazeen Chatur on 20th April, 2016. This affidavit was to be expunged from these proceedings on a condition which was not fulfilled by the Respondent. Nonetheless the court has disregarded, the default, and allowed the affidavit as part of the record.

v. BGH's submission dated and filed herein on 20th April, 2016.

vi. Applicant's submissions in reply dated 11th July, 2016.

Representation

4. BGH is represented in these proceedings by Counsel **O.P. Nagpal and M/S Terry Mwango,** MJP is represented by **Sanjeev Khagram.**

The background

5. By an agreement dated 14th August 1995 entered into between GBH and MJP, MJP agreed to erect for GBH, a cereals and fertilizer storage and handling terminal on GBH's property in Shimanzi, Mombasa *("**the Building Agreement**").*

6. The Building Agreement was subsequently amended by various documents, including the following;

a. Amending Agreement dated 20th March 1998

b. Amending Agreement dated 6th May 1998

c. Amending Agreement dated 29th May 1998

d. Letter dated 29th July 1998 by which the contract sum was fixed at USD 10,346,077

(See copies of documents related to above history at pages 1 to 48 of Bundle "SC1" attached to the said Supporting Affidavit of Shazeen Chatur)

7. MJP commenced the aforementioned building works on or about 5th December 1998. After the completion of the works and possession being handed over to GBH, a dispute arose between the parties following which MJP invoked the arbitration clause in the Building Agreement and commenced arbitration proceedings in May 2008 *("the **First Arbitration**").*

8. In the First Arbitration proceedings, MJP sought *inter alia*, payment of USD 3,611,791.65 at a contractually agreed rate of Ksh.60 to the US dollar, *(although this exchange rate and applicable currency is disputed by MJP)* for payments allegedly due to it from GBH, in respect of additional works and variations.

9. MJP's claim was defended by GBH who in turn filed a counterclaim for Ksh.117,881,486/- in respect of overpayments made to MJP in relation to the works the subject matter of the Building Agreement.

10. The First Arbitral proceedings commenced before Norman Mururu, Arbitrator (now deceased) who was appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch). The late Mr. Norman Mururu was then removed and replaced by the present Arbitrator following an application dated 2nd June 2011 filed by MJP in the High Court in *Misc Civil Application No.506 of 2011*. The matters complained of by GBH in the present application relate to the proceedings before the Arbitrator.

GBH' case

Bias, procedural unfairness/irregularity and lack of good faith

11. GBH's case is that it was treated unfairly by the Arbitrator during the arbitration proceedings and that the conduct of the Arbitrator demonstrates clear and persistent bias against it in addition to several procedural irregularities at the heart of the arbitration. There was obvious lack of good faith on the part of the Arbitrator. To demonstrate this GBH refers to the first preliminary meeting held before the Arbitrator on 4th February 2014, where the parties agreed that all communication regarding the arbitration was to be by way of email, and that all parties including their representatives, were to be copied in. **M/S Shazeen** in her Supporting Affidavit states that during the course of the arbitration, the Arbitrator issued in all, 7 (seven) procedural orders. **(See pages 51 to 71 of exhibit "SC 1").** The letter "N" against the procedural orders issued by the Arbitrator was added to differentiate the procedural orders issued by the Arbitrator from those issued by the previous arbitrator the late Mr Norman Mururu. The hearing of the arbitration commenced on 1st September 2014 and closed on 11th September 2014 after the Arbitrator's visit to the site in Mombasa when he declared the proceedings formally closed.

12. On 5thFebruary 2015 the Arbitrator sent the parties an email informing them that he would deliver his

award in March 2015. On 19th April 2015, the Arbitrator then sent an email to the parties' Advocates indicating that he was working on a draft award and required that the parties make submissions by 3rd May 2015 on;

a. the relevance (if any) of the Court of Appeal judgment in the ***Glencore v KPC*** case; and

b. whether VAT was payable on the sums claimed by either party and on the costs of the arbitration.

13. A few days later, the Arbitrator in an email sent to the parties on 23rd April 2015 indicated that, "*the Tribunal is actually ready to hand down its Award*". By an email sent by the Arbitrator on 30th September 2015, the Arbitrator informed the parties that, "*the Final Award in this matter is now settled*".

14. Whilst the parties were awaiting delivery of the award, the Arbitrator by an email sent on Monday 19th October 2015, requested MJP to clarify how it had arrived at the sums it had claimed. The Arbitrator stated in part that, "*the Tribunal would like to know how the sum of US $2,304,901 (paragraph 105, page 44 of the Claimant's Skeleton Argument dated 20th August 2014 and in the interest schedule to the Claimant's Final Written Submissions behind photographs V0 19D), is made out. How does it breakdown? The Tribunal should also like to know how the said sum of US$ 2,304,901 relates to…..*".

15. GBH was startled at this request by the Arbitrator on 19th October 2015 come as it did fully one year after the conclusion of the hearing on 12th September 2014 and despite the Arbitrator's previous communications to the effect that the award was ready.

16. The Arbitrator in his said email of 19th October 2015 requesting MJP to provide certain clarifications, also requested that the parties have a telephone conference and that he was "*willing to immediately re-transfer the Arbitrators fees back to the Parties on the basis that the Award is not handed down*" which offer GBH accepted. GBH maintains that any clarification on the quantum of the claim raised by MJP should have been sought and given on oath by MJP's witnesses during the hearing and not informally through its advocates during a conference call. It is GBH's case that the Arbitrator's willingness to refund its fees on the basis that the award was not handed down, was indicative of the fact that the Arbitrator acknowledged that he had significantly delayed publishing his award. GBH believes the Arbitrator was still undecided about it and was obviously totally unsure about the figures/sums claimed by MJP on which it was now clearly too late to take evidence. GBH states that it is significant that the Arbitrator in the email of 19th October 2015, only invited MJP to address him on the issues he had posed for the Respondent without affording GBH an opportunity to comment on the same. On this ground GBH believes that the Arbitrator was still grappling with the figures and was looking to MJP in an informal way by requesting the parties for a conference call of which there would have been no transcript to demystify the whole thing for him while leaving GBH completely uninvolved and the Arbitrator did not set out an agenda for the conference call and neither did he comply with agreed procedure.

17. Quite surprisingly, before any of the parties could acknowledge or respond to the Arbitrator's email of 19th October 2015 as had been agreed in the ground rules and email of 8thJanuary 2014, the Arbitrator then wrote an email to the parties on 20th October 2015 stating that "*the award dated 30th September 2015 is ready to be handed down*" subject to the clarifications sought from MJP. GBH's Counsel Mr Nagpal of O.P Nagpal & Company Advocates, only saw the Arbitrator's email of Monday 19th October 2015 on Wednesday 21st October 2015 as Tuesday 20th October 2015 was a public holiday in Kenya. GBH alleges that the Arbitrator's email of 20th October 2015 was the first time the Applicant and its then Advocate Mr Nagpal, came to know that according to the Arbitrator there was an award allegedly dated 30th September 2015 as it had not been sent to any of the parties. *(For the foregoing see pages 72-77 of the exhibit* ***"SC1").***

18. By an email dated 21st October 2015 sent at 10:47 am *(pages 78 to 79)*, GBH through its then

Advocate Mr Nagpal, wrote to the Arbitrator objecting to his request of 19th October 2015 seeking several clarifications from the Claimant. In this email of 21st October 2015, Mr Nagpal informed the Arbitrator that he would file his written statement of reasons for the challenge, within 15 days in accordance with section 14(2) of the Arbitration Act. GBH's case is that they sent their Written Statement of reasons to the Arbitrator through Mr Nagpal's email of 3rdNovember 2015, which was within the statutory period. A copy is at pages 80 to 85 of the exhibit "**SC 1**".

19. GBH believes that in view of the Arbitrator's email of 19th October 2015 stating that he would be traveling and would like a conference call with the counsel for the parties so that he could hand down the award as soon as possible, the Arbitrator was not in a position to hand down the award without receiving the requested clarification from the Claimant and or having a telephone conference with the parties' counsel. This being more so because of the following emails sent on 21st October 2015:

a. by an email sent by MJP's counsel at 11:14am on 21st October 2015, MJP's counsel stated that they would endeavor to provide the necessary information by 22nd October,2015 (pages 86 to 90);

b. by an email sent on 21stOctober 2015 at 1:33pm, the Arbitrator requesting MJP's advocate not to send the clarification until the Arbitrator had dealt with the Applicant's objection referred to above (page 91) ; and

c. by an email sent on 21st October 2015 at 3:16pm, the Arbitrator stated that, "*the Tribunal looks forward to hearing from the Respondent's Mr Nagpal by return of email*" (page 92).

20. It therefore came as a surprise to GBH that the Arbitrator proceeded to issue the award only a few hours after the Applicant had raised its objections and the Arbitrator had acknowledged receipt of the same. *(See pages 93 to 153 for a copy of the e-mail and the Award).*

21. GBH also felt aggrieved that despite the fact that the Arbitrator had on several previous occasions postponed delivery and publication of the award, he now suddenly felt that he had to deliver an award albeit urgently in such an irregular manner. GBH maintains that this change of mind on the part of the Arbitrator to urgently deliver the award, seemed suspect. More so, as the Applicant had already lodged a challenge with the Arbitrator and there was no time limit set anywhere as to the date of the delivery of the award, although it is understood that the same must be delivered within a reasonable time. GBH avers that there is nothing to show that either party in any way pushed the Arbitrator into writing an award urgently and or unprocedurally. In fact, neither party wrote to the Arbitrator asking when the award would be delivered and neither did either party consent to the Arbitrator delivering the award prior to determining the Applicant's challenge.

22. GBH believes that the Arbitrator in delivering such a rushed award was actuated by bias. In addition, the Arbitrator has repeatedly shown his incompetence and lack of capacity in the way he has purported to deal with and conduct the arbitration. GBH states that it was even more surprising that despite purporting to deliver an award on 21st October 2015, the Arbitrator sent an email to the parties on 3rd November 2015 *(pages 154)* stating inter alia, that, "*Pursuant to section 14(2) of the Arbitration Act and the Rules the tribunal is required to rule on the respondent's challenge*". The Arbitrator in this email of 3rd November 2015, also directed the parties to make a further deposit of Ksh.500,000/- each in respect of his fees for considering the challenge. Both parties paid the deposit totaling Ksh.1,000,000/-.

23. On 5th November 2015, the Arbitrator gave 20th November 2015 as the date by which he would deliver a ruling on the Applicant's challenge of 21st October 2015. *(See copy of the email of 5th November 2015 at page 155).*

24. By an email of 6th November 2015 sent by the Arbitrator at 12:16pm (page 156), he stated that he had jurisdiction to deal with the Applicant's challenge of 21st October 2015 by confirming *inter alia* that, "*The Tribunal recognizes that the challenge is a matter for the Tribunal*".

25. On 8th November 2015, the Arbitrator forwarded to the parties a corrected Procedural Order 6(N) by which he made the following orders:

a. "*The Claimant (if so advised) to file and serve written submissions in response to the Respondent's Challenge by 4:00pm on 12th November 2015.*

b. The Respondent to file and serve its Reply to the Respondent's written submissions (if any) by 4:00 pm on 18th November 2015.

c.. The Costs of the challenge are to be costs in the Application.

d. Liberty to apply".

26. Given that Procedural Order No. 6(N) denied GBH an opportunity to make written submissions on the challenge, on 9th November 2015, Mr Nagpal sent the Arbitrator an email protesting this fact. *(See copy of the email at pages 157 to 161 of the exhibit "**SC 1**").*

27. Prompted by Mr Nagpal's protest email as aforesaid, the Arbitrator subsequently issued Procedural Order 7(N) allowing GBH to file written submissions on its challenge by 4pm on 18th November 2015.

28. To the astonishment of GBH, before it had an opportunity to file its written submissions as directed in Procedural Order 7(N), the Arbitrator by an email sent on 14th November 2015 at 4:36pm (page 162) stated that the Tribunal had reconsidered its stance on the Applicant's challenge and inter alia that, "…*the tribunal formally informs the parties that the tribunal is now functus officio and without any mandate to consider the respondent's challenge and give a ruling*".

29. GBH believes that the Arbitrator purported to declare himself *functus officio* at the prompting of MJP who by an email sent by its advocate Geoffrey Muchiri on 13thNovember 2015 at 4:19am, stated that the tribunal was *functus officio* having rendered its final award. A copy of the Respondent's advocate's email is at page 163 of the exhibit "**SC 1**".

30. GBH maintains that based on the law, the Arbitrator is still seized of jurisdiction since the Arbitration Act, 1995 does not allow an arbitrator to unilaterally vacate his office without the consent of the parties while a section 14 challenge is pending. The Arbitrator still remains in office and may still be removed by an order of this Court under section 14(5) of the Arbitration Act. GBH was also astonished to see that in the email of 14th November 2015, the Arbitrator stated that he had spent 20 hours on the matter between 21st October 2015 and 14th November 2015 only to declare himself "*functus officio*". What was most surprising in the Arbitrator's email of 14th November 2015 was his statement to the effect that "*the arbitral proceedings are terminated by the Award dated 30th September 2015*".

31. GBH believes that this statement is absurd and reflects the Arbitrator's bias given that the Arbitrator had;

a.published his award on 21st October 2015, a date after he was allegedly *functus officio*;

b. on 19th October 2015, requested the Respondent to issue him clarifications on certain aspects of its claim;

c. accepted the Applicant's challenge to the request of 19th October 2015 as aforesaid;

d. issued Procedural Orders 6(N) and 7(N), in respect of the Applicant's challenge to his email of 19th October 2015, including assuring the parties that he would deliver a ruling on the issues raised by the Applicant; and

e. already made a partial determination on the Applicant's challenge by way of his email of 13th November 2015, on the issue of taxation of the costs he had awarded.

32. On Wednesday 18th November 2015 at 10:15am Mr Nagpal sent an email in response to the emails correspondences between the Arbitrator and MJP over the weekend. In that email Mr Nagpal expressed his reservations about the flurry of emails exchanged between the Arbitrator and MJP's Advocate between 7:19pm on Friday (after Kenya working hours) and 3:39pm on Saturday 14th November 2015 which is not a working day in Kenya.

33. GBH maintains that it should have been obvious to those engaged in this speedy exchange of emails that neither GBH nor Mr Nagpal had acknowledged receipt of any of the said emails which should have been a clear indication to the correspondents that GBH and its counsel had not the opportunity to acknowledge or respond to these emails. *(See pages 164 to 167 of **"SC1").***

Costs of the Applicant's challenge

34. The Arbitrator completely disregarded the Applicant's email of 18th November 2015 and sent an email on 19th November 2015 at 2:04pm reiterating that he was supposedly "*functus officio*" and requesting that the parties give him "*instructions for the return of the deposit balance and costs of couriers*". GBH considered this absurd by reason of the sequence of events leading up to the arbitrator declaring himself *functus officio* in that the Arbitrator requested the parties for a deposit on 3rd November 2015, which was a date after 30th September 2015 when he had supposedly become *functus officio*.

35. The Applicant's complaints regarding the Arbitrator's bias is compounded by the fact that he failed to consider the Applicant's challenge despite the fact that he had expressly stated he would. This is clear from the Arbitrator's second email dated 19thNovember 2015 by which the Arbitrator issued a *"without prejudice"* ruling on the Applicant's challenge. GBH believes that this indicates not only bias but incompetence and incapacity on the part of the Arbitrator. *(See pages 168 – 170 of **"SC1").***

Instances of irregular procedure

36. GBH's case is that in the process of filing further submissions after the conclusion of the hearing and at the request of the Arbitrator, the Arbitrator accepted an *"Expert Witness Statement of Weldon Mutai"* from MJP, despite protest from the GBH and knowing that the GBH had no opportunity to cross examine Mr Mutai on this statement which fact was pointed out to the Arbitrator by the GBH.

37. The Arbitrator by an email to the parties dated 23rd April 2015 requested that the parties submit "itemized costs schedules in the form of a high level bill of costs" and stated that "*a very brief description of the items charged and the amount would suffice*".

38. By various emails dated 4th May 2015 and 8th June 2015 sent by Mr Nagpal, he sought clarification from the Arbitrator on the Arbitrator's request to have parties put forward their "schedules of costs" in view of the express provisions of Rule 14 of the Arbitration Rules, 2012.

39. Mr Nagpal had on 8th June 2015 also sent an email to the Respondent's advocate pointing out that the parties had agreed to be bound by the Arbitration Rules, 2012 to the effect that it was for the Arbitrator to state in his award whether either party was to pay all or any part of the costs incurred by the other party and whether those costs were to be assessed as between party and party or as between advocate and client. GBH maintains that the Arbitrator is obliged by Rule 14 of the Arbitration Rules, 2012 to comply and give effect to the terms of this Rule in the award and the quantum of costs will then depend on the orders made by the Arbitrator pursuant to the Rule.

40. MJP sent a Bill of Costs to the Arbitrator, under cover of an email dated 14th September 2015. GBH challenged the said Bill of Costs, by an email dated 15th September 2015 from Mr Nagpal to the

Arbitrator.

41. MJP then sent the Arbitrator an email dated 24th September 2015, withdrawing its Bill of Costs on the basis that it agreed with Mr Nagpal's interpretation of sections 13 and 14 of the Arbitration Rules, 2012. *(Annextures relating to the foregoing are found at pages 171 to 193 of **"SC1".**)*

42. GBH states that to date, there has been no determination by the Arbitrator on the Applicant's challenge. However, by an email sent by the Arbitrator on 19th November 2015 at 9:04pm, the Arbitrator purported to determine the challenge by way of a *"without prejudice"* ruling. GBH states that the Terms of Appointment do not provide for a "without prejudice" ruling, and that the *"without prejudice"* ruling violates the principle of party autonomy by which the Arbitrator is bound. Further it is beyond belief that the Arbitrator issued the *"without prejudice"* ruling on 19th November 2015 at a time he considered himself to be *functus officio*. GBH believes this ruling has no basis in law and therefore undoubtedly demonstrates bias as well as incompetence on the part of the Arbitrator.

43. GBH believes, and it is its case that the totality of the conduct of the Arbitrator demonstrates bias, lack of procedural fairness and procedural irregularity in the conduct of the Arbitrator. GBH states that it is fair and just that this Court be pleased to uphold the Applicant's challenge, remove the Arbitrator and render the award wrongly sent by the Arbitrator on 21st October 2015, void pursuant to section 14(8) of the Arbitration Act.

44. The Applicant also prays that this Court be pleased to order a refund in full, of the Applicant's share of costs paid to the Arbitrator.

MJP's Response

45. The Originating Summons is opposed by MJP through the following documents filed herein:

i. Replying Affidavit by Paresh Varsani sworn on 3rd February, 2016 and filed herein on 4th February, 2016.

ii. Further Affidavit by Paresh Varsani sworn on 23rd March, 2016 and filed herein on 29th March, 2016.

iii. Respondent's submissions dated 15th June, 2016 and filed herein on 16th June, 2016.

46. MJP provided a brief background of the matter. While agreeing that MJP's claim in First Arbitration proceedings was for US$3,611,791.65 MJP denied that this was payable at a contractually agreed rate of Kshs .60.00 to the US Dollar as alleged by GBH. MJP's case is that the contractual price was agreed in Kenya Shillings (Kshs). This contract sum was however, by the Agreement entered into on 29th July, 1998 between the parties, converted to and made payable in US Dollars(US$) at a rate of Kshs. 60.00 to US$1.00 – Hence the claim currency being US$. MJP also admits that GBH made a counter-claim for Kshs. 117,881, 486.000 in respect of alleged over payments as stated in paragraph 11 of the said Supporting Affidavit. However, MJP maintains that the amounts of the claim and Counter-Claim made in the Arbitration are irrelevant for the purposes of the present application.

47. MJP maintains that the arbitral proceedings between the parties hereto terminated on 21st October 2015 when the final Award was handed down by the Arbitrator when the mandate of the Arbitral Tribunal also terminated. Consequently, the Arbitral Tribunal was *'functus officio'* as of that date. It is MJP's case that this Court has no jurisdiction to hear and determine the Applicants' present application under **Section 14 of The Arbitration Act (No.4 of 1995)**. MJP then proceeded in its Replying Affidavit on entirely without prejudice to the allegation that this court has no jurisdiction to entertain this matter. MJP stated that it would in the course of these proceedings raise a Preliminary Objection to these proceedings on a point of law, but that never happened at all.

48. MJP denies the allegations by GBH to the effect that it was treated unfairly by the Arbitrator during the arbitration proceedings and that the Arbitrator's conduct demonstrates definite and persistent bias as against it or that there were material procedural irregularities at the heart of the arbitration or that the Arbitrator lacked good faith in dealing with the arbitral proceedings. MJP annexed to the Replying Affidavit of Paresh Varsani annexture **"PV-2',** as true photostat copies of the relevant extracts from the transcript of the Arbitral proceedings which it states vindicate its position on the matter.

49. MJP states that in view of the sentiments expressed by the Applicants' Counsel, Mr. O.P Nagpal, at the close of the arbitration proceedings (in terms of the taking of evidence) which were made in the presence of GBH's Legal Director who is the deponent to the Supporting Affidavit, MJP finds it extremely distasteful and callous that an attack is now being mounted at the arbitral tribunal in the manner it has been done. MJP believes that this belated challenge on grounds of bias and particularly invoking the grounds stated in the Originating Motion dated 11th December, 2015 appears to be as a result of discontentment or disgruntlement on the part of the applicant with the Award. MJP states that if the GBH were genuine in their complaint Mr. O.P. Nagpal would not have made the remarks referred to above expressing his full confidence in the arbitral tribunal and its independence and impartiality in the presence of his clients' Legal Director. Instead, he would have undoubtedly raised objection and a challenge to the Arbitrator's continuation in this matter immediately he became aware of any circumstances that give rise to justifiable doubts about the Arbitrators impartiality and independence during the course of the arbitration proceedings.

50. MJP further believes the Applicants' challenge to the Arbitrator on the basis of the grounds stated has been unduly delayed and is outside the statutory time limit provided in The Arbitration Act (No. 4 of 1995). Effectively, the challenge is time barred.

51. MJP refuted the claims by GBH that the Award was to have been delivered in March, 2015, restating that by his e-mail of the 5th February, the arbitrator states that the Award would be delivered on ***"… a date not before the end of March 2015.."***

52. On the issue of procedural bias raised by GBH, MJP referred to information given to it by Mr. Subodh Inamdar of Messrs Inamdar & Inamdar, Advocates previously on record MJP, that on 19th April, 2015 the Arbitrator wrote to the parties informing them that he was working on a Draft Award and seeking clarification by way of Written Submissions on certain matters. MJP believes that the contents of the Arbitrator's e-mail of the 23rd April, 2015 has been deliberately distorted in furtherance of the wrongful allegation of bias. Indeed the Arbitrator sought clarification from the parties prior to handing down the award. MJP believes that the arbitrator was simply exercising caution and prudence in seeking the clarification on the claim, and that contrary to the assertions made by GBH, the arbitrator had every intention to give the GBH an opportunity to comment on any clarification provided. Parties cannot understand the statement by the arbitrator in his e-mail of the 19th October, 2015 which appears completely out of context in the trail of all the e-mails exchanged. MJP states it was mischievous of Mr. O.P. Nagpal purporting to accept what was not an offer to terminate the arbitral proceedings by the Arbitrator. MJP considers this was simply a ploy by the GBH to continue further delay and frustrate the MJP (claimant in the arbitration) from recovering monies rightly and justly due and owing to it. MJP maintains that what was sought was not clarification in the form of any evidence but rather how the cumulative amount referred to in the Claimant's Skeleton Arguments dated 20th August, 2014 was made up and how it related to certain claims made, and when no clarification was given by GBH to the Arbitrator, he later handed down his award. MJP denies that there was a ***'flurry of e-mails exchanged between the Arbitrator and the Respondents' advocate…'*** as is alleged by GBH.

53. In objecting to the application MJP states that once an award is published, the Arbitral proceedings are terminated as is the mandate of the arbitral tribunal which thereafter becomes *'functus officio'* and has no mandate or capacity to decide upon any matters relating to or concerning the arbitration. MJP rejects the allegations by GBH that the arbitrator's actions have been actuated by bias or that he has repeatedly shown incompetence and lack of capacity in dealing with the arbitration proceedings. MJP further rejects allegations that there has been a lack of procedural fairness or that the conduct of arbitral proceedings

herein demonstrates bias and/or procedural irregularity as alleged.

54. MJP maintains that GBH is disgruntled at the Award and knowing fully well that such award cannot be set aside save for the very limited circumstances statutorily provided.

55. In GBH disputed the rebuttal made by MJP as mischievous, deliberately misleading and contradicts the Respondent's own skeleton submissions dated 2^{0th} August 2014 at paragraph 12 in which the Respondent under the heading, "*what amount if any is owed to the Claimant*", expressly bases its claim on an exchange rate of Ksh.60 to one US dollar which amount translates to Ksh.138,294,060. A copy of these skeleton submissions is at annexed at exhibit **"SC 3**". GBH also restated that the amounts in the counterclaim and claim are relevant and are at the very heart of the dispute submitted to arbitration and the Arbitrator's award could not exceed the amount claimed and counterclaimed by the parties. GBH's case is that in dismissing its counterclaim without giving any reasons for such dismissal the Arbitrator has demonstrated his incompetence and/or his bias towards GBH. Such failure to give reason/s for dismissing GBH's counterclaim is contrary to the provisions of the Arbitration Act.

56. GBH maintains that the arbitral proceedings between the parties did not terminate on 21st October 2015 when the alleged final award was handed down by the Arbitrator and that the Arbitrator did not became *funtus officio* as of that date. The Arbitrator was not *functus officio* at the time the challenge was made (10:47am on 21st October 2015), and it was incumbent upon the Arbitrator to deal with the said challenge. The Arbitrator acknowledged receipt of the said email in his email of 21st October 2015 sent at 1:43pm, before he wrongfully handed down his award by his email of 21st October 2015 sent at 4.17pm. The conduct of the Arbitrator after his e-mail of 21st October 2015 is totally inconsistent with the allegation that he was *functus officio*. The Arbitrator claimed to be *functus officio* for the very first time by his e-mail of 14th November 2015 sent at 4.36pm at the prompting of the MJP's former advocate, Mr. Muchiri, by his email of Friday 13th November 2015 at 16:19pm, in which the counsel suggested to the Arbitrator that he was *functus officio* as of 21st October 2015.

57. In fact, the Arbitrator continued to engage with the parties after 21st October 2015 and even issued 2 Procedural Orders namely; 6(N) and 7(N) on 6th November 2015 and 12th November 2015 respectively. In addition to the foregoing, section 14 of the Act precludes an Arbitrator from unilaterally vacating office without the consent of the parties whilst a challenge raised before him under section 14 of the Act is still pending. GBH's case is that the above facts clearly show that as late as 14th November 2015 the Arbitrator was still under the sway of MJP and its advocates and this is clear evidence of continuing bias against the Applicant even at this late date.

58. As regards annexture of exhibit PV2 is an attempt by the Respondent to mislead the court into believing that Mr. Nagpal *"expressed his full confidence in the arbitral tribunal and its independence and impartiality"*. This is not correct. The truth of the matter is obvious from reading PV2 at page 33 thereof where Mr Oraro expressed his confidence in Arbitrator in the following words "*Sir, before I leave let me say we are very grateful for your patience and the manner in which you have conducted these proceedings up to now. On our part we think it is very fair. We have had opportunity to put whatever questions we wanted to put and we thank you and our team on the other side for the manner they have conducted themselves*". GBH maintains that it is clear from PV2 that Mr. Nagpal remained silent at the end of this glowing tribute by Mr. Oraro which led to the Arbitrator inviting Mr. Nagpal to say something by stating "*I don't know Mr. Nagpal if you have something to say*?" GBH is informed by Mr. Nagpal that this invitation of the Arbitrator put him in a very awkward position as both common etiquette and the interest of the Applicant as his client required him to react in a courteous manner hence his guarded response as follows: "*I fully endorse his gratitude. I was going to speak to that but I… fully associate myself with what he has said*". GBH believes that this pointed invitation by the Arbitrator to Mr. Nagpal to say something was a ploy by the Arbitrator to obtain a "certificate of good conduct" as it were, for use later, in the event of a challenge. GBH maintains that Mr. Nagpal, despite the numerous instances of bias exhibited by the Arbitrator prior to the tributes by Mr Oraro, acted in accordance with his instructions from his client in not making a direct attack on the Arbitrator concerning his lack of independence and

fairness and positive bias in favour of the MJP as the GBH believed that doing so may jeopardize its interest as it still nurtured the hope that in the end, the overwhelming evidence in its favour adduced by it, would leave the Arbitrator with no alternative but to make a just award. GBH's optimistic expectation was totally shattered when 10 months later the Arbitrator accepted a further witness statement by the claimant's witness Weldon Mutai in evidence, despite the objection by GBH and despite the fact the Arbitrator himself had formally closed the proceedings on 12th September 2014. Such acceptance of the said written statement denied the Applicant the opportunity to cross examine Mr. Weldon Mutai on his said statement. GBH believes that in doing so the Arbitrator breached all principles of natural justice because of bias in favour of the MJP.

59. GBH believes that it raised its challenge within required time. Further it is instructive to note that GBH had in its final submissions date 24th December 2014, expressly taken up the issue of the obvious bias on the part of the Arbitrator in favor of the Respondent.

60. It is the case by GBH that the challenge the subject matter of these proceedings was made before the purported Award was handed down by the Arbitrator and this application flows directly from that challenge and the application before the court is a continuation of the process as envisaged under section 14 of the Act. GBH believes that the Arbitrator ignored its several complaints now on record and persisted in his unequal, unfair and biased behavior towards GBH because of the provisions of section 10 of the Act.

61. GBH believes that it was the e-mail from the its advocates dated 21st October 2015 sent at 10:47am that made the Arbitrator realize the absurdity of his conduct resulting in him immediately asking MJP not to provide the clarifications sought by him to enable him to hand down the award and he also abandoned the idea of a telephone conference with advocates of the parties for which he had previously shown such keenness and urgency.

62. GBH states that the admission by MJP that the Arbitrator was simply exercising caution and prudence in seeking the clarification on the claims means that since the Arbitrator proceeded to hand down the award without receiving the "*clarifications*" sought, the said award lacks exercise of prudence and caution. GBH states that it is wrong for Mr Inamdar to speak as to the intentions of the arbitrator.

63. Giving each word of the email its ordinary meaning in that language it is plain that the Arbitrator was offering to immediately refund the fees paid to him by both parties on the basis that the award was not handed down. GBH states that Mr Inamdar appears to overlook the fact that the author of this letter is practicing Barrister in the U.K familiar with the English language who has accepted this fact that he did make this offer.

64. In the circumstances it was quite proper for Mr Nagpal acting on the instructions of GBH to accept this offer and call for the refund of GBH's share of the fees paid to the Arbitrator.

65. The Applicant cannot be expected to accept without challenge, an award made in the circumstances set out in this Application, that is, whilst a challenge was still pending before the Arbitrator which challenge he accepted he had to meet and deal with by ruling on it.

66. GBH believes that MJP is acting in bad faith in opposing the Application when it has itself also taken issue with the Arbitrator concerning the said award by way of an application filed under section 35 of the Act, being ***Misc Civ App No.545 of 2015 Mistry Jadva Parbat & Company Limited versus Grain Bulk Handlers Limited*** which it has not seen fit to disclose to the court in these proceedings.

67. By the aforementioned application filed under section 35 of the Act, the Respondent seeks to have parts of the Arbitrator's award set aside.

Copies of those proceedings as attached and marked exhibit "SC7".

The Arbitrator's Response

68. The arbitrator is represented in these proceedings by the firm of **Kaplan & Stratton Advocates**. The arbitrator did not enter appearance in this matter, but chose to write a letter to the court, containing his views on the Originating Motion. The letter is dated 22nd February, 2016. The arbitrator in his letter refers to these proceedings which he has carefully considered and understood, but he has

> ***"…concluded that I am best able to preserve my professional detachment from the underlying dispute by writing to the honourable court and by not filing affidavit. I consider that I have fairly and properly considered the applicant's challenge and rejected the challenge as wholly without merit. I am of the view that the issues in dispute are now matters for the honourable court"***

69. The Arbitrator then proceeds to give his professional background describing himself as a practicing **Barrister in England and Wales** *(admitted 1990)* and an advocate of the High Court of Uganda *(admitted 2006).* He is also admitted in the **State of New York as a Foreign Legal Consultant**. He has specialized in Commercial Arbitration as counsel for the past 16 years and is a Fellow of the Chartered Institute of Arbitrator *(admitted 2008)* and a Chartered Arbitrator at the Chartered Institute of Arbitrators *(admitted 2008).* He is on a member of arbitral institutional panels including the panel of Arbitrators of the Chartered Institute of Arbitrators, Kenya Branch.

70. The Arbitrator states that in the matter before hand, both parties had expressed complete satisfaction with his conduct of the final hearing, and non had indicated any misgivings at all. He is therefore surprised with the turn of events. The rest of the letter is meant to give the court a little of the inside proceedings, his views on the challenge, and on averment that he is willing to continue to hear the parties fairly and to decide any issues which this court may be minded to remit to him for his decision.

71. GBH through the affidavit of *M/S Shazeen Chatur* sworn and filed herein on 8th March, 2016, has objected to the admission of the Arbitrator's letters. GBH's position is that the court ought not to consider or rely on any of the matters set out in the Arbitrator's Letter and should disregard it in its entirety because the ***Arbitration Act, Cap 49*** *("the Act")* does not provide for the filing of any letter as a means for responding to an application filed under section 14. The only procedure provided under section 14(4) of the Act, for the Arbitrator to be heard on the Application is by filing an appearance. The word *"heard"* in this context can only mean either giving *viva voce* evidence, or filing an affidavit. A party cannot be heard by way of a letter.

72. By reason of the fact that the Arbitrator has expressly stated at paragraph 1 of his Letter that his Letter is filed "*in lieu of entering an appearance pursuant to section 14(4) of the Arbitration Act No 4 of 1995….*" and further at paragraph 15 that he intends no disrespect to the court "*by not entering an appearance*", GBH believes that the court has no jurisdiction to consider the Letter or any of the matters set out therein.

73. In addition, GBH maintains that the firm of Kaplan & Stratton can have no audience in this matter given the fact that the Arbitrator has emphasized in his Letter that he has not entered an appearance and therefore does not wish to be heard in these proceedings. Therefore, the Notice of Appointment dated 18th January 2016 filed by on 20th January 2016 ought to be disregarded.

74. Without prejudice to the foregoing objection to the admission of the said Letter in evidence, GBH maintains, in response to the matters set out in the Letter, and in the event that the said letter is accepted by the court, that it cannot be right that a party can put forward his story in a letter, asking the court to believe it, when that party cannot be cross examined. In this regard, the Letter has no evidentiary value at all. The only way a party can ask for cross examination is if the witness has given evidence *viva voce* or has filed an affidavit and not when the party has only filed a letter.

75. By filing his Letter, and purporting to answer the challenge in an unsworn statement, the Arbitrator is trying to avoid cross examination on what he states in the said Letter. This is impermissible and has no evidentiary value considering that it is the Arbitrator who has to meet the challenge and the serious charges of lack of fairness and positive bias on his part in favour of the MJP. It is his conduct in and of the proceedings that is in issue. Further the said Letter can carry no weight as it is not backed by the

sanction of punishment for perjury, should it contain matters that are not true. Again GBH maintains that even in that letter, the Arbitrator has made no attempt to offer any explanation or defence in respect of the specific complaints made against him. GBH submitted that paragraph 2 of the Letter deliberately omits to mention the fact that the Applicant has in prayer 3 of the Application, asked for its share of the fees paid to the Arbitrator to be refunded to it upon the award being declared null and void. In the same paragraph 2 the Arbitrator states that the Applicant's complaint is that he has failed to give it "*a reasonable opportunity to present its case*". GBH's case is that this is an attempt to fudge the real issue here. The complaints in these proceedings relate specifically to the manner in which the Arbitrator has dealt with the challenge lodged by the Applicant.

76. The Arbitrator has himself admitted in his email of 3rd November 2015 and 6th November 2015, that it is for him to meet the challenge.

77. Procedural Orders 6(N) and 7(N) issued by the Arbitrator also confirm that he had acknowledged that he would deal with the Applicant's challenge. GBH's case is that the Arbitrator has totally failed to follow the procedure laid down with regard to a challenge filed under section 14 of the Act by GBH. GBH states that it is curious that although the Arbitrator states at paragraph 3 of the Letter that he wants to be detached from the dispute and that this is the reason he did not file an affidavit, he then seeks to have the court consider "*some supplementary points for the benefit of the Honourable Court*". GBH states that it is difficult to understand his statement that "*I have properly considered the Applicant's challenge and rejected the same as wholly without merit*" considering that he only dealt with the challenge by issuing a "without prejudice" ruling sent on 19th November 2015 a procedure not known to the law, and then declaring that he was *functus officio* as of 30th September 2015. This was 21 days before the challenge was lodged (on 21st October 2015)**.**

78. GBH submitted that the time for the Arbitrator to preserve his "professional detachment", was during the hearing of the arbitration and not at this late stage when he has declared himself *functus officio* which means that he has no further role to perform. He himself admits at paragraph 3 of the Letter, "*that the issues in dispute are now matters for the Honourable Court"*.

MJP's Response

79. On this issue MJP in supporting the admission of the Arbitrator's letter aforesaid, submitted that the letter is admissible under Section 14(4) of the Act. MJP cited the case of ***Chania Gardens Ltd vs. Gilbi Construction Company Ltd & Another (2015) eKLR,*** where **Gikonyo J** in an application to challenge the Arbitrator under Section 14(3) of the Act stated that ***'… will 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…'.*** In the premises, MJP maintains that the submission that the matter ought to proceed on the premise that the arbitrator is not participating without properly considering the merits of the matter is wholly misconceived and completely untenable.

80. Secondly, and in any event, in the case of ***Zadock Furniture Systems Limited & Another vs Central Bank of Kenya (2014) eKLR,*** a similar issue was taken. The court in this matter held that the question of an arbitrator being entitled to appear and be heard on an application of this nature was not mandatory but one on which the arbitrator could elect whether or not to appear and be heard on and the manner in which he will exercise this entitlement. MJP submitted that like in the instant cases, in the ***Zadock Furniture*** case the Arbitrator chose to exercise his entitlement by way of a letter to the court and the court found ***'… the said letter by the Arbitrator is sufficient exercise of his entitlement to be heard under Section 14(4) of the Arbitration Act and all the arguments therein will be considered in this decision'.***

81. MJP submitted that it is in the circumstances incumbent upon this court to consider the contents of the letter from the Arbitrator addressed to the Deputy Registrar dated 22nd February, 2016 and filed herein on 26th February, 2016.

Finding of the Court on Arbitrator's Letter

82. This court will not belabor the point. **M/S Kaplan & Stratton** advocates who have watched brief for the Arbitrator have not sought to make any submissions in all the applications before the court preceding this ruling and neither have they made any submissions on behalf of the Arbitrator on the Originating Motion. Section 14(4) of the Act states that:

> ***"On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application".***

83. The issue then is the manner or procedure of that appearance. A party may appear in proceedings and choose to keep quiet, or to actively participate in the proceedings. If a party, in this case the arbitrator, chooses to appear by way of a letter written to the court, that appearance is acceptable subject only to the provative value the court should attach to that letter. It is good if the letter raises issues of no controversy. However, if the letter raises controversial issues, which issues are actually those to be determined in the application before the court, the arbitrator cannot be cross-examined on the content of his letter, and so the provative value of such a letter remains minimal, and would only confirm non contested issues. In the matter before the court, although the arbitrator states that he does to wish to *"appear"*, yet he proceeds and appears by way of the said letter in which he raises issues which require that he be cross-examined on, since the issues are the very ones to be determined in the current application. This court must take it that the procedure of appearance chosen by the Arbitrator under Section 14(4) of the Act is by way of the aforesaid letter, and that letter shall be admitted herein for its informative value, especially on the qualifications of the arbitrator, and on all the issues which are not controversial and on which the need to cross-examine the arbitrator would not be necessary. This court also understands the desire of the arbitrator to keep a safe distance from these proceedings. However, as has been pointed out by GBH, the Arbitrator's letter raises so serious issues that cannot keep him at a distance from these proceedings. Unfortunately, this court cannot compel him to appear through any other mode he has not preferred. In the opinion of this court, the said letter, which has been admitted herein, brings the Arbitrator right in the middle of these proceedings except that he has chosen not to avail himself to cross-examination, a matter which drastically dilutes the provative value of his appearance vide that letter.

Parties Submissions, Analysis and Determination

84. GBH has pointed out that the challenge which it seeks to have this court uphold is set out in the email dated 21st October 2015, sent to the Arbitrator at 10:47am by the Applicant's then advocates O P Nagpal & Company *(hereinafter referred to as "**OPN**")*, challenging the *"impartiality, independence and capacity"* of the Arbitrator. It is submitted that the said OPN's email of 21st October 2015 starts with the words, *"in view of the past conduct of this arbitration by you culminating in your email under reply"*, which GBH submitted clearly that the Arbitrator's unfair and biased behavior continued throughout the arbitration.

85. The Challenge was supported by the Written Statement of Reasons for Challenge forwarded to the Arbitrator with OPN's email of 3rd November 2015. The grounds upon which GBH brought the Challenge before the Arbitrator, and the manner in which the Arbitrator dealt with the Challenge, are summed up in the following 7 grounds:

a. the Arbitrator conducted himself in such a manner that exhibited bias and was contrary to the rules of natural justice;

b. the Arbitrator failed and/or neglected to treat the parties to the arbitration equally and fairly;

c. the Arbitrator failed to give the Applicant herein a fair and reasonable opportunity to present its case;

d. the Arbitrator failed to hear and determine the Applicant's challenge lodged on 21st October 2015;

e. the Arbitrator failed to follow the procedure agreed to by both parties;

f. the Applicant has lost total confidence in the Arbitrator's ability to fairly determine the arbitration; and

g. the Arbitrator acted contrary to the principle of party autonomy which is a guiding principle.

The seven (7) grounds set out above form the basis of GBH's submissions.

86. In response, MJP also filed submissions raising the following grounds of objection to the application.

a. That the court lacks the jurisdiction in this matter.

b. That GBH had waived the right, if any, to complain of arbitrator's alleged bias.

c. Allegations of misconduct are unfounded.

d. That the arbitrator was *functus officio.*

87. In this determination, I will analyze parties' submissions simultaneously and make my finding on each issue thereafter.

Failure by the arbitrator to act impartially, independently, fairly and with equality towards the parties

88. GBH submitted that quite early in the proceedings it was concerned about the manner in which the Arbitrator was conducting the arbitration. It had noticed lack of independence and impartiality and indeed positive bias on the part of the Arbitrator in favour of MJP. This bias was compounded by the equally apparent incompetence and procedural irregularities on the part of Arbitrator in the way he conducted this arbitration. GBH submitted that it had noticed that the Arbitrator displayed procedural unfairness and lack of good faith towards it. The first indication of the Arbitrator's bias is demonstrated in the manner in which he treated the parties' witnesses and their evidence. It was submitted that during the course of the arbitral proceedings, the Arbitrator repeatedly and wrongly descended into the arena and took an adversarial role in the proceedings contrary to the principles set out in ***Turner (East Asia) v Builder Federal (Hong Kong) and Josef Gartner & Co. [1988] 42 BLR*** in which the court said, ***"There can be no doubt that an arbitrator must always act judicially with a detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words must always be measured and circumspect"***. GBH submitted that the Arbitrator deliberately, constantly and persistently interrupted GBH's cross examination of MJP's witnesses. This is submitted to be captured in the Applicant's Written Statements of Reasons for the Challenge. *(See pages 80 to 85 of exhibit "SC 1" to the Supporting Affidavit).* It is submitted that the interruptions were calculated to benefit MJP as can be seen at the following pages of the transcripts of proceedings annexed to the Further Affidavit *("tr" means transcript of proceedings")*: tr.4/p.62-66, tr.1/p.7-11, tr.1/p.15-16, tr.1/p.23-27, tr.1/p.18-22, tr.1/p.33-39, tr.1/p.45-50, tr.1/p.52-58,tr.1p66-68, tr.2/p.6-12, tr.2/p.15-17, tr.2/p.19-32,tr.2p35-36, tr.2/p.38, tr.2/p.42-43, tr.2/p.45-53, tr.2/p.56-62, tr.2/p.69-74, tr.3/p.13, tr.3/p.18-19, tr.3/p.21, tr.3/p.23-24, tr.3/p.26-29, tr.3/p.30-35, tr.3/p.38-40, tr.3/p.44-50. It was submitted that the Arbitrator repeatedly raised questions and made comments during the cross examination of the Respondent's witnesses as can be seen in tr.1p52-58, tr1.p66-68, tr.2/p.17, tr.2/p.22, tr.2p35-36,tr.2/p.38, tr.2/p.48, tr.2/p.50-53, tr.2/p.58-59, tr3.p21. In addition, the Arbitrator deliberately curtailed and limited the cross examination of MJP's witness Mr. Stephen Ndibui Kamau. See tr.3 p13.

89. The Arbitrator received evidence from MJPA's witness Mr. Stephen Ndibui Kamau with regard to documents which were not actually produced before the Tribunal and which documents had not been authored by this witness. See tr.3/p.35-36, tr.3/p.39-41.

90. In addition, the Arbitrator allowed MJP's witness Mr. Stephen Ndibui Kamau to give evidence on

matters not included in his witness statement (tr.1p 45-50, tr.3/p.44-46). Quite apart from the above, it was submitted that the Arbitrator deliberately, constantly and persistently entered into the arena and extensively questioned MJP's witnesses during their re-examination and cross-examination (tr.6/p.47-52, tr.6p84,tr.8/p.4-21, tr.8/p.65-76, tr.8/p.79-81, and tr.9/pp82-83). For example, the Arbitrator took over the examination of MJP's expert witness Mr. Francis Gichuhi Mwaniki from GBH, and attributed words to him which the witness had not uttered. *(See tr.6p47-52, tr.6p65, tr.6p78-80, tr.6p84)*. It was submitted that all along GBH was concerned about the conduct of the Arbitrator from the outset of the proceedings, but it continued to nurture the hope that the Arbitrator's attitude would change as the arbitration progressed and the Applicant adduced its evidence. However, this was not to be and the Arbitrator persisted in his bias in favour of the Respondent right to the end, resulting in this Challenge.

91. GBH cited the case of **Misc Civ App No.193 of 2014** ***Zadock Furniture's Systems Limited & another v Central Bank of Kenya [2014] eKLR***, in support of allegations of witness interference by arbitrators. Part of the complaint in the **Zadock Furniture's** case was that the arbitrator had interfered with the line of questioning and sometimes suggesting answers to the questions put to the witnesses.

92. GBH submitted that the effect of the Arbitrator's conduct amounted to bias in favour of the Respondent's witnesses and was tantamount to muzzling of the Applicant.

Improper conduct of proceedings/procedural irregularity, denying the Applicant its right to be heard, lack of natural justice

93. On the above issues, GBH submitted that the Arbitrator was enjoined by section 19 of the Act to treat the parties "with equality" and to give each party a fair and reasonable opportunity to present its case.

94. Section 19 is based on Article 18 of the Model Law which lays down the fundamental requirements expected of an arbitral tribunal for the purposes of procedural justice to be; equal treatment of the parties; and full opportunity of the parties to present their case – *(See **UNCITRAL 2012 Digest of Case Law** at page 97, paragraph 4).*

95. It is submitted that the Arbitrator on several occasions, failed to uphold the principles of section 19 of the Act and/or the Model Law. Contrary to these well-known tenets of law, the Arbitrator conducted the arbitral proceedings irregularly and in a manner contrary to the principles of natural justice, with the result that the Applicant was denied its right to be heard and present its case. It was submitted that the Arbitrator allowed the Respondent to refer to documentation that had not been produced before the Tribunal. In this context the court's attention is drawn to tr.2/p.49-52. The Arbitrator accepted this evidence to the gross prejudice of the Applicant notwithstanding that the Respondent had failed to discover documents upon which it relied. This was contrary to Procedural Order N (1) referred to above.

96. Paragraph 10 of the Arbitrator's Procedural Order No.1 (N) states that any witness statement or expert report would be considered as that witness' direct testimony. It is stated at paragraph 11 of Procedural Order No.1 (N) that "*witness testimony will be heard on oath*".

97. This meant that and was rightly understood by the Applicant to mean, that each party would be afforded equal time at the hearing which included the same treatment when it came to its witnesses and evidence. See paragraph 12 of Procedural Order No.1 (N).

98. Contrary to Procedural Order No.1 (N), in or about April 2015 - some seven months after the close of the arbitral proceedings, the Arbitrator invited further submissions from the parties on the issue of illegality, which issue came to the fore during the hearing of the arbitration in September 2014. GBH submitted that in doing, the Arbitrator provided MJP with a belated opportunity to address him on the issue of illegality which MJP had completely omitted to address in its 50 page written submissions dated 24thDecember 2014.

99. Additionally, this invitation provided the Respondent an opportunity to smuggle on to the record, a witness statement of Mr. Weldon C. Mutai dated 11thJune 2015 which statement the Respondent

presented to the Tribunal as the evidence of an "*expert witness*".

100. This irregular procedure was further aggravated by the fact that the Arbitrator accepted the Witness Statement of Weldon C. Mutai as part of the record without comment or demur, knowing fully well that the Applicant had had no opportunity to cross examine the said witness on the contents of the said statement. GBH submitted the following emails, now part of the record as relevant to this point.

a. email dated 19th April 2015 from the Arbitrator to Mr. Geoffrey Muchiri;

b. email dated 19th April 2015 from the Arbitrator to Mr. Geoffrey Muchiri;

c. email dated 21st April 2015 from Geoffrey Muchiri to the Arbitrator;

d. email dated 22nd April 2015 from the Arbitrator to Geoffrey Muchiri;

e. email dated 22nd April 2015 from OPN to the Arbitrator;

f. email dated 23rd April 2015 from the Arbitrator to OPN;

g. email dated 04th May 2015 from OPN to Geoffrey Muchiri;

h. email dated 8th June 2015 from OPN to Geoffrey Muchiri;

i. email dated 8th June 2015 from OPN to S.T. Inamdar;

j. email dated 8th June 2015 from OPN to Geoffrey Muchiri;

k. email dated 8th June 2015 from OPN to the Arbitrator;

l. email dated 8th June 2015 from the Arbitrator to OPN;

m. email dated 8th June 2015 from OPN to the Arbitrator;

n. email dated 7th July 2015 from OPN to the Arbitrator;

o. email dated 7th July 2015 from the Arbitrator to OPN;

p. email dated 14th September 2015 from Inamdar & Inamdar to the Arbitrator;

q. email dated 15th September 2015 from OPN to the Arbitrator; and

r. email dated 24th September 2015 from Geoffrey Muchiri to the Arbitrator.

101. GBH submitted that in allowing the witness statement of Mr Weldon C. Mutai to be introduced as aforesaid, the Arbitrator acted contrary to the principle enunciated in the ***Norbrook Laboratories Ltd v Tank [2006] EWHC 1055*** to the effect that "*each party must be given the opportunity of questioning the witness*" and further, that it was "*absolutely axiomatic*" that a party be given the opportunity "*to refute any statement adverse to its case*".

102. The Applicant submits that the Arbitrator was in breach of and failed to uphold the principle of natural justice and more particularly the principle that each party must;

a. have a full opportunity to present his own case to the tribunal;

b. be aware of his opponent's case and must be given a full opportunity to test and rebut it;

c. have the same opportunity to put forward his own case, and to test that of his opponent. The parties must be treated alike.

103. GBH cited the case of ***Kipkoech Kangongo & 62 others v Board of Governors Sacho High School & 5 others [2015] eKLR,*** where it was held at page 8 that, "*A fair trial has many faces, and includes the right to have one's case heard by an independent, impartial and unbiased arbiter or judge*".

104. It was submitted for GBH that in declining to adhere to the procedure agreed to by the parties, and allowing the statement of Weldon C. Mutai on the record, the Arbitrator acted contrary to the principle of party autonomy.

105. In response MJP submitted that the allegations of lack of impartiality, independence, fairness, equality towards the parties, procedural irregularity, denial of the applicant's right to natural justice are not correct. MJP referred the court to the sentiments expressed by Mr. Nagpal in the proceedings as regards the fairness thereof and the fact that his clients had been given a fair opportunity to present their case. It was submitted that it is against this background that these proceedings must be viewed.

106. MJP cited the case of ***Mumias Sugar Company Limited v Mumias Outgrowers Co. (1998) Limited [2012] eKLR,*** where I had considered the principles as regards an application made on account of allegations of bias. I had this to say:

> ***'While I appreciate the substratum or the persuasive intent of these cases, I must distinguish the same from what is commonly called 'judicial bias'. A Judge or an Arbitrator is not expected to demonstrate at all times that he is not biased. The judicial function by its very nature allows and intends an element of elementary bias which enables a judicial officer to give direction to his thoughts. This elementary bias is controlled by the Judge throughout the proceedings. It allows the Judge to prod into the issues before the court in order to prevent any miscarriage of justice. It allows the Judge to comment on the matters before him and give particular directions in the interest of justice. This kind of bias does not go into the decision of the Judge.'***

The learned Judge further commented:-

> ***'In relation to the matter before the court I am not satisfied that bias has been proved. What is clear to me is that the parties themselves have deep seated prejudices against each other, and have taken and entrenched certain positions and beliefs. The applicant now, in my view, intends to make the sole Arbitrator part of those prejudices, systems and beliefs. To expect the sole Arbitrator not to make passing comments on some rather obvious aspects of the matter before him is to gag the Arbitrator. A gagged Judge or Arbitrator cannot perform his duties in the way that he should.***

107. I have carefully considered the issue of bias as contextualized in the foregoing paragraphs. It is apparent that the proceedings, especially in the taking of evidence of witnesses show considerable interruptions by the arbitrator. It is also true that MJP's witness **Stephen Ndibui Kamau** was allowed by the arbitrator to give evidence on matters not included in this Witness Statement. It is also true from the proceedings that the arbitrator took over the examination of MJP's expert witness **Mr. Francis Mwaniki** from GBH. These facts are true from the proceedings. Later on, many months after the actual hearing, a Witness Statement of **Mr. Weldon C. Mutai** dated 11th June, 2015 was presented to the Arbitrator as evidence of expert witness. The arbitrator accepted this Witness Statement without allowing GBH to comment on it, or to cross-examine the witness on it. This was a material miscarriage of justice, and an affront to the principle of fair trial and equal treatment of parties. However, a part from the issue of this Witness Statement, which took place several months after the hearing, this court is unable to understand how GBH could maintain absolute silence in light of these hearing irregularities. While I do not consider it correct that Mr. Nagpal had given the process and the arbitrator a clear bill of health due to his comments now widely cited in these proceedings, in the sense that I believe that under the said

circumstances Mr. Nagpal had no option but to be courteous, it requires greater faith to understand the silence of GBH in light of the said irregularities. While it is the finding of this court that an arbitrator can still be cited for bias for matters which took place during the proceedings where there is established justifiable grounds, I am not satisfied with the cause for delay herein. To admit that bias which was notable during the hearing and which was not pointed out several months after the hearing can form a basis of an action against an arbitrator would be, as submitted by MJP, to encourage litigants to play ***"Russian Roulette"*** by awaiting the outcome of the arbitral proceedings and raise the matter only if it is unsuccessful in a bid to derail the entire process. In this regard, this court accepts the waiver principle, and adds that the conduct of GBH in failure to raise the allegation of bias amounted to a waiver in the exercise of that right. However, it is to be noted that this application demonstrates various facets of bias, and a determination of one facet may not necessarily affect the other facets. For example this does not apply to the evidence of Mr. Weldon. The principle of equality of arms demands that the parties be given equal opportunity to bring their cases before the arbitrator. This kind of bias is not the one to be perceived or subject to different interpretations. It is actual bias. However, whether this actual bias should lead to disqualification of an arbitrator depends on the actual evidence presented by such a witness. It is the finding of this court that the conduct of the arbitrator was such as to divest GBH of the right of equality before the arbitrator. However, whether that anomaly would support the disqualification of an arbitrator on account of bias would depend on the provative value of such evidence.

Alleged "Clarifications"

108. GBH submitted that in addition to the aforesaid wrongful acts, defaults and unfairness displayed by the Arbitrator during the proceedings, the last straw that broke the camel's back, as it were, in relation to the Arbitrator's conduct, was the email from the Arbitrator dated 19th October 2015 sent to the parties at 15:14 *(pages 75 and 76 of the exhibit "SC 1" to the Supporting Affidavit)* seeking so called *"clarification"* from MJP.

109. I will not recite this issue. There has been scanty response to this issue by MJP who submitted that the clarifications were necessary for the arbitrator to write the award.

110. The starting point for this court is to note that in his email of 19th October 2015, the Arbitrator sought *"clarification"* from the Respondent only and did not invite any comment, or *"clarification"* from the Applicant. The Applicants contention is that the so called "clarification" was not a clarification at all, but rather an invitation by the Arbitrator to MJP to make further submissions on the issue of quantum, which the Arbitrator was clearly still very confused about and the Arbitrator's belated explanation that he was merely seeking "clarification" on the applicable exchange rate is also unbelievable as the email was cast in very wide terms which are reproduced below:

> ***"How the sum of US$ 2, 304, 901 (paragraph 105, page 44 of the claimant's skeleton argument dated 20 August 2014 and in the interest schedule to the claimant's final written submissions behind photograph VO 19 D is made out. How does it break down?***
>
> ***(1) "The tribunal should also like to know how the said sum of US$ 2,304,901 relates to:-***
>
> ***a. The Pro-forma Final Account dated 15 May 2000 in the sum of US$ 4,186, 418.35 (claimant's Points of Claim paragraph 21) and US$ 533, 286.10 (claimant's Point of Claim paragraph 22)***
>
> ***b. The sum said by the claimant (but denied by the respondent) to have been agreed by the parties on 26 June 2014 without prejudice;***
>
> ***c. The claim for US$ 3,611,791.65 (claimant's Point Of Claim, paragraph 26);***
>
> ***d. The sum of Kshs. 706, 765, 754 (see claimant's skeleton argument dated 20 August***

2014, paragraph 6.3 page 7), and

e. The claim for Kshs. 710, 254, 965 (see Claimant's Skeleton Argument dated 20 August 2014, paragraph 6.3, page 7)".

111. GBH submitted that to mask the real purpose of his query, the Arbitrator also asked MJP to express its responses in Kenya Shillings as well as US dollars (with exchange rates) "*as this may be at the root of the tribunal's concerns*" and asks the parties to "*kindly tentatively confirm their attendance for a telephone conference call at 4 PM Nairobi time on Wednesday or Thursday of this week*".

112. The Arbitrator concluded his email of 19th October 2015 with these words *"For the sake of good order the Tribunal is willing to immediately re-Transfer the Arbitrator's fees back to the Parties on the basis that the Award is not handed down"*.

113. Receipt of this email of 19th October 2015 by GBH left no doubt in its mind of the bias, lack of impartiality and independence as well as the incompetence on the part of the Arbitrator.

114. I have considered this issue. It is evident that the Arbitrator crucially required this clarification. This is made clear from the following wording in the email: *"would the claimant let the tribunal have this information by return please so that it can send the award, which as the tribunal says is virtually ready"*.

115. The Arbitrator, in his said Letter to this Court in defence of his conduct states in the last paragraph on page 2 thereof, that he "*requested clarification of the **exchange rate** purely to ensure that my understanding was correct*".

116. This court finds that this sentence does not tell the whole truth given the clear wording in the email. It is also clear from the said email of 19th October 2015 sent over 1 year and a month after the close of the arbitration, that the Arbitrator was still struggling to understand the dispute at the very heart of the arbitration – which was MJP's claim, and GBH's counterclaim. The Arbitrator having failed to understand the same, wrote to the parties asking MJP to explain its claim and how it was arrived at as pleaded and as claimed in its expert's report. It is also evident from the said email that the Arbitrator felt that such "clarification" or explanation by email was not going to be enough as there was a lot more that needed to be cleared which he intended to do during the telephone conference he was seeking with the counsel for the parties.

117. On 20th October 2015 the Arbitrator sent another email at 9:32p.m headed "***Re-clarification** urgent **please claimant**" in this email the Arbitrator states **"subject to clarification"** below sought the award dated 30th September 2015 is ready to be handed down. The Tribunal should like the **claimant's comments** as soon as possible*".

118. He further states that he would be travelling and he would like to hand down the award as soon as possible. He asks counsel for both parties to confirm availability for a telephone conference on Thursday 22nd October 2015. On 21st October 2015 at 11.14 a.m, the firm of Inamdar & Inamdar wrote to the Arbitrator stating that due to "*current commitments we shall endeavour to provide the necessary **information** by tomorrow 22nd October 2015*". It is clear from this that they needed time to answer all the questions posed in the Arbitrator's email dated 19th October 2015. It was **not** merely a question of stating the applicable exchange rates.

119. On 21st October 2015 at 12.46 pm GBH through its advocates OPN, wrote to the Arbitrator challenging his competence, impartiality and independence under section 13 of the Act which is to be found at pages 78 to 79 of the exhibit "SC 1" to the Supporting Affidavit.

120. In this email of 21st October 2015, GBH accepted the Arbitrator's offer to refund the fees it had paid

to him. GBH also declined to have any telephone conference with the Arbitrator.

121. It was on receipt of the above email that on Wednesday 21st October 2015 the Arbitrator sent an email to Mr Muchiri and Mr Oraro who were acting for MJP, asking them to hold off sending the Tribunal any comment until the Tribunal has clarified the Applicant's objections.

122. It is obvious from this email that by now the Arbitrator had realised the folly of seeking the so called "clarification" and was now anxious to stop Mr Geoffrey Muchiri from sending him further evidence on behalf of MJP.

123. The Arbitrator then wrote to OPN on 21st October 2015 at 13.42p.m stating: "*Dear Mr Nagpal, thank you very much indeed for your email. The Tribunal is very concerned as to the suggestion that there has been some unfairness. The assertion that the Advocates are giving evidence is completely misconceived. It was the Tribunal's intention to request the Respondents' view as to the claimant's clarification though that was not stated in the email. In view of the Respondent's right of reply, please indicate by return whether the respondent would have the same complaint as to fairness were it to have that opportunity*".

124. This was the very first time that the Arbitrator expressed an alleged intention to request GBH's view regarding the "clarification" while admitting that this intention was not stated in his email**.** It is clear from this that it was the Challenge which produced this response.

125. On 21st October 2015 at 15.02p.m, the firm of Inamdar & Inamdar wrote to the Arbitrator acknowledging receipt of the Arbitrator's email of the same date confirming that they would not be sending any clarification to the tribunal as requested. GBH did not write any further email to the Arbitrator as it had already lodged its Challenge as aforesaid.

126. It is clear from the award handed down on 21st October 2015 (after the Challenge had been lodged) that in the absence of *"clarifications"* he had sought from MJP the Arbitrator was not certain about the sums claimed by MJP in its pleadings and by the claim prepared by its expert, as demonstrated by the fact that in its undated and unsigned Amended Points of Claim, the Claimant prayed for an award in the sum of USD 3,611,791.65. In the Respondent's aforementioned skeleton submissions at paragraph 12 thereof, as well as at paragraph 105 of its final submissions dated 24th December 2014 ("**SC 6**"), the Respondent claimed a sum of USD 2,304,901 (exclusive of VAT and interest) calculated at the exchange rate of **Ksh.60 per USD**. Ignoring the above figures, the Arbitrator by his purported award and without receiving the alleged "clarifications", made an award for "*the balance due and owing on the sum of Ksh.641,574,621 (plus vat as permitted by statute)"*.

127. The finding of this court is that the Arbitrator acted irregularly, and wrongfully in seeking the alleged *"clarification"* 13 months after the close of the arbitration; and to have sought the "clarification" from the Respondent only; and having stopped the Respondent from supplying the so called "clarifications", it was wrong for the Arbitrator to publish the purported award in light of the uncertainties provoked by the need for the said clarifications.

128. This court agrees with GBH that in light of the above, GBH cannot be expected to have any confidence in the purported award which it is now clear was the result of the said uncertainties, confusion or bias and void without the alleged clarifications being made.

129This went against the principles of natural justice for the Arbitrator to have sought clarifications from the Respondent alone, 13 months after the conclusion of the arbitral proceedings.

130. In the case of ***International Petroleum Refining & Supply SDAD Ltd v Elpis Finance S.A. ("The Faith") [1993] Vol.2 Lloyd's Law Reports 408***, **Hobhouse J** stated *inter alia*, that it was not in the interest of the administration of justice *"whether by the Courts or by arbitrators"*, that arbitrators should have matters referred back to them after such inordinate periods of tim*e*. The Judge added that to go back

over the course of the proceedings after the event by the calling of further evidence is unacceptable in an arbitration. *(See pages 142 to 148 of the judgment).*

131. In this case the Arbitrator did the very things that Hobhouse J found objectionable.

Functus officio

132. As set out above, GBH raised its Challenge on 21st October 2015, which was supported by its Written Statement of Reasons for Challenge filed on 3rd November 2015 at 15:33 pm. The Arbitrator then issued a "without prejudice" ruling by way of his email of 19th November 2015 and declared that he was *functus officio* as of 30th September 2015.

133. GBH submitted that the effect of issuing a "without prejudice ruling" is that there is no ruling. GBH finds support for this proposition in **Greenberg, "Stroud's Judicial Dictionary of Words and Phrases" (8th edition),** page 1175 where it is stated that, "*An arbitrator or referee cannot be said to be functus officio when he has given a decision which is held to be no decision at all*".

134. GBH submitted that ***"The use of the term 'without prejudice' is used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing lawsuit" – Industrial Cause No.2512 of 2012 Millicent Wambui v Nairobi Botanica Gardening Limited [2013] eKLR***. *They also cited* ***Halsbury's Laws of England Volume 17(1), (4th edition Reissue), 2002***, at page 401, paragraph 887; **Jowitt's Dictionary of English Law (3rd edition),** page 2432. GBH submitted that the Arbitrator was required by section 14(2) of the Act, to consider GBH's Challenge. The section is couched in mandatory terms – "*the arbitral tribunal shall decide the challenge*". It was submitted that a *"without prejudice"* Ruling cannot possibly be said to comply with the requirements of this section. GBH also cited the commentary on Article 14 of the **UNCITRAL Model Law, 1998** which is identical to section 14 of the Arbitration Act, where the commentators state at page 34, paragraph 4; that the considerations on whether an arbitrator failed to act include "*whether the arbitrator has conducted himself in a manner that clearly falls below the standard of what may reasonably be expected from an arbitrator*".

135. Following from the above, it is GBH's position that the Arbitrator is not *functus officio* as he claims to be. Such a position is not supported by the facts surrounding the arbitral proceedings, or the law.

136. MJP in response submitted that the arbitral tribunal was *functus officio* at the time GBP lodged the challenge with it in November, 2015. It is submitted that this court need not look any further than section 33 of the Arbitration Act which provides that '***That arbitral proceedings shall be terminated by the final arbitral award..'.*** MJP submitted that it goes without saying that the tribunal thereafter becomes *'functus officio'* and the only challenge that could be brought is to set aside the award on the basis of questioning its legality rather than a Section 14 challenge which the Arbitral Tribunal had no authority to consider or determine. MJP cited the case of ***International Petroleum Refining & Supply Sdad Ltd –vs- Elphis Finance S.A (the "faith") [1993] 2 LLR 408***. In that case, **Justice HobHouse,** at page 410, held that ***'The Arbitrators having published their award were functus officio…'.*** It is MJP's submission that the arbitrator, being *functus officio*, had no jurisdiction to consider any challenge brought under Section 14 of the Arbitration Act and the purported determination of the challenge on a *'without prejudice basis'* is, as is also conceded by GBH, a nullity and of no effect.

137. To address this issue, the court looks at the chronology of events between 21st October 2015 when the Applicant filed its Challenge, and 19th November 2015 when the *"without prejudice"* Ruling was issued.

138. The Arbitrator took up and begun to deal with the Challenge on 3rd November 2015, the same day that the Written Statement of Reasons for Challenge was filed by GBH. This is evidenced by Arbitrator's

email of 3rd November 2015 sent at 14:43pm (page 154 Supporting Affidavit) in which the Arbitrator stated that he was required to rule on the Challenge and more specifically that, *"pursuant to section 14 (2) of the Act and the rules the tribunal is required to rule on the respondent challenge"*. In the same e-mail the Arbitrator asked for a further payment in the sum of Kes.500,000 from each party. This shows that the Arbitrator had considered himself properly seized of the matter with the requisite jurisdiction under the Act to deal with the Challenge on 3rd November 2015 and did not consider himself to be *functus officio* on that date or during the period between the time the Challenge was filed up to the date that he issued the "*without prejudice"* Ruling.

139. Further evidence of the fact that the Arbitrator had taken steps to consider and determine the Challenge is captured in this email of 3rd November 2015 in which he stated *"the tribunal will issue a Procedural Order for the determination of the respondent challenge to include submission by the claimant to the Respondent's challenge followed by a reply by the respondent. The tribunal will then issue its ruling on the respondent's challenge"*.

140. On 5th November 2015, the Arbitrator sent an email at 19:14pm expressing the hope that he would be able to hand down directions in respect of the Challenge on 6th November 2015 or soon thereafter. He further states that *"the tribunal should like to rule on MJP challenge on or before 20th November 2015"* which again clearly shows that as at the date of that email the Arbitrator did not consider himself *functus officio* and was dealing with GBH's Challenge with a target date of 20th November 2015 for the ruling on the matter.

141. On 6th November 2015, the Arbitrator sent an email to the parties at 12:16pm in which he stated that " *the tribunal recognizes that the challenge is a matter for the tribunal"*.

142. The issue of the tribunal being *functus officio* is raised for the very first time not by the Arbitrator but by Inamdar & Inamdar in their email to the Arbitrator of 6th November 2015 sent 13:35pm which is headed *"Grounds 1-11, 13-14"*. In paragraph 3 of the said email Inamdar & Inamdar state "*With regards to your 1st email of 6th November 2015 our response is since the arbitral tribunal has given its award it is functus officio and any application under section 14 is mis-conceived*".

143. The letter from Inamdar & Inamdar seems to suggest that the Arbitrator became *functus officio* on 21st October 2015 on which date it gave the Award. This court finds that the interpretation by Inamdar & Inamdar is incorrect and untrue given that on 6thNovember 2015 OPN wrote to the Arbitrator at 18:07pm and with reference to the letter from Inamdar& Inamdar of 6th November 2015 and stated that ***"With reference to the letter from Inamdar & Inamdar of today's date we would point out that the objection was lodged before the Award was handed down which is why you are dealing with it as you are".***

144. If the award had already been given then, as has been submitted above, the Arbitrator should not have been seeking any *"clarification"* from MJP or issuing any Procedural Orders in respect of the Challenge as by that logic he had already become *functus officio*. It is clear therefore that despite the said interpretation from Inamdar & Inamdar on 6th November 2015 the Arbitrator did not consider himself *functus officio* and he in fact continued to deal with the Challenge as evidenced by his email **7th November 2015** at 00:57 pm forwarding his Procedural Order 6 (N) to the parties.

145. The court's attention is drawn to the recitals of this Procedural Order in which having noted in recital No. 7 that ***"the claimant asserting in its email dated 6th November 2015 at 10.36 that the Tribunal is functus officio that the challenge is misconceived, reserving its right to raise further or other objections and thereby expressly not agreeing to the challenge"*** the arbitrator continued to deal with the Challenge. It is obvious that if the Arbitrator had even for one moment considered himself to be *functus officio* he would have declared it so and thereby put an end to the Challenge. The fact that he did not do so and rushed forward to deliver an award, means that the award was delivered in breach of the Act and is therefore void.

146. On 9th November 2015 OPN wrote to the Arbitrator an email sent at 16: 53pm protesting the fact that the Applicant had not been given an opportunity to make written submissions in support of its Challenge. The Arbitrator then issued an amending Procedural Order 7 (N) on 12th November 2015 allowing the Applicant to make submissions.

147. It is obvious therefore that up to Thursday 12th November 2015 the Arbitrator did not consider himself *functus officio* and on the contrary issued Procedural Order No 7 (N).

148. Then followed a most remarkable exchange of emails between Inamdar & Inamdar and the Arbitrator during the weekend beginning with an email sent on Friday 13th November 2015 at 7.19pm by Mr Geoffrey Muchiri in which he stated ***"The Claimant has now had an opportunity of consulting with its advocates and hereby communicates to the Tribunal its position, which said position is that the Tribunal having rendered a Final Award is functus officio and can give no further directions in respect of these proceedings which came to an when the Final Award was published by the Tribunal on 30th September 2015".***

149. This email was not acknowledged by either OPN or GBH because it arrived during the weekend and OPN was not in office to respond.

150. On Saturday 14th November 2015 at 11.31am Mr Geoffrey Muchiri wrote to the Arbitrator again acknowledging receipt of the Tribunal's email dated 13th November 2015.

151. He then goes on to state "The Claimant would merely like to clarify an inadvertent error which it noticed in its email namely line 2 of the said email which ought to read: "*The tribunal having rendered a final award is functus officio and can give no further directions in respect of these proceedings which came to an end when the Final Award was published by the Tribunal on 30th September 2015"* clearly suggesting to the arbitrator that he had published his award on 30th September 2015 which as at the time of Mr Muchiri's email was not the Arbitrator's stand. On Saturday 14th November 2015 at 4.36pm without waiting for any acknowledgement from OPN or GBH of receipt of his said email and knowing that Saturday is not a working day in Kenya and that normal office hours in Kenya are between 8.30 am - 5.00 pm Monday to Friday, the Arbitrator wrote his email of Saturday 14th November sent at 4.36 pm to the parties and for the very 1st time adopted the line suggested by Mr. Muchiri and stated in paragraph 5 of his said email that ***"the tribunal has concluded that pursuant to section 33 (1) of the act the arbitral proceeding are terminated by the award dated 30th September 2015 and" that pursuant to section 33(1) of the act the tribunal mandate does not extend to considering the respondent challenge which falls outside the Tribunal residue mandate under rule 20 and section 34 of the Arbitration Act".***

152. He then goes on to say that ***"To save time, to avoid incurring further unnecessary costs and in fairness to the Parties, the Tribunal formally informs the parties that the tribunal is now functus officio and without any mandate to consider the respondent's challenge and to give a ruling".***

153. This is not the conduct of an honest and fair arbitrator who is treating both parties with equality. At this stage, and in the process leading to the Arbitrator declaring himself *functus officio*, the Arbitrator was clearly under the full control of Mr. Muchiri counsel for MJP. This also shows the fullest expression of what bias means. Bias was clearly established in the process leading to the Arbitrator declaring himself *functus officio.*

154. It is strange that the Arbitrator who is at pains in his said Letter to display his qualifications and experience makes this volte-face without any explanation while at the same time informing the parties that he had spent 20 hours of work between 21st October 2015 to 14th November 2015 for which he intended to charge them.

155. When the court admitted the said letter of the Arbitrator to these proceedings, the court stated that the same would be useful for information purposes. The court observed the colorful qualifications of the

Arbitrator. The court had expected that the said qualifications would mean something including competence, fairness, experience etc. I am disappointed that the Arbitrator should show such kind of professional incompetence and bias in the light of such colourful qualifications. The Arbitrator treated his duties with such professional casualness which cannot be explained in the light of his said qualifications, starting with a *"without prejudice"* ruling to declaring himself *functus officio.* This can only mean intended bias or intentional incompetence in light of the said qualifications. The Arbitrator seems to have gratefully accepted the suggestion put forward by Mr. Muchiri in his email of 13th November 2015 sent at 11:13am as a way out of his dilemma. One would ask; his ruling of "without prejudice" was without prejudice to what?

Costs

156. GBH submitted that the Arbitrator's bias in favour of the Respondent is further obvious from the way in which he dealt with the issue of the costs of the arbitration. MJP did not submit on this issue. However record shows that OPN repeatedly pointed to the Arbitrator the provisions of Rule 14 of the Arbitration Rules 2012, and Mr Muchiri writing to him on 24th September 2014 of his agreement with OPN on the interpretation of the provisions of the said Rule. The Arbitrator ignored the same but awarded the sum of Kes.21,000,000 in costs without taxation. The Arbitrator's award also ignored the fact that when Mr Muchiri himself was quoting the figures of Kes.21,000,000 as costs, he stated that the said figure was *"subject to taxation in the usual way"*.

157. Section 29(1) of the Act provides that, "*an arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute*".

158. The Arbitrator was required to conduct the proceedings in accordance with the procedure agreed by the parties.

159. In **Civil Appeal No.38 of 2013** ***Tanzania National Roads Agency v Kundan Singh Construction Limited [2014] eKLR*** the Court of Appeal, in declining to recognize and enforce an arbitral award, relied on the fact that the arbitral tribunal had failed to adhere to the rules of law chosen by the parties.

160. In the present case, the parties had agreed to be bound by the 2012 Rules which the Arbitrator blatantly ignored, showing his bias.

161. In ***Associated Engineering Co v Government of Anhra Pradesh And Anor [1992] AIR 232*** it was held that, ***"the arbitrator cannot act arbitrarily, irrationally capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract***". This means that the Arbitrator was bound to agree to the parties' agreement on the issue of costs.

Delay in making award

162. GBH submitted that on several occasions, the Arbitrator stated that he was ready to hand down the award. In the end, the award was sent to the parties more than a year after the conclusion of the arbitral proceedings. GBH submitted that the Arbitrator by accident or design or through his incompetence or otherwise, failed to understand the essence of the monetary dispute between the parties at the heart of this arbitration which was simply how much was owed by who to whom? GBH submitted that this is the very thing according to his email of 19th October 2015, for which he was seeking *"clarification"* to enable him to understand the financial claims of the Respondent which was the nub of the arbitration, before handing down the award.

163. It is instructive to note that the Arbitrator stated in his email of 19th October 2015, that the award dated 30thSeptember 2015 was "*virtually ready"* to be handed down. According to Oxford dictionary the word *"virtually"* means nearly or almost. It is obvious therefore that the award was not ready on 30th September 2015 unless the Arbitrator is in the habit of dating and signing awards that are nearly or almost

ready. By his email of 30th September 2015 the Arbitrator stated that, "*the final award in this matter is now settled*".

164. It is clear that the award was not ready and/or settled for the reason that the Arbitrator sent an email on 19th October 2015 indicating that the award "*is virtually ready*" and seeking "clarifications" of MJP which went to the heart of the dispute between the parties.

165. GBH submitted, with concurrence of the court, that the inordinate delay in making the award did not afford confidence in the arbitrator.

Bias

166. GBH submitted that a case for bias has been established against the Arbitrator. The definition of bias and the test for the removal of an Arbitrator is set out in the case of ***Modern Engineering v Miskin [1981] 1 Lloyd's Rep 515*** as being that;

> ***"The proper test to apply when considering whether to order removal was to ask whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion….The question is whether the way he conducted himself in the case was such that the parties no longer have confidence in him. It seems to me that if this arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a judge or an arbitrator saying, 'I have not had a fair hearing' ".***

167. The above test was also applied in **Misc Civ App No. 506 of 2011** ***Mistry Jadva Parbat Company Limited v Grain Bulk Handlers Limited [2012] eKLR*** resulting in the removal of the late Norman Mururu. In that case, the court stated that an arbitrator could be removed "*only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence*".

168. In **Misc Civil Application No.193 of 2014** ***Zadock Furniture System Limited and Maridadi Building Contractors Limited v Central Bank of Kenya [2015] eKLR***, the court held that ***"The test for bias or prejudice must be that there is real danger that the arbitrator is biased, and in deciding whether bias has been established, the court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there is a real likelihood of bias".***

169. Similarly, in ***PT Central Investindo v Franciscus Wongso and others and another matter [2014] SGHC 190***, the court held at paragraph 19, that the test for apparent bias/likelihood of bias was that; ***"the applicant has to establish the factual circumstances that would have a bearing on the suggestion that the tribunal was or might be seen to be partial. The second inquiry is to then ask whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it".***

170. When considering the issue of bias, ***"the court looks at the impression which would be given to other people. Even if he (arbitrator) was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand"*** – see ***Metropolitan Properties Co. Ltd v. Lannon (1968) 3 All ER. 304*** at page 310, paragraphs A to B.

171. It is submitted that all the facts set out in these submissions demonstrate bias on the part of the Arbitrator as a result of which he ought to be removed. This court is satisfied that a case of bias has been established against the Arbitrator.

Removal of Arbitrator

172. It is clear that GBH has for the foregoing reasons lost confidence in the Arbitrator and prays that the court exercises its power under section 14 of the Act, and removes him.

173. GBH submits that the Court has jurisdiction to remove the Arbitrator on the basis that the Applicant has demonstrated bias on the part of the Arbitrator and has complied with the requirements set out in section 14 of the Act.

174. GBH acknowledges upfront, the fact that in the present matter, it is seeking an order to remove an arbitrator after an award has been rendered and relies on the decision set out in **PT Central Investindo** (above)**,** a Singapore case in which the same facts existed, in so far as in that matter the arbitrator also issued an award in the midst of the hearing of the application to remove him. In the said the court stated that ***"even though an award had been rendered…a decision had …legal …procedural and practical utility."*** The court further stated that ***"If he had in mind an arbitrator who had manifested apparent bias and then disingenuously proceeded to rush out an award for illicit reasons, that arbitrator would prima facie have allowed his biasness to infect the award rendered".***

175. In further support of the proposition that the Court may still deal with the present application despite the fact an award has been rendered, the Applicant relies on the case **Zadock Furniture's** in which the court stated:

> ***"On my part, I make the following reading of section 14(8) of the Arbitration Act. Unlike in other jurisdictions, the section vests in the parties the decision to commence, continue and conclude arbitral proceedings while an application under section 14(3) of the Arbitration Act is pending…..Out of this reading, one thing is clear; the arbitral tribunal cannot make the decision in section 14(8) of the Arbitration Act to commence, continue and conclude arbitral proceedings unless with the consent of the parties. Even when the arbitral proceedings are concluded under section 14(8) of the Arbitration Act, the arbitrator will not make an award until the challenge is concluded".***

176. This court finds that bias has been proved against the Arbitrator. As far as this court is concerned, it does not matter that the Arbitrator has purported to deliver an award as the Award does not negate the issues of bias raised by the Applicant.

117. In **Zadock Furniture's** the court recognized that section 13(3) of the Act set out the grounds upon which an arbitrator may be removed. The court added that the test pursuant to section 13(3) was 2-pronged and that:

> a. the court must find that circumstances exist, and those circumstances are not merely believed to exist; and
>
> b. those circumstances are justifiable

178. This court is satisfied that both limbs of this test set out above have been satisfied. Lack of confidence in an arbitrator brings into question not just the arbitral proceedings, but any decision made in respect thereof. In the case of ***Fox and Others v P.G. Wellfair Ltd [1981] 19 BLR 59,*** it was held that, ***"In any event, in view of the misconduct in relation to the main arbitration, I do not think that the award in Mr. Fisher's arbitration can stand either. Mr. Fisher must have lost confidence in the arbitrator by reasons of his misconduct to the main arbitration".***

Refund of fees

179. GBH submitted that it had accepted the Arbitrator's offer of 19th October 2015, to refund the fees paid to him.

180. In dismissing GBH's claim for refund of fees MJP in the Replying Affidavit of Paresh Varsani states at paragraph 16 (f) that both they cannot understand the statement by the Arbitrator in his email of 19th October 2015 "which appears completely out of context and the trail of all the emails exchanged and which are attached as exhibits to this affidavit".

181. He further states in paragraph 16(g) of the said Replying Affidavit that he has been informed by Mr Inamdar that "it was mischievous of Mr OP Nagpal acting on behalf of GBH in the arbitration to purport to accept **what was not an offer** to terminate the arbitral proceedings by the arbitrator".

182. To resolve this issue, I will have to note what the Arbitrator says for himself on the subject in his aforesaid Letter to the court. At paragraph 3 of page 3 of his Letter to the court the Arbitrator unequivocally admits that he did make the offer. His exact words are "as for my alleged offer to return the last fee deposit, I made this offer (not expecting either party to purport to accept the offer) on the basis that I had been concerned that I might have got my exchange rate sums wrong".

183. GBH submitted that in this response the Arbitrator wrongly tries to create the impression that his offer of refund of fees was limited to the "last fee deposit" which is not true as can be seen from his email of 19th October 2015. Nowhere in the said email of 19th October 2015 has he mentioned the words "last fee deposit".

184. By stating that he did not expect either party to take up this offer what the Arbitrator is saying in effect is that this was a mere bluff on his part. This is not the behaviour of an honest conscientious and unbiased competent arbitrator. The Arbitrator appeared to have been making some very serious jokes. His *"without prejudice"* ruling, his declaration that he was *functus officio*, and now his joke about refunding fees do not make him appear as a serious professional. There is a lot of what, for the lack of appropriate words, one may call comic relief in the entire proceedings soon after he took parties's evidence. Arbitration is a serious issue. It is meant to solve parties' disputes. If one accepts to be an Arbitrator, one is professionally expected to deliver results. That is why one is paid. In the absence of any results, an Arbitrator would not expect to be paid professional fees.

Jurisdiction

185. On their part MJP submitted that **Section 13(3)** of **The Arbitration Act** permits a challenge to an arbitrator ***'…. only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence…'*** and the challenge procedure is set out in **Section 14** of the said Act.

186. Section 14 of the said Act sets out the procedure for challenging an Arbitrator and, in particular, requires that ***'… a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of any circumstances referred to in Section 13(3), sent a Written Statement of the Reasons for the Challenge to the arbitral tribunal…'*** whereupon the arbitral tribunal is required to decide on the challenge in the event the Arbitrator does not withdraw from office or the opposing party does not agree to the challenge.

187. Where the challenge is unsuccessful, the challenging party may, within 30 days of being notified of the decision to reject the challenge, apply to the High Court to determine the matter *(Section 14(3) of the said Act).* MJP submitted on ground No 4 in support of the Motion.

> ***"4. The Arbitrator failed to hear and determine the applicant's challenge lodged on 21st October, 2015".***

This Ground is supported by the averments made in the Supporting Affidavit at paragraph 67 where the deponent states that the Arbitrator ***'… failed to consider the applicant's challenge…'.***

188. MJP submitted that it is now a well settled principle of law that a party is bound by its pleadings and cited the case of ***Independent Electoral & Boundaries Commissions & Anor vs Stephen Mutinda Mule & 3 others (2014) eKLR*** where the court approved passages from the several authorities as good law and

held that ***'As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the petition on the bias of matters not properly before her. To that extent, she committed a reversible error…'.***

189. In the present matter, it is GBH's case that the Arbitrator failed to hear and determine the challenge lodged before him by the applicant. Given court's jurisdiction can only flow from the provisions of section 14 of the said Act, MJP submitted that this court lacks the jurisdiction to ***'… confirm the rejection of the challenge or uphold the challenge…'*** pursuant to the provisions of section 14(5) of the said Act which, incidentally, is mandatory in terms. Consequently this court it ought to dismiss and/or strike out the present application for want of jurisdiction. MJP cited '***LILLIAN S'*** where the Court of Appeal held that, ***'… Jurisdiction is everything. Without it, the court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...'.***

190. Pursuant to the provisions of Section 14(2) of the said Act, neither the Arbitrator nor by extension, this court has jurisdiction to deal with any challenge unless such challenge was lodged within 15 days after becoming aware of any circumstances referred to in Section 13(3) of the said Act. It is therefore important, for the purposes of addressing the question of jurisdiction, to determine the limitation date in respect of which any challenge could be raised.

191. It is MJP's submission that by reason of the contents of Section 14(2) of the said Act, a challenge to the arbitral tribunal can only be said to have been mounted or commenced on the date the reasons for the challenge are set or lodged with the arbitral tribunal. According to GBH, its challenge was lodged on 21st October. The e-mail by which the challenge was purportedly lodged appears at page 78 of the exhibits annexed to the Supporting Affidavit from which it is clear that the application was no more than expressing an intention to lodge a challenge with the arbitral tribunal concerning its impartiality, independence and competence on the basis of instructions received and stated that the Written Statements of reasons for the challenge would be filed within 15 days. The Written Statement of Reasons of challenge to the Arbitrator which appear at page 81-85 of the exhibit to the Supporting Affidavit were forwarded to the Arbitral Tribunal under cover of an e-mail sent on the 3rd November, 2015.

192. MJP submitted that in the premises, the challenge to the Arbitrator pursuant to the provisions of Section 13 of the Act can only be said to have been mounted or lodged on 3rd November, 2015. Significantly, only matters that came to the attention of the applicant within the 15 days period prior (to 3rd November, 2015) and were circumstances within the contemplation of Section 13(2) of the Act could be relied upon. Accordingly, no challenge could be raised on matters or any circumstances prior to the 19th October, 2015 as all the matters complained of as constituting circumstances referred to in section 13 of the Act were well within the knowledge of and contemplation of the applicant. Any challenge mounted or lodged premised on such facts is without jurisdiction and/or time barred and neither the Arbitrator nor this court has power under the Act to extend this.

193. By embarking on a hearing and/or making a determination based on matters that occurred prior to 19th October, 2015 or grounded thereupon, this court would be acting without jurisdiction.

194. GBH responded that the challenge which it seeks to have this court uphold is set out in the email dated 21st October 2015, sent to the Arbitrator at 10:47am by the Applicant's then advocates O P Nagpal & Company, challenging the *"impartiality, independence and capacity"* of the Arbitrator *(hereinafter referred to as "the Challenge").* In support of the Challenge, the Applicant filed with the Arbitrator, Written Reasons for Challenge *("Written Reasons"),* on 3rd November 2015.

195. GBH's case is that MJP has completely misunderstood the nature of GBH's application and the basis of the Challenge. GBH summarized its application as follows:

a. the Arbitrator received the Applicant's Challenge on 21st October 2015 and the Written Reasons on 3rd November 2015.

b. the Arbitrator then confirmed to the parties on several occasions (see paragraphs 112 to 136 of the Applicant's written submissions dated 20th April 2016) that he had the power under the Act to hear and determine the Challenge and that he would do so.

c. the Arbitrator also issued Procedural Orders 6(N) and 7(N) in respect of the Challenge and more specifically, the timetable for the filing of documents in respect of the Challenge.

d. On 19th November 2015, the Arbitrator issued what he called a "without prejudice" ruling and rejected the Challenge (see page 170 of annexure SC 1 to the Supporting Affidavit) on *inter alia*, the grounds that he was allegedly *functus officio*.

e. the court therefore has the power under section 14(5) to confirm the rejection of the Challenge or uphold the Challenge and remove the Arbitrator.

196. GBH submitted that the Arbitrator was required by section 14(2) of the Act, to consider the Applicant's Challenge. The section is couched in mandatory terms – "*the arbitral tribunal shall decide the challenge*".

197. A without prejudice Ruling stating that the Arbitrator cannot deal with the Challenge as he is *functus officio*, cannot possibly be said to comply with the requirements of this section.

198. It is submitted that the effect of the Arbitrator stating that the Ruling was issued without prejudice is, following the reasoning in **HCCC No.29 of 2016** ***Maxam Limited & 2 ors v Heineken E.A. Import Co. Limited & 2 ors*** (unreported), that;

a. the Arbitrator's Ruling cannot have the effect it was intended/claimed by him to achieve (i.e., determine the Challenge);

b. it divests the Ruling of any legal force;

c. puts the Applicant in a position where it is entitled to think that the Ruling did not conclude the issue of the Challenge;

d. it is not the kind of Ruling contemplated in law or envisaged under the Act; and

e. it lacks legal clarity with respect to the orders it was required to convey.

199. This court also notes that MJP has also conceded at paragraph 67 of its written submissions, that a without prejudice ruling is "*a nullity and of no effect*". It is clear therefore that there is no basis for suggesting that the court has no jurisdiction.

200. It has also been stated at paragraph 33 of the Respondent's submissions, that the Applicant is precluded from raising the Challenge as it had on 21st July 2015, been aware of the Arbitrator's bias. However, it is the finding of this court that the fifteen (15) days time limit does not apply where a party raises bias. Section 14(2) of the Act as read together with section 13(3), gives a party 15 days within which to file a challenge upon becoming aware of any circumstances giving rise to *inter alia*, justifiable doubts as to the arbitrator's impartiality and independence.

201. *"After becoming aware of" means that the time limit for challenging an arbitrator starts running only from the point in time at which the challenging party acquired actual knowledge of the ground for challenge. Mere negligent ignorance of the ground for challenge, even to such a degree as to constitute constructive knowledge, has not been found sufficient to trigger the time limit.* ***A party who could have***

challenged an arbitrator while the arbitral proceedings were ongoing but who failed to do so was found not to be barred from subsequently challenging the legality of the award on the basis of a reasonable apprehension of bias" - **UNCITRAL Model Law, 1998** at page 69, paragraphs 6 and 7.

202. It is therefore clear that MJP's argument has no basis in law or fact.

Determination

204. Pursuant to the foregoing paragraphs of this ruling, it is the finding of this court the GBH, the applicant herein, has raised issues and grounds in support of the application, to which MJP, the respondent herein, has failed to challenge.

204. This court is satisfied that the application has merit and should be granted. Further the Arbitrator, having so incompetently handled the said arbitration, and having delivered no award, and having wasted the time of the parties herein, ought not to be remunerated for there is no valid consideration for such remuneration. However, this court will allow the Arbitrator to keep one half of the total fees and expenses already paid to him by the parties. The final orders of the court are as follows:

a. the challenge lodged by the Applicant before the Arbitrator on 21st October 2015 is hereby upheld.

b. the Arbitrator is hereby removed.

c. the arbitral award dated 30th September 2015 and issued by the Arbitrator on 21st October 2015, is hereby declared void.

d. the Arbitrator shall refund one half of total fees and expenses paid to him by GBH in the arbitration; and

e. The costs of this application shall be for GBH.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF DECEMBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

M/S Terry Mwango for applicant

No appearance for Respondent

No appearance for Arbitrator

Court Assistant – Mr. Munyao