REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC CIVIL APPLICATION NO 479 OF 2014

IN THE MATTER OF THE ARBITRATION ACT CHAPTER 49 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ARBITRATION RULES, 1997

BETWEEN

EVANGELICAL MISSION FOR AFRICA :::::::::::::::::::::: 1ST CLAIMANT

CINDY SANYU OKOVA :: 2ND CLAIMANT

VERSUS

KIMANI GACHUHI :: 1ST RESPONDENT

PETER MBUTHIA GACHUHI :::::::::::::::::::::::::::::::: 2ND RESPONDENT

R U L I N G

INTRODUCTION

1. There are two applications before the court leading to this Ruling. The first application is a Chamber Summons dated 26th September 2014 and filed in court on 30th September 2014 by the Claimant's pursuant to Sections 35 and 39 of the Arbitration Act, Cap 49 of the Laws of Kenya, and pursuant to parts of the Constitution of Kenya and Civil Procedure Order and Act cited in the application.

2. The application seeks to secure a total of ten orders stated therein the summary of which is that this court be pleased to set aside in toto the Final Award dated 19th August 2014 by the two arbitrations named in the application, and that the court be pleased to issue any consequential orders that its deems necessary to serve the cause of justice.
3. The application is premised on the grounds set out therein and the Applicants rely on the following documents filed in court.

- ***Supporting Affidavit of Mrs. Hwa Ock Im.***
- ***Claimant's written submissions filed in court on 6th March 2015.***

- ***Claimant's Addendum submissions filed in court on 10th March 2015.***
- ***The Final Award dated 19th August 2014 and filed in court on 9th October 2014.***
- ***Entire pleadings before the court including oral submissions by their counsel Mr. Ahmednassir Abdullahi.***
- ***Entire pleadings before the court include oral submission by their counsel Mr. Kamau Karori.***

4. The application is opposed by the Respondents who have filed the following documents:-

- ***Replying Affidavit sworn by Peter Mbuthia Gachuhi sworn on 24th November 2014.***
- ***A supplementary affidavit sworn on 11th February 2015.***
- ***Written submissions dated 16th March 2015.***
- ***The Final Award dated 19th August 2014 and filed in court on 9th October 2014.***

5. The second application is a Notice of Motion dated and filed in court on 24th November 2014 pursuant to Order 2 Rule 15 (b), (d) and order 50 Rule 1 of the Civil Procedure Rules, and Civil Procedure Act. The application is premised on the grounds set out therein and is supported by affidavit of **Peter Mbuthia Gachuhi** dated **24th November 2014**, and seeks to secure orders striking out the Claimant's first application herein in its entirety, or in the alternative striking out of grounds number 4, 9, 10, 14, 16, 17 and 21 of the said Chamber Summons dated 6th October 2014 together with paragraphs 34, 35 (b), (d), 39, 43 and the annextures referred to in paragraphs 4 and paragraphs 35 of the supporting affidavit sworn by **Hwa Ock Im** on 6th **October 2014**.
6. The Claimants have not filed any response to this application by the Respondents, but it is common ground that the two applications contain issues which are cross cutting, and one should be in response to the other.

7. A brief summary of the history of the matter is important. It is common ground between the parties that on 16.9.2005 the Claimants and the Respondents entered into an agreement for the sale and purchase of part of L.R Number 2951/84 for Kshs 64 million. (Agreement number 1"). Subsequently, an agreement for novation was executed. This is the second agreement between the parties. On 4.6.2007 the parties executed a variation agreement and also executed a license agreement allowing the claimants to occupy and use the land.

8. The Claimants paid the sums agreed under the contracts and took possession of the suit property in the process. They built a school infrastructure and started running a thriving primary school. All was fine for the Claimants as they waited for their title deed to be handed over to them by the Respondents. The sale of the suit land was subject to the land being subdivided. The Claimants were buying part of the Respondents' property. An application was made to the City Council for approval of the sub-division. The Respondents were informed that the sub-division would be allowed on condition that they surrender 10% of the land for public utility. This condition did not please the Respondents who were not ready to let go of the said 10% and they appealed against the decision by the City Council that required their surrender of 10% for public utility. That appeal was never finalized.
9. With a view to finalize the matter and move it forward, the Claimants now allege that they agreed gratuitously that the 10% that the City Council wanted surrendered for public utility could be cut off or hived from the piece they were buying. The Respondents were skeptical on this offer and insisted on proceeding with the appeal. As the process of appeal delayed, the proceedings show that the Claimants employed a consultant who got approval for the sub-division from City Council without much fuss. However the Respondents were reluctant to accept the approval, and instead opted to terminate the agreements citing undue delay in completion of the transaction. This action annoyed the Claimants who then filed HCCC No. 569 of 2009 and obtained a temporary injunction. It was subsequently agreed between the parties that the dispute between them be resolved through arbitration as provided for in the license agreement between the parties. The parties herein then appointed two arbitrators Messers Joe Okwach SC and Steven Gatembu Kairu. The later was subsequently appointed judge of the court of appeal. They published their final award on 19th August 2014, (a copy of which is filed herein on 9th October 2014). It is that Award which the Claimants now challenge in this court, and which the Respondents ask this court

to adopt.

10. The Claimant submitted that it is is common ground that the only document between the parties that contained an arbitration clause is the license agreement of 4.6.2007. Clause 4 of the said license stated: "***All questions hereinafter in dispute between the parties hereto shall be referred to arbitration in accordance with the provisions of the Arbitration Act (1995) or any statutory re-enactment thereof for the time being in force in Kenya"***. The Claimants submitted that this provision is critical in resolving the dispute before the court. It provides the centrifugal force of the dispute. It is submitted for the Claimants that the Claimants herein filed the suit in the High Court with a view to get conservatory orders under the Arbitration Act and then refer the matter to arbitration under Clause 4 of the License aforesaid. Indeed a consent order referring the matter to arbitration was recorded by the parties on 7.7.2010. The Claimants challenge the Final Award of the arbitrators partly on grounds of jurisdiction, and also under Section 35 of the Arbitration Act. These grounds are:

1. ***The Arbitral Award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration.***
2. ***The arbitration award contains decisions on matters beyond the scope of the reference to arbitrate.***
3. ***The composition of the tribunal was not in accordance with the agreements of the parties and was not in accordance with the Arbitration Act.***
4. ***The making of the Award was induced or affected by Fraud, bribery, undue influence or corruption.***
5. ***The Award was in conflict with the public policy of Kenya.***
6. ***The award was contrary to the Laws of Kenya.***
7. ***The Award was in violation of the Constitution of Kenya.***

APPLICABLE LAW

11. The Claimants have robustly stated that the application raises serious constitutional issues, including the national values under the Constitution, and that his court has enhanced latitude to dispense justice well beyond the boundaries of the Arbitration Act, 1995. In laying the basis for such an expansive approach, the Applicant's counsel Mr. Ahmed Nassir Abdullahi submitted that the application graphically captures a desperate and last attempt on the part of the claimants to stop the demolition of a primary school that is home to hundreds of vulnerable children between the ages of 7 to 14, by rich and powerful individuals; and that this case is another attempt by the feeble and vulnerable in society to stop and fend off the disposition of a school and its buildings by the rich, powerful and mighty; that it is a contest that vividly encapsulates a tussle between a David and a Goliath; it is a contest between might and justice;. it is a contest between right and wrong; it is a fight between a senior partner in Kaplan & Stratton Advocates and an evangelical missionary that looks after the children of the vulnerable and weak members of society. Mr. Abdulahi submitted that this case is a graphic contest between human greed and the virtues of missionaries in the mold of Mother Teresa. Counsel submitted the alleged heinous land grabbing and the imminent and impending demolition of the school (the subject matter of the application before the court) will be pursuant to an arbitration award that is being challenged. It was submitted that this grabbing and demolition of the school has a vile and corrupt veneer of legality, and if the challenge before this court fails the court will give the green light and stamp the seal of legal legitimacy to the Respondents to fraudulently takeover the school and then subsequently demolish and evict the school children. In the process, property and a school worth over Kshs 1 billion will be unjustly handed over in a golden platter to the said Respondents. To say that the Respondents will be laughing all the way to the bank will be an understatement, and a cruel one at that, it was submitted. With this in mind, the counsel then appeared to justify his propagation for an expended jurisdiction and stated that the application before the court is premised and grounded firstly on the Constitution of Kenya 2010. Second, on the Arbitration Act and all relevant laws of the land. Counsel submitted that the Application first is in pursuant to Article 165(6) of the Constitution. Counsel submitted that Article 165(6) of the Constitution breathes into the appeal

process of arbitration awards a fresh, enlightened and liberating constitutional breath. In the process it brings into sharp focus a constitutional paradigm shift. Counsel submitted that the hitherto accepted notion that awards from an arbitration process can only be evaluated on narrow statutory grounds under the Arbitration Act has been thrown to the four winds by Article 165(6) of the Constitution. That notion that shackles the powers of this court should be treated a judicial relic from another era and must give way to the new jurisdiction of the High Court. Article 165(6) reads: "***The High Court has supervisory jurisdiction over subordinate courts, and over any person, body or authority exercising judicial or quasi-judicial function, but not over a superior court***". Counsel submitted that the court ought to accept that the foundational bricks of the process to challenge an award by an arbitration tribunal is laid down first by Article 165(6) of the Constitution. Such a challenge like the one undertaken by the Applicant thus has a constitutional blessing and thrust. It is thus the Applicants' humble submission that an arbitral tribunal obviously exercises and discharges a judicial function. Second such a tribunal is a person or a body that exercises and discharges a judicial function. In light of this, this court in appraising the application before it, must accept that it indeed has a blank legal cheque and stands on an expansive and firm jurisprudential plateau to see to it and ensure that it subjects the decision of the arbitral tribunal to searching test of conformity to all the laws of the land and especially the Constitution itself. The court, once it assumes this jurisdiction under Article 165(6) of the Constitution must also ensure that the decision of the tribunal passes the mandatory test of Article 10 of the Constitution. This requirement is not unique to arbitral tribunals. Article 10(2) of the Constitution states, ''***all persons and institutions must observe the national values and principles of governance when they "apply or interpret any law"***. Since the arbitral tribunal applied the law and interpreted it, its award or the decisions it makes must be subjected to the requirements of Article 10 of the Constitution. In other words the application and interpretation of the law in a given context is no longer left to the personal liking, dislikes or whimsical interpretation of the person. He/she must apply the national ethos and values of the country, which are provided under Article 10(2) of the Constitution.

12. On their part, and in response to the submissions of counsel for the Claimants, Mr. Kamau Karori for the Respondents submitted that the scope of any intervention by court on arbitral proceedings is carefully circumscribed. By advancing the argument that Articles of the Constitution breathes into the appeal process of arbitration awards, Mr. Karori submitted that it is clear from that assertion that the Claimants are seeking to appeal against the award dated 19th August, 2014. Counsel submitted that the law in Kenya as regards the role of the court in arbitral proceedings is now well settled. To begin with, Section 32A of the Arbitration Act, specifically provides that an arbitration award is final and binding on the parties and the same cannot be interfered with except in accordance with the provisions of Section 35 of the Arbitration Act. This is in addition to the provisions of Section 10 of the Arbitration Act, which excludes courts from the arbitral process except in the limited circumstances set out in the Act, which for the purposes of these proceedings includes Section 35 and 36 of the Arbitration Act. Where parties desire that there should be an appeal (on matters of law only), they must specifically stipulate that in their agreement so as to bring themselves within the purview of the provisions of Section 39 of the Arbitration Act. In this case, no such agreement was entered into by the parties in writing or under the terms of the consent order in the earlier suit. Therefore, the provisions of Section 39 of the Act do not apply to these proceedings. Counsel submitted further that the arbitration clause to which the Claimants seek (wrongly to attempt to confine themselves) in this case which is Clause 4 of the Licence, expressly stipulated that all questions in dispute between the parties shall be referred to arbitration in accordance with the provisions of the Arbitration Act (1995). By so stipulating, the parties, by their own deed, agreed to bring themselves within the provisions of the Arbitration Act with all its benefits and limitations. Neither party can complain when the provisions of the statute they agreed to be bound by are applied especially in not providing for an appeal under Section 39 of the Act. Counsels cited cases which transcend both the period before and after the promulgation of the Constitution of Kenya, 2010. Two of those cases aptly capture and explain the current jurisprudence on the issue as enunciated by the Court of Appeal. The first one is the case of **Nyutu Agrovet Limited v Airtel Networks Limited, Civil Appeal (Application) No. Nai 61 of 2012** which was delivered on 6th March 2015, five (5) years after the promulgation of the Constitution

including Article 165. This was a decision of a five judge bench in which they unanimously laid out the following principles:-

An arbitral award is final and binding on the parties; the intervention of the Court as regards an award delivered by an arbitral tribunal is limited strictly to the grounds set out in Section 35 of the Arbitration Act and no more; the authority of the court in dealing with an application under Section 35 does not confer upon it an appellate jurisdiction meaning that the court is not entitled to review the decision of the arbitrators for the purposes of substituting its own view or conclusions with that of the arbitral tribunal. The court will respect the fact that the parties opted to go to an arbitral tribunal instead of going to court and therefore except for the grounds set out in Section 35, it will not interfere with an arbitral award even if the court itself, on the facts as proven, might have reached a different conclusion; that our Arbitration Act is in keeping with the UNCITRAL Model Law to which Kenya is a signatory and so in keeping with its international obligations, it must uphold, respect and enforce the arbitral process; that the intervention of the court must be in furtherance, and not in hindrance of the arbitral process. In arriving at the above findings, the Court of Appeal considered, among others, arguments in relation to the provisions of the Constitution and specifically Article 164 of the Constitution. They also accepted as good law, the decision of the Court of Appeal in the case of **Anne Mumbi Hinga v Victoria Njoki Gathaara, [2009] eKLR** where the Court had stated as follows:-

> ***"We therefore reiterate that there is no right for any Court to intervene in the arbitral process, or in the award, except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties, and similarly, there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act … We are concerned that contrary to the broad principles of finality of arbitral awards as set out in the Arbitration Act, the Superior Court all the same entertained incompetent Applications which have in turn resulted in the 10 years delay in the enforcement of the award."***

Counsel submitted that the law on the limited intervention available to the court in matters the subject of arbitration, is settled law and urged the court to be guided by those decided cases. The invitation in the application by the Claimants, amounts to asking the court to sit on appeal on the decision of the arbitral tribunal, a jurisdiction that the court clearly does not have. Case law in Kenya emphatically eschews any attempt by a court to reevaluate the evidence tendered before the arbitral tribunal for any purpose including ascertaining whether the court may itself have arrived at a different decision whether on the law or the facts.

13. I have considered the parties' submissions in regard to applicable law and the scope of intervention by the court. This court finds that there is no contradiction in terms of the submissions by the parties in the matter. The jurisdiction and extent of a court's intervention is carefully circumscribed. However, I understand the Applicant to be saying that within the provisions of the law allowing intervention, the Constitution now expects the court to more robustly pronounce itself and thereby whenever necessary, protect the rights of the claimant's which may have been violated by the arbitrators, including the Claimant's right to property under the Constitution. What the Claimants are urging me to do requires no urging. It is the duty of this court, at all times to uphold the provisions of the Constitution to the uttermost, and to robustly apply the same within the law. Nothing stops this court form applying the integrity Chapter 6 of the Constitution, or Chapter 10 on National Values, and indeed any other Articles in the Constitution for the purposes of delivering justice. I will therefore be guided in this Ruling by the relevant provisions of the Constitution in ensuring that the applicable provisions of the Arbitration Act are applied within the spirit of the Constitution as the supreme law. No one can deny this.

THE RESPONDENT'S NOTICE OF MOTION DATED 24TH NOVEMBER 2014

14. The second application herein, the above Notice of Motion, in my view raises preliminary issues which this court should dispense with before proceeding further in this matter. The second

application seeks to strike out the first application and in the alternative, strike out named grounds and paragraphs of the supporting affidavit of Hwa OCK IM dated 6th October 2014.

15. The Claimant's application is premised on the following grounds:-

1. ***That the Final Award dated and delivered on the 19th August 2014, is in flagrant disregard/contravention of public policy in Kenya.***
2. ***That the Final Award dated and delivered on the 19th August 2014, is inimical to the national and economic interests of Kenya.***
3. ***That the Final Award by the two Arbitrators is contrary to established principles of law and justice.***
4. ***That the Final Award by the two Arbitrators dated and delivered on the 19th August 2014, was tainted with gross mala fides, undue influence and corruption, hence the Respondents cannot derive any benefit there from nor seek to rely on the same.***
5. ***That the two Arbitrators failed to decide the substance of the dispute according to the considerations of justice and fairness.***
6. ***That the Arbitrators acted arbitrarily, irrationally and capriciously by deciding on matters that were not submitted to them and were expressly provided for in the Sale Agreement.***
7. ***That it is in the interests of justice and equity that the prayers sought herein are granted.***
8. ***That the Final Award delivered on 19th August 2014, is unconstitutional and contravenes a litany of constitutional provisions.***
9. ***That the Final Award delivered by the Arbitrators was the result of a conspiracy between the Defendants and the Arbitrators.***
10. ***That paragraph 147 (G) at page 56 of the Final Award, is a clear manifestation of the intent of both the Arbitrators and the Defendants.***
11. ***That in light of the findings of the Arbitrators and the gist of the Final Award, this Honourable Court has a constitutional duty to set aside the same.***
12. ***That it was an implied term of the arbitral process that if the Arbitrators made an award in breach of the law, parties would have recourse to an Appeal to the High Court.***
13. ***That this court has jurisdiction to hear and determine the matter before it.***
14. ***That the award was designed to unjustly enrich the Respondents.***
15. ***That it is evident that there is imminent and great danger that the entire school and its infrastructures will be pulled down with a resulting direct and consequential loss to the Applicants running into Billions of Kenya shillings.***
16. ***That there is little doubt and it is quite obvious from a rudimentary reading of the law that the Agreements between the privy parties herein were not frustrated by any reading of the law or at all. It is conceivable that an independent unbiased tribunal free from any influence could reach the decision the two Arbitrators reached and hold that the mere demand by City Council for 10% of the land to be surrendered under the Physical Planning Act could frustrate the Agreements.***
17. ***That there is little doubt in the minds of the Claimants that the Final Award by the two Arbitrators (and the same is self evidence ex facie on the award) was procured through fraud, bribery, corruption abuse of office, dishonest and in flagrant breach of the law and common decency by the two Arbitrators and the Respondents, and this court should never allow such an award to stand.***
18. ***That the gross injustice visited upon the Claimants is similarly manifested in the fact that one of the Arbitrators herein, one Steven Gatembu Kairu is a sitting Court of Appeal judge who from the onset should have never have sat on the arbitral tribunal as the same greatly prejudices the Claimants in the sense that any judge in the superior court will have reservations in entertaining such an application due to its nature and the prayers sought.***
19. ***That the participation of Judge of Appeal Steven Gatembu Kairu declares the award herein null and void.***
20. ***That the participation of Judge of Appeal Steven Gatembu Kairu compromises fundamentally the right to a fair trial of the Claimant's herein.***
21. ***That the award in an oppressive instrument designed to force the Respondents to renegotiate the sale agreement in light of the price escalation of the suit property.***

16. The Respondent's application seeking to strike out the Claimant's application is premised on

grounds that the application herein is demonstrably and explicitly scandalous, frivolous and vexatious. It is clearly and solely intended to vex, embarrass and therefore prejudice the Respondents and the Honourable Arbitral Tribunal. The application is therefore meant for an improper and/or ulterior purpose. The application as presented is not intended for the bonafide purposes of seeking to set aside the arbitral award dated 19th August, 2014. It is meant to intimidate and harass the Respondents. The application does not disclose any or any bonafide grounds of challenge to the Award. It merely contains sensational allegations meant to coerce the Respondents to abandon their rights pursuant to the Award. The application amounts to clear abuse of the Court process as to warrant the orders sought. The Application and the supporting affidavit offend section 117(a) of the Penal Code. The Application is tainted with illegality. The Claimants have deliberately and improperly purported to introduce new evidence which was not before the Arbitral Tribunal. The application and supporting affidavit do not set out any or any reasonable basis for the highly injurious allegations of conspiracy, fraud, bribery, corruption made against the Honourable Arbitral Tribunal and the Respondents. In the disclosed circumstances, it was submitted, the offending content of the application should not be permitted to stand as it amounts to a flagrant abuse of this Court's process. It is in the best interests of justice and the overriding objective of the Court will be achieved if the orders sought are granted.

17. The Claimants have not specifically responded to these allegations, but there is a general response found in the body of pleadings and submissions of the Claimants. I have carefully considered the Respondent's application and the allegations compelling the application. I have carefully perused and considered the Grounds on which the application is based and in particular grounds number 4, 9, 10, 14, 16, 17 and 21 which assert that the Award was procured through collusion, corruption, bribery and fraud perpetrated by the Arbitral Tribunal and the Respondents. Those allegations are repeated by Mrs. Im in paragraphs 34, 35 (b), (d), 39 and 43 of the supporting affidavit.

18. The allegations of bribery, corruption and collusion are serious as they go to the integrity of the people mentioned and indeed constitute criminal offenses under the laws of Kenya. It follows that such allegations must be based upon or supported by actual and cogent evidence. In this case, other than making the aforesaid allegations, no material or evidence has been offered in support thereof. These allegations are indisputably highly injurious of the persons mentioned in connection with those allegations. These allegations were not necessary. The Claimants are clearly dissatisfied with the Award, but that is not enough reason to believe that the Award was procured through fraud, bribery and other illegalities. The allegations of impropriety that question the character and integrity of individuals cannot be casually thrown around. They must be well thought out and properly established. In that regard, therefore I hereby strike out any pleadings, whether in the supporting affidavits, in the body of the application, or in the parties' submissions which make any references to the alleged bribery, corruption, fraud, conspiracy, dishonesty, etc. In particular I hereby strike out grounds number 4, 9, 10, 14, 16, 17 and 21 of the application, as well as paragraphs 34, 35 (b), (d), 39 and 43 of the supporting affidavit of Mrs. Hwo Ock Im.

19. Prayer number 2 of the second application is therefore allowed. That also means that the issues for determination herein as framed by the Claimants and accepted by the Respondents and adopted by this court will now be considered on their merit except that issue number four which stated that, "***The making of the Award was induced or affected by fraud, bribery, undue influence or corruption***" is hereby struck off.

THE ISSUES

20. I will now turn to the issues raised by the parties for consideration. Grounds 1 and 2 are that the arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration. The Award is at pages 797 to 853 of the Claimant's record. The Claimants submitted that it is clear from paragraph 8 of the award at page 797 of the record that the arbitral proceedings were grounded on clause 4 of the license agreement between the Claimants and the Respondents. It reads: "***All questions hereafter in dispute between the parties hereto shall be referred to arbitration in accordance with the provisions of the Arbitration Act (1995) or any statutory re-enactment thereof for the time being in force in Kenya."*** It is the Claimants' submission that the only issues that could be arbitrated pursuant to clause 4 of the license

agreement were issues that were the subject matter of the license and that arose after the license was executed. The Claimants urged that it must be appreciated that the license, which is reproduced at paragraph 16 of the supporting affidavit and is annexure 11 deals with issues that are solely related to the said license. It has nothing to do with the other matters between the parties. The arbitrators could not address issues that arose before the license was executed. The words "***all questions hereinafter in dispute between the parties hereto…***" are the controlling words in the dispute. The Claimants submitted that there isn't any nexus between the license agreement and the sale agreement, the novation agreement and the variation agreement. Whereas the latter three agreements are interrelated and deal with the same subject matter i.e. issues of sale and purchase of the suit property, the license agreement was a completely different matter. Furthermore, it is also material to note that the arbitration clause in the license agreement was unique to the license agreement and was limited to the issues raised in the said license agreement. It must be appreciated that the license agreement was not concerned with any aspect of the sale agreement. This clearly means that a fusion of issues or subject matter merger was not plausible within the context of the issues addressed by the Arbitrators. The Claimants submitted that the issues drafted and submitted for determination before the tribunal are captured at paragraphs 44 to 47 of the final award [see pages 814 to 817 of the record]. These issues are an amalgam of issues that transcend and crisscross all the four agreements. Some touched on the license while many issues related to the other agreements.

21. In response, the Respondents submitted the litigation between the parties was commenced by the Claimants when they filed a plaint, in HCCC No. 569 of 2009 (hereinafter referred to as "**the Earlier Suit"**), on 9th November, 2009. That Plaint was accompanied by a chamber summons application and supporting affidavit running into twenty six (26) pages. By the plaint in the Earlier Suit, the Claimants pleaded that their rights contained in the Agreement for Sale dated 16th September 2005, the Novation Agreement dated 30th November 2005, the Variation Agreement dated 4th June 2007 and the Licence to occupy dated 4th June 2007 had been breached. For that reason, they sought injunctive orders pending referral of the dispute to arbitration. In their pleadings in the Earlier suit the Claimants and in particular and for purposes of reference only, paragraphs 7, 9, 10, 16, 17 and 18 of the Plaint identified the four agreements set out above as the basis of their claims and hence dispute between the parties. At paragraph 31 of the Plaint, the Claimants stated that:-

> ***"A dispute has arisen between the Plaintiffs and the Defendants with respect to whether or not the Defendant's (sic) unilateral termination of the Agreement and Licence to Occupy is lawful and contractual …"***

22. The Respondents submitted it is clear that the Claimants' case was that the dispute that they intended to and did refer to arbitration arose from breach of those four agreements. It is that dispute as identified by the Claimants in their own pleadings that the parties consented to, and the Court ordered, to be referred to arbitration. The consent order is annexed to the Claimants' Supplementary Affidavit filed on 20th February, 2015.

The Earlier Suit was marked as settled in terms of the consent order to refer all the matters pleaded to arbitration. After the constitution of the arbitral tribunal, the Claimants filed their Statement of Claim and once again identified their claim as being based on the four agreements. Indeed, their main prayer in their Statement of Claim was for an order of specific performance of the Agreement for Sale. Based on that pleading, the Claimants prepared and filed witness statements in which their principal witness, Mrs. Hwa Ock Im, complained of breach by the Respondents of the Agreement for Sale and the Variation Agreement. Again, in the written submission filed by their counsel, the same submissions revolving around those agreements was repeated and emphasized. A lot of reliance was placed on, for example, the interpretation of clause 4.5 of the Variation Agreement. The Respondents submitted that it is clear from the above background that through their pleadings, the Claimants specifically and expressly identified the four agreements as constituting the scope of dispute they wanted resolved by the arbitral tribunal. This was not one of those cases where parties exchange demands and agreed to go for arbitration. The entire process of commencing the

proceedings first in Court was the unilateral act of the Claimants. Indeed, when the Respondents objected to the participation of the 2nd Claimant in the proceedings on the basis that she was not party to the Licence to Occupy which was the only document containing the arbitral clause, the Claimants strenuously contended that by entering into a consent in the High Court in which issues had been raised regarding the four agreements, the Claimants and Respondents had by the Consent order in the Earlier suit agreed to confer jurisdiction on the arbitral tribunal to deal with issues arising from or in connection with those agreements.

23. The Respondents further submitted that in any event, the argument on the question of the jurisdiction of the tribunal is time-barred. Under Section 17 of the Arbitration Act, this Court can only deal with the question of the scope of the jurisdiction of the tribunal by way of a challenge to the decision of the tribunal on that point. So that any party desirous of taking objection regarding the jurisdiction of the tribunal must raise it before the tribunal itself and there are strict timelines within which it must be done. Under Section 17, such a challenge cannot be taken after the conclusion of the arbitration proceedings. The issue not having been taken by the Claimants before the arbitral tribunal, they are precluded from doing so now. That is the reason why the issue of the substantive jurisdiction of the tribunal is not one of the grounds for setting aside under Section 35 of the Arbitration Act. This was emphatically held in **Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others,** Civil Application No. 327 of 2009, where the Court stated thus:-

> ***"...I fully endorse the principles as outlined in the CHANNEL CASE (supra) because they are in line with the arbitral tribunal's jurisdiction as set out in section 17 of the Arbitration Act of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of section 17 and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is "Competence to decide upon its competence" and as expressed elsewhere in this ruling in German it is "Kompetenz/Kompetenz" and in French it is "Competence de la Competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."***

24. Finally on this point, it is necessary to comment on what a party relying on this ground is expected to show. The law is that this ground deals with situations where an arbitral tribunal deals with a matter not set out by the parties in their pleadings or identified by the parties as an issue for determination or which was not referred to by the parties in their submissions because it was not within their contemplation. This was aptly captured by this Court, Ogola J, in **Equity Bank Limited v Adopt a Light Limited** [2014] eKLR that:-

> ***"There is no proof that the arbitrators went beyond the scope of their jurisdiction, or engaged in a frolic of their own. An Arbitrator sitting as a Tribunal has the authority to interpret contractual documents. The law must give them enough latitude to interpret those documents in a manner which makes them more effective, without re-writing the contracts. This court will accept a genuine attempt by a Tribunal to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties. In the case of Mahican Investments Limited v Giovani Gaid & 80 others, Justice P.J. Ransley stated that '…In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the Applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute. I totally agree. There is no proof in this matter that the Tribunal went off the tangent and in an expedition looking for fresh terms to insert the contract. I reject any such suggestion or insinuation."***

It was submitted that in this case, the Claimants have not identified any issue that was not contained in the pleadings filed by the parties or that was not identified as an issue for determination or that was not referred to in their submissions. Indeed, it is clear from paragraphs 5 onwards of the Statement of Claim that the Claimants were relying on and advanced arguments in connection with the Agreement for Sale, the Variation Agreement and its effect. Indeed at paragraph 26 of the Supporting Affidavit filed in the High Court, the Claimants state and we quote "*… the defendants' letters seeking to terminate the agreement for sale … fly in the face of Clause 4 of the Licence to Occupy dated 4th June,2007."* Mr. Karori submitted that this is the arbitration clause which required the parties to refer all disputes to arbitration. It is clear therefore that in the contemplation of the Claimants themselves, the termination of the agreement entitled them to invoke the provisions of Clause 4 of the Licence to Occupy on the mode of dispute resolution. The issue of the parties' rights under the Agreement for Sale and Variation Agreement were introduced by the Claimants themselves. Counsel submitted that if the Tribunal had failed to deal with those issues it would have rightly been accused of failing to deal with a matter referred to them for determination.

25. I have carefully considered this issue. It was deliberated upon by the arbitral tribunal at paragraphs 50 to 51 of the award [see pages 917 to 918] the tribunal distils 8 issues that it then delineates for determination. It is material to note that at paragraph 50 of the award, the tribunal raises the issue as one of the issues to be determined. It states "1. ***Whether this tribunal has jurisdiction to adjudicate on claims arising from the other agreements other than the license?"***

The Tribunal addresses the issue. Paradoxically it is the Respondent who raised that objection. At paragraphs 52 to 59 of the award [see pages 818 to 820] the tribunal literally wrestles with the question whether its jurisdiction is limited to the issues raised at clause 4 of the license. At paragraph 56 of the Award, the tribunal accepts that the arbitration clause is contained only in the license agreement and not in the other agreements.

However at paragraph 59 the tribunal rules on the matter and states:

> ***"Based on the consent order recorded before the High Court establishing the tribunal, we are satisfied and hold that this arbitral tribunal has jurisdiction to adjudicate on the claims presented before us in this reference arising from the agreements as well as under the license".***

The Claimant have contested this finding by the tribunal and instated that he consent filed in court did not confer the tribunal with the requisite jurisdiction, and that the tribunal had accepted that only clause 4 of the license agreement has an arbitration clause and that was limited to issues in the license. To found jurisdiction, and expand its scope the tribunal then fell back on the consent order. The Applicants scrutinized the consent order to see whether indeed it expanded the mandate of the tribunal to address issues that arose in the other agreements. The consent order in HCC Number 569 of 2009 is at pages 69 and 70 of the Supplementary Affidavit. Orders 1, 3, 4 are relevant to the arbitration. Order 1 states that "***the dispute between the parties be and is hereby referred to arbitration*.*"*** 3 and 4 address the issues of the arbitrators. The Claimants then concluded that it is clear from the consent order, that contrary to holdings and assertions by the arbitrators at paragraph 59, no such jurisdiction to address issues relevant to the various agreements can be justified via the Consent Order filed in court. The consent order merely or simply stated that the dispute between the parties was to be referred to arbitration. The Claimants submitted that when parties filed the consent; only the Claimants filed their papers. In the papers and the affidavit filed in court and as shown hereinabove, the Claimant clearly stated that the arbitration was seeking to refer the parties to arbitration as contained in paragraph 4 of the license agreement. It is thus clear beyond any doubt that the arbitral tribunal by grounding its jurisdiction on the consent order clearly took upon itself issues that were beyond its jurisdiction. This submissions by the Claimants sounds reasonable, but it clearly forgets he history of the matter, which for me, is relevant in order to establish the jurisdiction of the tribunal and also its scope and mandate. The pleadings by the Claimants in the earlier suit, and their prayers in the Plaint show

clearly that the Claimant themselves had at the filing of the suit willfully submitted to the eventual jurisdiction of the tribunal. The Ruling of the tribunal on that matter, and the submissions of the Respondents on the same, cannot be faulted. It is therefore my finding that issues number 1 and 2 fail accordingly.

ISSUE NUMBER 3 ON COMPOSITION OF THE TRIBUNAL

26. The Claimants submitted that the two agreed arbitrators at the inception were Okwach and Kairu. They heard the matter substantially till the latter was appointed judge of the Court of Appeal. At that stage he showed willingness to conclude the matter and obtained the permission of the Chief Justice to finalize all his arbitration cases. The Claimant herein didn't object to that continuation. However, now the Claimants submitted that the said continuation by Kairu was illegal and unconstitutional, and that the the consent by the Claimants was immaterial and could not validate an illegality.
27. First, it is submitted, the Claimants' concession was under duress and undue influence on the part of the judge. By insisting on continuing on with the matter, he presented a fait accompli to the Claimants. No claimant in Kenya can stand up to a judge of the Court of Appeal and request the Judge leave a case when the Judge had shown extreme keenness to continue listening to the matter. Secondly, it is submitted for the Claimants the composition of the tribunal radically changed when Mr. Kairu was appointed judge of the Court of Appeal. The parties agreed to two lawyers and not a judge of the Court of Appeal. Midstream the tribunal was transformed into a quasi-judicial decision with a senior judge sitting as an arbitrator. The Judicial Service Commission pursuant to Article 172 of the Constitution appoints judges of the Court of Appeal. Article 164 of the Constitution sets out the jurisdiction of the Court and its judges, which is to hear appeals from the High Court and tribunals as provided for by statutes. From the moment he was appointed a judicial officer, Justice Kairu could not remain an arbitrator. It is inconceivable for a judge of the Court of Appeal to be earning fees as an arbitrator when he is paid a salary from the consolidated fund. So when we have a situation where a judge of appeal does a part time job of arbitration instead of his full job and earns fees, the process is compromised and is illegal from that point in time. The claimants now submit that the composition of the arbitral tribunal that made the award was very different from the one the parties agreed upon. It also elevated the award to almost a decision of the court of appeal and raises troubling issues both ethical and legal for any court that hears a matter relating to the award.

28. In response, the Respondents submitted that the accusations leveled against the tribunal are most unfortunate and unfair for the following reasons:-

i. The parties themselves and not the Court decided on the identity of the people to act as arbitrators. Both Justice Kairu and Mr. Okwach were chosen by the parties themselves as the persons most suitable to hear and determine their dispute. They dealt with the arbitration and even delivered two (2) interlocutory awards without any complaint by any of the parties. They then heard all the witnesses numbering eight (8) in total, without any complaint by any of the parties. Up to that point, neither of the two arbitrators had been appointed to serve in the bench and all that remained was for the parties to lodge their respective submissions and the award to be rendered. The timetable for doing so was again agreed upon by the parties.
ii. Upon his appointment, Mr. Kairu JA, immediately notified the parties of his appointment and enquired from them whether they had any objections to his continued involvement or participation in the arbitration. The answer by the Claimants was an emphatic **NO**. (See the correspondence annexed to the affidavit sworn by the 2nd Respondent on 24th November, 2014). There is nothing from the correspondence produced before the court to show that at any time, the tribunal or Mr. Justice Kairu, suggested, insisted, proposed or insinuated that he would prefer that the parties allow him to continue with the arbitration. Instead the letters demonstrate a most courteous enquiry by the learned Judge. The suggestion that the tribunal insisted on Mr. Kairu continuing with the arbitration is false, malicious and most unfortunate.
iii. There is no suggestion or complaint that Mr. Justice Kairu treated the Claimants any differently or improperly before or upon his appointment. There is no claim of bias or ill-will by Justice Kairu as

against the Claimants. Indeed, up to the time the award was delivered, there had been no complaints by any of the parties against any of the arbitrators. The accusations against Justice Kairu in the circumstances are clearly meant to serve no purpose other than to tarnish the name and reputation of the arbitral tribunal.

29. I have carefully considered this issue. It is an issue I do not need to dwell on at length, suffice to say as ably put by the Respondents' counsel Mr. Karori, that there is absolutely no blame on the part of the Honourable Justice Kairu JA. I have seen the correspondence on the issue, and I have no doubt that Justice Kairu did the right thing. Apart from seeking the view of the parties as to whether they wished for him to continue with the arbitration, the Learned Judge went a step further and enquired from his employer, by the letter to the Chief Justice dated 10th December, 2012 whether he could continue and complete the arbitration. This was clearly a person who was not pushing or insisting on proceeding with the arbitration. He did not surreptitiously try to proceed with the arbitration without the knowledge of his employer. He did not hide the fact of his appointment and he did not insist on proceeding with the arbitration. It is the parties themselves who pleaded with him to proceed with and complete the arbitration. Quite remarkably, the Claimants did not deny or controvert the assertion by the Respondents in paragraph 11 of the supporting affidavit sworn by the 2nd Respondent on 24th November, 2014 in support of the application for striking out that it is the parties that pleaded with the learned Judge to proceed with the arbitration.

ISSUES NUMBER 4, 5, 6 AND 7 – AWARD CONTRARY TO PUBLIC POLICY OF KENYA, LAW AND CONSTITUTION

30. The remaining three issues are that the Award was in conflict with the public policy of Kenya; that it was contrary to the Laws of Kenya; and that the Award was in violation of the Constitution of Kenya. It was the Claimants very robust submissions that the findings by the two arbitrators were clear indication that the arbitrators were compromised. This court has already ruled that there was no evidence of such allegations. So the only way this court can consider the finding is in relation to whether the same was contrary to Kenya's public policy, the Laws of the land or the Constitution. I will now turn to those issues.

31. In this regard, the court has to be careful for its not the mandate of this court to assess or re-evaluate the evidence presented before the tribunal or to sit on appeal against the decision so made by the arbitral tribunal. The law is that the arbitrators are the masters of the facts. (See for instance the decision of Justice Gikonyo in **National Oil Corporation of Kenya v Prisko Petroleum Network Limited**, HCCC No. 27 of 2014). This was a conclusion that they were certainly entitled to arrive at as stated above in the decision in **Equity Bank Limited v Adopt a Light Limited,** on the latitude to be given to arbitrators in appreciating the evidence adduced before them. Similarly in this case the tribunal was entitled to draw its own conclusions after evaluating the evidence and other material put forward by the parties.

32. The Claimants have raised some issues which mainly pertain to interpretation of the facts by the arbitrators. The Claimants have also had issues with certain phraseology or terms used by the arbitrators in the Award. The Applicants have questioned use of certain phrases and alleged that such interpretation or use was a way of either hiding the real intention of the arbitrators, or showed apriori intention to favour the Respondents.

33. An example is paragraph 147 (G) of the award. In their application at paragraph 10, Supporting affidavit at paragraph 43 and paragraphs 55 and 56 of their written submissions, the Claimants had problems with the order made at paragraph 147 (G) of the award. In the submissions, the suggestion made is that the arbitrators were directing or encouraging the parties to enter into an agreement in connection with the entire award. Indeed, at paragraph 56, they suggest that the arbitrators encouraged the parties to enter into a new agreement. This court finds that assertion not only untrue but insincere and intended to mislead this court. I reproduce below the said paragraph 147 (G):-

"G. Subject to any other agreement the parties may enter into within 60 days from the date of delivery of this Award, the 1st Claimant shall on or before the expiry of the 12 calendar months referred to in F above restore, at its own cost, the property to the state in which it took possession."

34. I accept Mr. Karori's submissions that the order in paragraph 147 (G) emanates from the finding at paragraph 147 of the award that the Claimants were under an obligation to restore the property to the condition it was at the time they took possession of the same. Why the assertion by the Claimants is not correct is because to the knowledge of the Claimants, the Tribunal had already dealt with the issue in an earlier interlocutory award delivered on 23rd February 2012, a copy thereof is attached to the affidavit in support of the Respondents' application for injunctive orders dated 13th February 2015. In that interlocutory award, the tribunal dealt with the issue of the unauthorized developments that the Claimants were undertaking on the property in breach of the provisions of the Licence to Occupy. The tribunal allowed the Claimants to complete the works but held that:-

"Considering however that the road construction and the perimeter wall construction are virtually completed as at the time of the tribunal's site visit on 16th January, 2012, we are reluctant to restrain the 1st Claimant from completing the same. Should it however turn out at the conclusion of the reference that the Claimants are not successful in the claims before this tribunal, we shall invite the parties to address this tribunal with regard to the disposal of the developments."

35. The Respondent submitted that neither party challenged that decision made by the tribunal. It clearly indicated that the tribunal would deal with the issue of the restoration of the property if the Claimants did not succeed in their claim at the conclusion of the reference. In the Counterclaim and submissions by the Respondents, the Respondents had urged the Tribunal to order the restoration of the property, by the Claimants, to the condition it was in at the time they took over the property under the Licence. The paragraph 147 (G) basically envisages a situation where the Respondents may consider the option taking over the property in the state it is at the moment. In that event, the Claimants would not be required for instance to demolish the walls it put up, dig up the road it constructed and remove all structures it had put up. Since Clause 3 (j) of the Licence to Occupy provided that Claimants could only put up pre-fabricated structures, they are entitled to either remove the structures and take them away or deal with them as they wish. The Respondents could of course agree to retain them if they so wished and that is the meaning and effect of paragraph 147 (G).

36. It is clear to me from the extract of paragraph 147 (G) set out above, that there was no invitation to the parties to enter into any new agreement for sale. Indeed, there was a default clause attaching to paragraph 147 (G) which was if the Respondents do not agree to waive the requirement that the Claimants should restore the property to its original condition, then the Claimants shall at their own cost restore the property within a period of 12 months. It is clear from that analysis that the allegations at paragraphs 55 and 56 of the Claimants' submissions are deliberately misleading and insincere.

10% Surrender Requirement

37. The last issue raised in the Claimants' submissions revolves around the issue of imposition of the 10% surrender requirement and how the arbitral tribunal dealt with the issue. The Respondents submitted that this court has no jurisdiction to review the findings of the tribunal and substitute its own findings for those of the tribunal, and secondly, that these proceedings are not in the nature of an appeal and therefore the issue of whether or not the tribunal was right in concluding that the imposition of the 10% surrender altered the nature and character of the contract entered into by the parties, cannot be entertained by this court. It was submitted that is not an issue that falls under the grounds set out in Section 35. It may be a ground for an appeal but it is most certainly not a ground for setting aside. However, my position is that this is a court of justice. In as much as this

court may not fault a tribunal in its findings, it is still required by law to deliver a just decision. So ultimately, even if this court will not question certain conduct, activities or decision on arbitral tribunal, the court must question the validity of its decisions and whether such a decision indeed renders justice to the parties. If an arbitral tribunal were never to be questioned on its decisions, and if *prima facie* their decision is not only wrong but also unjust, then such decisions can only be deemed to have been influenced, unduly, by factors mentioned under Section 35 (2) (vi) of the Arbitration Act, 1995. Therefore, the process of arbitration, because it is so insulated from outside interference, must also deliver justice. Where the process cannot be faulted, yet the Award is *prima facie* unjust, this court's hands cannot be tied. Injustice has no place in the corridors of justice.

GROUND 5. THE AWARD IS IN CONFLICT WITH THE PUBLIC POLICY OF KENYA

38. Claimants submitted that this is a very important ground. Kenya's public policy in ensuring fidelity and strict adherence to the law is well know and very important. This has arisen to a new height in line with the national values and principles in the constitution. In this regard Article 10 of the constitution is critical. The Applicants submitted that Kenya's public policy is also strong in the fight against corruption, especial the one that pollutes the stream of justice. The Award by the Arbitrators is such a clear instance where the respondents and the arbitrators with a view to block the stream of justice from flowing deposited heavy pollutants. Mr. Abdullahi cited Justice Aaron Ringera as he then was in **Christ for all Nations versus Apollo Insurance Co. Ltd. [2002] 2 366,** on what public policy of Kenya is. At page 54 last paragraph he said:

> ***" I am persuaded by the logic of the supreme court of India and I take the view that although public policy is a most broad concept incapable of precise definition…an award could be set a side under section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either: (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten, or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough…in the third category, I would, without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public moral."***

Mr. Abdullahi submitted that an award that offends the constitution is invalid *abinitio*. So is the case where an arbitration offends any law of the land whether statutory or common law. He submitted that the arbitral award that is being challenged by the Claimants offends every known law of the land. It is an award premised on illogical, dishonest and torturous reading of the facts and law. It is a dishonest falsification of both. Counsel also cited the case of **Glencore Grain Ltd versus TSS Grain Millers Ltd. [2002] 1 KLR 606.** At page 78 line 29 the court while analyzing the circumstances that would led to the setting aside of an arbitration under section 35 of the Arbitration Act states:

> ***"I hold that position despite the fact that I am conscious of the fact that it is also in Kenya's public policy to enforce international arbitral treaties and agreements such as the one under consideration with a view of sustaining such treaties and agreements as Kenya may be signatory to…in this case the court is persuaded to protect a public policy in favor of Kenyan citizen who would be exposed to a health risk as discussed hereinabove. Indeed in my opinion, a contract or an award whose effect would be to release to the public maize unfit for human consumption would itself be tortuous as well as illegal within the legal meaning used hereinabove and accordingly the transaction contract would be against Kenya's public policy".***

At page 77 line 15, the judge said:-

> ***"A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal***

and/or moral principles or values in the Kenyan society. It has been held that the word "illegal" here would hold a wider meaning than just "against the law". It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive".

Counsel submitted that the above dictum applies very strongly to the case before the court. Here we have a primary school with hundreds of children learning their school curriculum. The owners of the school have paid in full the purchase price for the land. A modern school infrastructure at a cost of hundreds of millions has been built on the land. Then the arbitrators order that the school be demolished and the children thrown to the streets. This action must offend the sense of justice of every citizen. Counsel submitted that Kenya has a strong public policy against the demolition of school and even a stronger policy that primary school education should be supported. Counsel also cited the case of **Rwama Farmers Co-operative Society Limited versus Thika Coffee Mills Limited [2012] eKLR,** where Justice Mabeya, after reviewing a number of local and international court decisions defines "public policy " as provided in Section 35 of the Arbitration Act. He states:

"From the foregoing, it is quite clear that the term "conflict with the public policy" used in Section 35(2)(b) of the Arbitration Act, is akin to "contrary to public policy", "against public policy", "opposed to public policy". These terms do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society".

Counsel submitted that the arbitral Award herein is illegal, it is immoral, it is offensive, it is indecent, it is obnoxious, it is wicked, it is against the public good, it is an affront to common decency, it is against the national good, it offends our national sense of what is right and wrong and of course it was corruptly procured. It was the product of illegality and bad faith. Such an award cannot be enforced. Counsel also cited the case of **Oil & Natural Gas Corporation Ltd versus Saw Pipes Ltd**, Indian Supreme Court, 2003. The case turned on whether the arbitral award will be enforced or rejected. From page 194 the court addressing the meaning of the phrase "public policy in India". At pages 194, 195 and 196 the court engages in searching and very deeply a comprehensive and comparative analysis of the phrase "public policy". It agrees that the phrase can have both a narrow and wide meaning. It further states that the phrase is not defined and neither is it static. It expands or contracts according to the prevailing circumstances of a country at a given point in time. This is what the court state at page 195. The court for instances explicitly states that the courts must borrow from the constitution to see what is public policy of India at a given point in time:

"It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices, which were considered perfectly normal at one time, have today become obnoxious and oppressive to public conscience. If there is no new head of public policy, which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case, which may not be covered by authority, our courts have before them the beacon light of the preamble to the constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the fundamental rights and the directive principles enshrined in our constitution".

Counsel submitted that the court's pronouncement on this point is very important. It is in support of the submissions that ultimately in deciding this matter the national values and principles of the constitution under Article 10 of the Constitution must be the guiding light. The constitution can't be wished away. In other words in addition to the Arbitration Act, others laws of the land, whether statutory or common law and ultimately the constitution must shine the rays of light that the dispute before the court cries for so loudly.

39.In response Mr. Karori counsel for the Respondents submitted that the public policy in Kenya as

regards arbitration is now well settled. The public policy in Kenya is in favour of promoting the finality of arbitration awards and enforcement. As explained in the case of **National Cereals & Produce Board v Erad Suppliers & General Contracts Limited**, *supra,* at page 16, and we quote:-

> ***"One of the principles underlying the Arbitration Act, is the enforcement of an important public policy in enforcement of awards and the principle of finality…"***

In Kenya, the respect for and recognition of arbitration awards is an all-important public policy. This principle has been repeated such as **Kenya Shell Ltd v Kobil Petroleum Limited,** Civil Appeal No. 57 of 2006 in which the court underscored the importance of the principle of finality of arbitral awards. Indeed in that case, the court explained that:-

> ***"The [Arbitration] Act, which came into operation on 2nd January 1996, and the Rules thereunder, repealed and replaced Chapter 49 Laws of Kenya, and the rules thereunder, which had governed arbitration matters since 1968. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to courts ... The message we think, is a pointer to the public policy the country takes at this stage in its development … At all event, the tribunal was bound to make a decision that did not necessarily sit well with either of the parties. It would nevertheless be a final decision under Section 10 of the Act unless either party can satisfy that court that it ought to be lawfully set aside. In this case the decision was final. We do not feel compelled therefore to extend the agony of this litigation on account of the issues raised by the applicant."***

This was the same principle enunciated in the **Anne Mumbi Hinga v Victoria Njoki Gathaara,** and most recently in **Nyutu Agrovet Limited v Airtel Networks Limited**. Flowing from all those authorities is the principle that the public policy in Kenya as regards arbitration leans heavily and decisively in favour of upholding and respecting arbitration awards and their finality. As explained above, that is also the principle encapsulated in Section 32A of the Arbitration Act. Counsel submitted that the beginning point in considering the public policy involved in the setting aside of an arbitral award by a court of law is the recognition of the vital importance that the public attaches to the principle of finality of arbitration awards. In Kenya, public policy only allows the court to intervene in very limited circumstances. Indeed, in **National Cereals & Produce Board v Erad Suppliers & General Contracts Limited**, the court explained that:-

> ***"... one of the principles underlying our … Arbitration Act is the severe restriction on the role of the court in the arbitral process. That principle finds expression in section 10 of the Act. Section 35 of the Arbitration Act is underpinned by that principle. Our courts have since the coming into force of that statute observed and given effect to that principle."***

Counsel submitted that the courts have identified the public policy in Kenya as being against an interventionist approach. They have always accepted that their role in arbitration is supportive rather than restrictive. It follows that the argument in favour of expanding the scope of section 35 is completely against the public policy of Kenya. Mr. Karori submitted that the references by the Claimants to authorities regarding the public policy in India, have no relevance to our circumstances because the Kenyan courts have themselves expressed on what is the public policy as regards arbitrations in Kenya. Obviously, public policy will differ from country to country and Kenyan courts are best suited to determine the Kenya public policy which they have already done. Counsel emphasized the comment of court on Section 35 itself from a public policy point of view. This issue was discussed in **National Cereals & Produce Board v Erad Suppliers & General Contracts Limited**, *supra*, and at page 16, this is what the court said:-

> ***" … section 35 of the Arbitration Act permits the setting aside of an arbitral award. It does not permit an appeal. Setting aside is a narrower avenue for challenging an award***

than an appeal. The grounds for setting aside an award are restricted under the Act."

Counsel submitted that the courts have emphatically rejected an expansionist view for purposes of Section 35 of the Act. The argument in the Claimants' submissions calling for the expansion of the scope of Section 35 and the elevation of challenges under that section to the status of an appeal are clearly misconceived and run counter to the settled law in Kenya.

40. I have carefully considered the issue of public policy in this matter. Critical to the entire arbitral process, and in fact critical to the parties before the court was whether or not the contracts could be specifically performed. Critical to this answer was the imposition of the 10% land which the City Council of Nairobi demanded. I will not go into the details of evidence and facts on how the issue was determined, since this court is not the master of facts in matters coming from arbitration. What is clear to me is that the arbitrators had a duty to deliver justice to the parties, using the contractual tools before the arbitrators, and the land in question. Every arbitration process must aim at finding an acceptable solution to parties' problem, promptly with little costs and minimum delay. An arbitration process is itself an embodiment of justice. People go to arbitration because they believe that it is a process that delivers justice fast, and a least cost. It is a process which is less adversarial, and designed to deliver justice even to parties who loose before it. A mere submission to arbitration process is an expression of hope that ultimately, an acceptable solution may be within reach. That is why arbitration is referred to as Alternative Dispute Resolution. It is therefore baffling that parties who hitherto had expressed great hope in arbitration process can come out of the process feeling more divided, dejected, hopeless and abandoned. In the matter at hand, it is my finding that the two parties entrusted the arbitrators with a job to do and they expected results. The parties had been in a contractual relationship for close to ten years. The Claimants had taken effective possession of the contract premises, and built on part thereof a world-class school For All Nations. When the parties approached the arbitrators, both parties expected a solution, a reasonable solution, which is realistic and is in tandem with the laws of the land, and its social- economic ethos. The imposition by the City Council of Nairobi of 10% land from the Respondents was not a factor to ever render the contract frustrated. Firstly, the land is available, and was to be taken from the land which was to be retained by the Respondents. However, for whatever reason the Respondents were reluctant to surrender the 10% of the land, the Claimants claim that they were willing to provide the same. However, if the Claimants were not willing to provide the same, it was the duty of the arbitrators to arbitrate the dispute with the intention of finding a solution. It seems to me that instead of the arbitration finding a solution to the problem, they found comfort in rushing to declare the contract frustrated. I will not go into the issues of law on the doctrine of frustration because that is not my mandate. However that does not stop me from stating that the finding that the contract was frustrated was itself not correct going by the known doctrine of frustration. In declaring the conflict frustrated, the Award completely violated the Claimants right o property under the Constitution of Kenya which guarantee everybody a right to property, and which declares that nobody's property would be taken away without due process. The arbitrators forgot that for close to ten years the parties have acted upon the contracts, have acquired certain rights pursuant thereto, and that the Claimants had a thriving international school on the contract land. The arbitrators ignored the economic and social benefits of the school to the Claimants, the students, the Government and the people of Kenya. They forgot the public policy of the Republic towards schools and children, and towards social economic developments. The arbitrators were in a perfect position to find a solution to the parties before them, but they did not do this. Who was to benefit under frustration? Only the Respondents. This then amounted to economic sabotage. For the arbitrators to return the verdict that the said school be destroyed and the children rendered destitute, was a decision which cannot be justified. In finding solace in the concept of frustration of contract, the arbitral tribunal found an easy solution to a complex problem which they had the capacity to unravel and to sort out, nonetheless. Judicial and quasi judicial officers have the constitutional duty to find solutions to complex problems. Finding accommodation in the doctrine of frustration was an abdication of duty by the arbitrators. Such abdication of clear duty amounts to acting outside the norms and the laws of the land. The Award to the extent that it enriches the Respondents unjustly is against the social-economic ethos of the Republic of Kenya. The value of the land since the Agreement was

entered into ten years ago has escalated beyond comparison. What was bought at Kshs.64,000,000/= could as well be Kshs,800,000,000/= now. The question that this court asks is – Was there no other way to reach an acceptable solution to both parties' problem? As I said earlier, the spirit of arbitration is to find solutions to the parties. Both parties need not necessarily accept the decision, but even the losing party should see some sense of justice in the Award. In the case at hand, the injustice visited on the Claimants makes them justified to feel cheated out of their property, which they had paid for, and partly developed pursuant to effective possession.

41. I agree with the Court of Appeal decisions that one of the principles underlying the Arbitration Act, is the enforcement of awards and the principle of finality. I also believe that the Court of Appeal decisions did not mean that finality of disputes through arbitration should be desired at any cost. Underlying the decisions in the Court of Appeal cases cited by the Respondents, is justice. After achieving justice, at least on the face of it, then arbitral decision should stand. While accepting the Court of Appeal on the issues of finality of decisions as an overriding objective on public policy, I am satisfied that public policy concept will keep on changing, and as it does, we shall be guided by the values contained in our legal instruments being the Constitution and our laws, and also various policy documents emanating from various ministries in the country. Our Constitution at Article 10 thereof sets out national values which all decision makers in the country are obligated to observe while performing a public duty. Those values, when it comes to judicial officers and arbitrators must necessarily import the duty to do justice in deciding disputes. A decision which, on the face of the record, is so devoid of justice, and cannot be explained in any rational manner, can only be set aside on account of failure to satisfy public policy consideration. If an Award, like the one at hand, involves a contract executed under which parties had acquiesced, and secured certain rights; under which the Claimants had build and is running an international primary school, which is to be destroyed and the pupil made destitute; under which the value of the contract subject matter has escalated beyond ten times the contract value; under which the school infrastructure is to be destroyed, and under which one party stands to be unjustly enriched and the other correspondingly made poorer; if the Award pricks the conscience of the society, and the Award cannot rationally be explained, we have to go back to the values contained in our Constitution to see if the Award can stand the test given in the Constitution. I am satisfied with the Indian authorities cited by Mr. Abdullahi. Traditionally, this country has heavily borrowed from Indian jurisprudence. What affects the Public of India will most probably affect us in the same way. In the case of **Murlidhar Agarwal and Another – Vs – State of U.P. and Others [1974] 2 SCC 473**, the Indian Supreme Court observed that:-

> ***"Therefore, in our view, the phrase public policy of India, used in section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice… (page 202) Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void".***

This court has the uttermost responsibility to do justice, and must ensure that an arbitral tribunal, exercises and discharges its judicial function properly. In light of this, this court in appraising the application before it, must accept that it indeed has a blank legal cheque and stands on an expansive and firm jurisprudential plateau to see to it and ensure that it subjects the decision of the arbitral tribunal to searching test of conformity to all the laws of the land and especially the Constitution itself. The court, once it assumes this jurisdiction under Article 165(6) of the Constitution must also ensure that the decision of the tribunal passes the mandatory test of Article 10 of the Constitution. This requirement is not unique to arbitral tribunals. Article 10(2) of the Constitution states, ''***all persons and institutions must observe the national values and principles of governance when they "apply or interpret any law"***. Since the arbitral tribunal applied the law and interpreted it, its award or the decisions it makes must be subjected to the

requirements of Article 10 of the Constitution. In other words the application and interpretation of the law in a given context is no longer left to the personal liking, dislikes or whimsical interpretation of the person. He/she must apply the national ethos and values of the country, which are provided under Article 10(2) of the Constitution. These values include the rule of law, equity, social justice, integrity, transparency and accountability. In my finding, the decision of the tribunal failed to pass the mandatory tests under Article 10 of the Constitution, and is against public policy of Kenya.

42. Pursuant to the foregoing paragraphs of this Ruling, this court makes the following findings and orders:-

a. ***The Claimant's application by way of Chamber Summons dated 26th September 2014 succeeds.***
b. ***The Arbitral Award herein dated 19th August 2014 cannot stand and is hereby set aside in toto under Section 35 (2) (b) (ii) for being in conflict with the public policy of Kenya, and against the Constitution of Kenya.***
c. ***Save and except to the extent that it has succeeded in the foregoing paragraphs of this Ruling, the Notice of Motion application by the Respondents filed in court on 24th November 2014 fails.***
d. ***The matter is herewith referred to arbitration for the second time. The parties shall be at liberty to agree on the arbitrators, and the terms of arbitration, within 14 days. If they are not able to agree then the court will make appropriate orders for appointment of arbitrators and the terms for arbitration.***
e. ***Costs herein shall be for the Claimants/Applicants.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 19TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Cohen holding brief for Ahmednassir for the Claimants

Mr. Gitonga for the Respondents

Teresia – Court Clerk