REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

WC 1 OF 2000

IN THE MATTER OF COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

GICHOHI MACHARIA……..…..1ST PETITIONER

DUNCAN MWAURA KAMAU…….…..2ND PETITIONER

VERSUS

KIAI MBAKI……..……1ST RESPONDENT

WAWERU M……..……...2ND RESPONDENT

THIONGO KIUNGA…….…….3RD RESPONDENT

AND

IN THE HIGH COURT OF KENYA AT MILIMANI

MISC CIVIL APPLICATION NO 555 OF 2014

WAWERU MUGO & 19 OTHERS…….APPLICANTS

VERSUS

TITUS THUO MACHARIA & ANTHONY MACHARIA GICHUHI

(Sued as the Managers/Aministrators of the Estate of

G M (Unsound Mind)….....RESPONDENTS

RULING

1. Before the Court were two applications; the first application was dated 6th November 2014 and was made by the Petitioners in Winding Up Cause No 1 of 2000 and was brought pursuant to the

provisions of Order 46 Rules 1, 3(1), 10 & 18(1) of the Civil Procedure Rules, Section 50 of the Civil Procedure Act and Section 36 of the Arbitration Act. The Petitioners sought the following orders *inter alia*;

1. ***Spent;***
2. ***THAT this honourable Court order for the cancellation of the Notice of the Annual General Meeting Scheduled for 14th November 2014;***
3. ***THAT this honourable Court be pleased to order that the arbitrators award dated 6th October 2014 be deemed as filed as a record of this honourable Court and be adopted as judgment of this honourable Court;***
4. ***THAT the costs of this application be provided for.***

2. The application was predicated upon the grounds that the parties had by consent appointed an arbitrator to determine the issues in dispute between the parties. Further, it was contended that the arbitrator had made a determination on the issues in his award dated 6th October 2014, and that the same should therefore be adopted as the judgment of the Court. The application was further supported by the affidavit of Peter Mwangi Macharia, in which further to reiterating the grounds as adduced, was deponed to that all issues in contention were determined by the arbitrator after the same were preferred to him by the parties by consent entered on 22nd March 2014.
3. The second application dated 21st November 2014 was brought pursuant to the provisions of Section 35(2) of the Arbitration Act, Rule 7 of the Arbitration Rules and Order 21 Rule 22 of the Civil Procedure Rules. The Applicants sought the following orders *inter alia*;

1. ***THAT this honourable Court be pleased to set aside the arbitral award herein dated 6th October 2014;***
2. ***THAT there be a stay of the execution of the Arbitral Award and any consequential orders thereto pending the hearing and determination of this application;***
3. ***THAT in any event, the costs hereof be awarded to the Applicants.***
4. The application was predicated upon the grounds that the arbitrator failed to fully appreciate the claimants' case, which was in their contention, actuated by acts of fraud and that in any event, fraud was not arbitrable according to Kenyan law and public policy. The application was further supported by the affidavit of Waweru Mugo, who deponed that the process of conversion of a then existing partnership into a limited liability company was not consultative, and that this very issue was not appreciated by the arbitrator in his final award.
5. The parties filed their respective submissions to their applications. The Applicants contended that the arbitral ward was made contrary to the provisions of Section 35(2)(b) of the Arbitration Act, in that the award was against public policy and that the issues determined by the arbitrator were not capable of settlement by the arbitrator. Further, they relied on the case of **Christ for All Nations v Apollo Insurance Co Ltd (2002) EA 366** for the preposition that a contract entered on the basis of an illegality was void *ab initio*. They further submitted that the claim presented before the arbitrator was premised in fraud, which according to them, was an issue that could not be settled by the arbitrator.
6. It was further submitted that the consent to refer the matter to arbitration had not been presented to all the shareholders of the company, and that as a result therefore, the award would not be binding on any of the shareholders who were not parties to the Winding Up Cause No 1 of 2000.
7. On its part the Respondents' filed their submissions and in which they submitted that the Claimants acted on behalf of and on the instruction of the other shareholders not included in the Winding Up Cause No 1 of 2000, and that therefore any award by the arbitrator was binding upon all of them. Further, it was submitted that the issue of fraud which was included in the Statement of Claim that was presented to the arbitrator was an issue that was determinable as such by the arbitrator, and that no objection had been raised in that regard. It was also submitted that there was no fraud or fraudulent issue that had been raised by the Claimants, and that the law was very clear on the purview of the Court in considering the grounds upon which an arbitral award could be set aside.
8. The Court has considered both applications by the respective parties, the replying affidavits

thereto and the submissions filed. It has also had the opportunity to consider the final award in its entirety, and more particularly the issue of distribution of shares which was the scope of the claim that was to be determined by the arbitrator. The main issue for determination before the Court was set out in pg. 5 of the Claimants Submissions dated 2nd March 2015. Therein it was stated that;

> ***'The main ground on the basis of which the applicants seek to have the award set aside is that there was fraud in the manner in which G M acquired the majority shareholding. Fraud being a criminal offence is not arbitrable. '***

9. Pursuant to the consent filed by the parties and recorded in Court on 8th November 2012, it was agreed that the issue for determination would be presented before an arbitrator, whose jurisdiction would be limited to the issue of shareholding. Further to that, and in a letter dated 28th May 2012, the arbitrator accepted his appointment as a sole arbitrator and the scope of reference was set out in the introductory part of the final award. At pgs. 4-5 thereof, the arbitrator set out in detail the issues, facts and statements of the dispute at hand, and at pgs. 8-9, laid out the issues for determination. Issue (i) as set out in the list of issues was the acquisition of shares by one G M. The issue is produced herein thus;

i. **Whether G M had validly acquired 15,376 ordinary shares in Terrace Hotel Ltd from 26th April 1971, the day of incorporation, to the day of his illegal ouster from the management of the Company in September 1997 as represented by Form 213 of the Amended Annual Returns of Terrace Hotel Limited made up to 31st December 1979 filed by Martha Maina & Associates.**

10. In **Mustill & Boyd's Commercial Arbitration 2nd Edition at page 641** and **Halsbury's Laws of England Vol. 11 4th Edition** Paragraph 622,offer some critical analysis and guidance as the learned authors state that:

> **"An Arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Act which embodies the principles derived from a specialized branch of law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from the Contract amounts not only a manifest disregard to his authority or misconduct on his part but may be tantamount to a malafide action."**

11. In his rendering of this issue, the arbitrator went at length to discuss the issue of incorporations, issuance and return of allotment of shares and the calling up by the then appointed directors for unpaid shares by the other shareholders. He thus limited his scope f reference to the issues as pertained in the Statement of Claim, and that he was within the confines of his jurisdiction.
12. It was found that there was no dispute, or sustainable dispute, that he shareholders were unaware that the business had subsequently been incorporated into a Company limited by shares, and in which all the existing shareholders were required to pay up for their shares.
13. It was further determined that share allocation would not be equal as contended by the Claimants, on the clear implication that they had not all equally paid up for the shares. He went further to set out that the shares in which G M had been allotted were premised on (1) a loan of Kshs 160,000/- that he had secured as balance for the purchase of Unity House which had been converted to shares and (2) return of allotment between 1973-1974 in which his shares increased to the shareholding as reflected in the Amended Form of Annual Returns filed on 31st December 1979. The arbitrator further held that Form 213 Amended Return of Allotment dated 21st October 2009 was invalid and ineffective in law.
14. From the summations made by the arbitrator, there was no evidence of fraud that had been adduced by the Claimant in its witness statements. No evidence was adduced that G M had fraudulently bequeathed upon himself shares, or acted in a manner to suggest that there had been fraud on his part. There was no evidence that the shareholding was deemed to be equal, or that there had been payments made by the shareholders for the taking up of the shares that had been

allotted over the years.

15. Turning to the Claimants application, the same was predicated upon Section 35 of the Arbitration Act. At subsection (2) parts (a) and (b) thereof, the Court has been empowered to intervene and interfere with an arbitral award if the same goes against the provisions as set out therein. The crux of the Claimants application can squarely be placed upon Section 35(2)(b)(i) and 35(2)(b)(ii) in that issue as determined by the arbitrator was incapable of being settled by arbitration and that the award made was against public policy of Kenya. In Christ for All Nations v Apollo Insurance Co Ltd (supra) Ringera, J (as he then was) relied upon the case of **Renusagar Power Co. v. General Electric Co. AIR (1994) SC 860: (1994) CLA sup 1 SC**on the issue of determining what portends public policy. He held that;

> ***"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 or that as the common law judges used to say, it is an unruly horse. An award could be set aside under Section 35 (2) (b) of the Arbitration Act as being inconsistent with public policy of Kenya if it was shown that it was either***
>
> ***1. Inconsistent with the constitution or other laws of Kenya whether written or unwritten;***
>
> ***2. Inimical to the national interests of Kenya,***
>
> ***3. Contrary to Justice or morality."***

13. Does the Claimants claim therefore, fall within the purview of what is elaborated above? In the case of **Profilati Italia SrL v PaineWebber Inc (2001) 1 All ER (Comm) 1965, (2001) 1 Lloyd's Rep 715,** Moore-Bick J stated that where a party alleges that the way in which an award was procured was contrary to public policy, it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on the part of the successful party has contributed in a substantial way to the award being made. The court should not be quick to interfere. The Claimants have not been able to show that the Respondents in any way or manner interfered with the way in which the award was made, and that in lack of such evidence, the application would not succeed on such ground.

14. With regards to the issue of fraud, it was the Claimants contention that the same was not an issue that could be determined by arbitration. It was reiterated that under the Kenyan law and public policy, and issue of fraud could not be dealt with under arbitral proceedings. As has already been established, there was nothing in the award that went against public policy as enunciated in **Christ for All Nations v Apollo Insurance Co Ltd** (supra), and it is therefore for the Court to determine whether the issue of fraud cannot be referred to arbitration as contended by the Claimant.
15. Under Section 24(1) of the Arbitration Act, the Claimant shall state all the facts supporting his claim, his points of issue and the remedy or reliefs sought. In return the Respondent shall state his defence in respect of the issues raised. The said provision reads;

> ***'Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required particulars of such statements.'***

Further, it is provided under Section 10 of the Act that the Court shall not interfere with matters governed by this Act. It is provided that;

> ***'except as provided in this Act, no court shall intervene in matters governed by this Act.'***

16. Under the aforementioned provisions, the Court may not interfere with any matters referred to in arbitration, unless by any reason that any of the parties may refer to it through an application to the

Court. If the Claimant had any issues as with regards to the jurisdiction of the arbitrator to deal with any issue of fraud, the same should have been raised during the hearing of the arbitral proceedings in order for the same to be determined as a preliminary issue. It is provided under Section 17(2) of the Act it is provided that;

> ***'A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence*, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.'**(Emphasis original).

17. At Section 5 of the Act, it is provided that;

> **'A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.**

18. In accordance with the provisions of Section 5 of the Act, as read together with Sections 10 and 17(2), the Court lacked the mandate to interfere with the arbitral process once the parties consented and/or agreed to subject themselves to the jurisdiction of the arbitrator. It was the onus of the Claimant, if he at the time disagreed that the arbitrator could conclusively deal with the issue of fraud, to raise such objection at the hearing of the arbitration, and could not thereafter after the award has been made claim that the arbitrator lacked the jurisdiction to determine issues of fraud.
19. The parties fully complied with the provisions of Section 24(1) of the Act subsequent to the consent that they had entered before the Court on 8th November 2014 to refer their dispute to an arbitrator. Once they had subjected themselves to the arbitrators jurisdiction, and with no objection raised as to his jurisdiction or the mandate and scope of his jurisdiction, neither of the parties could be seen or heard to thereafter to claim that the arbitrator lacked jurisdiction. This was the position taken by Koome, J (as she then was) in **Donwoods Company Limited v Samura Engineering Limited [2010] eKLR** where she held *inter alia*;

> ***"Is this a fundamental flaw that goes to the root of the matter and takes away the jurisdiction of the arbitrator? Firstly, the competence, integrity and independence of the arbitrator are not in issue. The applicant has also not stated that the appointment of the arbitrator has caused them prejudice. The arbitrator was appointed on 24th September 2008; the applicant participated up to the hearing date when it raised this objection on the threshold of the hearing. The applicant was in possession of the subcontract which provided that the arbitrator would be appointed by the Architectural Association of Kenya. By waiting and participating in the proceedings for a period of almost 6 months and rising an objection on the day of the hearing, that delay in my humble opinion was tantamount to a waiver of the applicant's rights. Under Section 5 of the Arbitration Act it provides:-***
>
> ***"A party who know by any provision of this act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, shall be deemed to have waived he right to object".***
>
> ***If there was a mistake in the manner in which the arbitrator was appointed the applicant waived their rights when they submitted themselves to the jurisdiction of the arbitrator and agreed to proceed. Moreover it can also be interpreted to mean the parties agreed on the arbitrator as indeed the applicant did not raise any objection to the appointment of the arbitrator until after six months. A parallel can be drawn in this case with a decision by the Court of Appeal of Uganda in the case of Uganda Law Society vs. The Attorney***

<u>General EALR (2001) I EA 301</u> the presumption is;

"All things are presumed to have been legitimately done, until the contrary is proved (omina praesumuntur legitime facta probetur in contrarium)"

20. No objection was raised by the parties, and moreso the Claimant as to the issues that would be presented to the arbitrator for determination. In accordance therefore with the provisions of Section 5 of the Act, the Claimants waived their right to object to the jurisdiction of the arbitrator once they had agreed and commenced arbitral proceedings to their logical conclusion.
21. Further, at Section 35(2)(a)(iv) of the Act, it is provided that;

An arbitral award may be set aside by the High Court only if-

iv. <u>the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration</u>, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; o

22. The Claimant had failed to establish that indeed the matters or issues dealt with by the arbitrator were beyond his scope as provided under Section 35(2)(a)(iv) of the Act, or that the matter was not capable of settlement by arbitration under the laws of Kenya as provided under Section 35(2)(b)(i). Under Section 35(2)(b)(ii) an award made against public policy, the Claimant has not been able to distinguish what involves public policy, or that the award was made in contravention of the same as highlighted in **<u>Christ for All Nations v Apollo Insurance Co Ltd</u>** (supra).
23. The Claimant after proceedings with the filing of their Statement of Claim, submissions and providing testimonies at the arbitral proceedings, cannot thereafter claim, once the award made was against them, that the issue of fraud could not be determined by the arbitrator; they would be approbating and reprobating at the same time.
24. The upshot is that the application by the Claimant is without merit and the same is dismissed with costs to the Respondents. Conversely, the Respondent application seeking for the adoption of the award as a judgment of the Court is allowed. Costs are awarded to the Respondents.

Dated, Signed and Delivered in Court at Nairobi this 4th day of December, 2015.

……

C. KARIUKI

<u>JUDGE</u>