REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 571 OF 2011

BELLEVUE DEVELOPMENT COMPANY LIMITED……...……PLAINTIFF/APPLICANT

Versus

VINAYAK BUILDERS LIMITED…….…… 1ST DEFENDANT/RESPONDENT

NORMAN MURURU ……...…….2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

Arbitrator's Jurisdiction to withdraw

[1] The application that I shall determine is the one dated the 13th day of May, 2013 since those dated the 29th day of July, 2013 and 13th November, 2013 are now spent. I recite, below, orders No. 3.4,5, 6 which are the substantive orders that are sought in that application. I also reproduce the alternative prayers i.e. prayer 6A and 7:-

> ***3.THAT this Honourable Court do see it fit proper and just in circumstances herein to enjoin in these proceedings P. Mwaniki Gachoka of P.O. Box 13439 – 00800 Nairobi and of Design Centre, 3rd Floor, Office suite no. 3A, Tausi/Mogotio Road off Muthithi Road, acting and practicing as sole Arbitrator by the between the plaintiff herein and the 1st Defendant/Respondent; as the 3rd Defendant and Respondent herein.***
>
> ***4. THAT pending hearing and determination of this Application,***
>
> ***a temporary injunction do issue against the 1st Defendant herein, its directors, officers, managers, servants, agents, employees or assigns restraining it and them from progressing proceedings or in any other manner advancing the arbitration proceedings before P. Mwaniki Gachoka sitting as sole Arbitrator by and between the Plaintiff and the 1st Defendant/Respondent.***

5. THAT pursuant to [and incumbent upon] the grant of Orders 3 and 4 sought afore, a temporary injunction do issue against the 3rd Defendant herein, sitting as sole Arbitrator by and between the Plaintiff and the 1st Defendant/Respondent; restraining him from progressing proceedings or in any other manner advancing the arbitration proceedings before him pending hearing and determination of this Application.

6. THAT pursuant to the judgment delivered in this suit by Honourable Justice G.V Odunga on 21st March, 2012, an order do issue terminating the arbitration proceedings as between the Plaintiff and the 1st Defendant with respect to the "Proposed Bellevue Apartments on Plot No. 209/11424/2 South C- Nairobi – Vinayak Builders Ltd vs Bellevue Development Company Ltd" and proceedings before the 2nd Defendant and by extension the 3rd Defendant herein.

OR IN THE ALTERNATIVE

6A. THAT pursuant to judgment delivered in this suit by Honourable Justice G.V. Odunga on 21st March, 2012 and [incumbent] upon the grant of Order 3 sought afore, mandatory injunction do issue, directed at the 3rd Defendant herein, sitting as sole Arbitrator, by and between the Plaintiff and the 1st Defendant/Respondent, directing him to terminate the arbitration proceedings before him with respect to the plaintiff and 1st Defendant herein.

A Preliminary objection was also raised

[2] I should also consider the preliminary objection which was forged against the said application by the 1st Respondent's Notice of Preliminary Objection (hereafter the PO) filed on 2oth November, 2013. The PO is as here under:

1. THAT the Application is incompetent, misconceived, bad in law and does not lie; the suit having been determined by the court by its judgment delivered on 21st March 2013, hence the Court is functus officio.

2. THAT the application is incurably defective for seeking Orders against a person who is not a party to the proceedings. In any event, joinder cannot obtain post judgment.

3. THAT the Court has no jurisdiction to entertain the application, such jurisdiction vest in the Arbitrator under Section 14 of the Arbitration Act, 1995 and paragraph 15 (3) and (4) of the Arbitration Rules 1998, and who has already pronounced himself on the same.

4.THAT the matter the subject of the Application is also pending in the application filed herein and dated 13th May 2013 and as the matter comprised in the application dated 13th November, 2013 are therefore sub judice.

5. THAT the Application offends Article 159 of the Constitution of Kenya, 2010.

[3] Parties filed their respective submissions on the application which I hereby reproduce in *ex tenso* as below.

PLAINTIFF'S SUBMISSION

[4] The Plaintiff's starts by stating giving the background of the application as follows, that:

1. This is truly an unfortunate situation in the administration of justice:

2. This suit was commenced by way of an Originating Summons dated and filed on 15th October 2011. They invite the Hon. Court to examine the Plaintiff's pleadings and entire court record.

3. The suit was defended by the 1st Defendant and ignored by the 2nd Defendant. They invite the Hon. Court to examine the 1st Defendant's response to the plaintiff's Originating Summons.

4. The suit was determined by a judgment read, signed ad delivered by Hon. Justice G.V. Odunga on 21st March 2012.

5. It is common ground that the Honourable Court allowed the plaintiff's Originating Summons and set aside the offending Ruling delivered by the 2nd Defendant as Arbitrator; the Hon. Justice Odunga's determination in the last two paragraphs on page 28 of his judgment is set out below.

*"**Without extension of the said orders, I find that the arbitrator had no jurisdiction to take any step in the matter since there was no valid statement of claim before him. The only thing he could validly do was to invoke the provisions of section 26(a) of the Arbitration Act and terminate the proceedings. Any other orders made by the arbitrator after the expiry of the period stipulated for filing and service of the statement of Claim and supporting documents are, accordingly, invalid, null and void.***

In conclusion the 2nd defendant's ruling issued as an arbitrator is hereby set aside. The plaintiff will also have the costs of the originating summons to be borne by the 1st defendant."

6. It is the plaintiff's contention that the judgment in this suit delivered by Hon. Justice G.V. Odunga on 21st March, 2013 was very clear and unambiguous that the 2nd Defendant had only **ONE** course of action open to him after the said judgement and that was to **TERMINATE** the arbitration proceedings before him.

7. The 2nd Defendant **DID NOT** and **HAS NOT** to date terminated the arbitration proceedings before him with respect to the Plaintiff and 1st Defendant.

8. It is common ground between the 1st Defendant and the Plaintiff that the arbitration proceedings before the 2nd Defendant were to be terminated post judgment as delivered by Hon. Justice G.V. Odunga in this matter. They humbly refer the court to the submissions filed by the 1st Defendant on 23rd January, 2014 at page 10 paragraph 30.

9. The 2nd Defendant **DID NOT** terminate the arbitration proceedings before him and the subject of this suit and they draw the court's attention to Annexure 'JM1' in the Supporting Affidavit sworn on 13th May, 2013 by Josephat Mutugi. The 2nd Defendant in his letter dated 18th June 2012 [annexure 'JM1' purports to **WITHDRAW** as sole arbitrator in the subject matter of this suit. The 2nd Defendant states in his letter of 18th June 2012 –

"I refer to this matter, the court ruling therein and subsequent correspondence by the parties. It is evidence that the parties have been unable to agree on the proper interpretation of the court ruling. In the circumstances, I find it prudent to withdraw as sole Arbitrator and leave the parties to resolve their grievances at other fora."

10. They draw the court's attention to and rely on annexure 'JM2'[Letter dated 23rd January, 2012 from the 1st Defendant addressed to the Chairman of the Architectural Association of Kenya] in the Supporting Affidavit sworn on 13th May, 2013 by Josephat Mutugi. The court will humbly note that the 1st Defendant sought to have a 'substitute arbitrator appointed pursuant to section 16 of the Arbitration Act. It made this request- ***"This is therefore to request appointment of a substitute Arbitrator in terms of section 16 of the Arbitration Act Cap 49."***

11. They further draw the Court's attention to and rely on annexure 'JM3' [Letter dated 28th January, 2013 from the plaintiff addressed to the Chairman of the Architectural Association of Kenya] in the Supporting Affidavit sworn on 13th May 2013 by Josephat Mutugi. The court should humbly note that the plaintiff is addressing the attempt by the 1st Defendant to have a 'substitute' arbitrator appointed and drew the attention of the Chairman of the Architectural Association of Kenya to the fact that this court had required the 2nd Defendant to terminate the proceedings before him but had instead opted to withdraw.

12. Further attention of the court is drawn to 'JM4' [Letter dated 14th February, 2013 from the Chairman of the Architectural Association of Kenya addressed to the 1st Defendant, Plaintiff, Paul Mwaniki Gachoka amongst others] in the supporting Affidavit sworn on 13th May 2013 by Josephat Mutugi. The court will humbly note that the Chairman of the Architectural Association of Kenya records that Paul Mwaniki Gachoka is being appointed as sole arbitrator pursuant to the resignation of the 2nd Defendant in the captioned matter and proceeds to instruct him as hereunder-

"**By a copy of this letter, I am requesting Advocate Gachoka to confirm his acceptance to proceed with the hearing immediately."**

13. The court is also referred to annexure 'JM5' [Letter dated 6th March 2013 from Paul Mwaniki Gachoka addressed to the 1st Defendant, the Plaintiff and copied to amongst others, the Chairman of the Architectural Association of Kenya] in the Supporting Affidavit sworn on 13th May, 2013 by Josephat Mutugi. The said Paul Mwaniki Gachoka accepted the appointment by Chairman of the Architectural Association of Kenya.

14. The Plaintiff was then forced to file on 13th May 2013 the instant Notice of Motion by the activities of the 2nd Defendant, 1st Defendant, and the Chair to the Architectural Association of Kenya and Paul Mwaniki Gachoka in continuing the arbitration proceedings commenced before the 2nd Defendant.

15. See the averments made in the Supporting Affidavit of Josephat Mutugi sworn on 13th May, 2013 in support of the Plaintiff's Notice of Motion herein.

16. The Plaintiff's Notice of Motion Application dated 13th May, 2013 was not heard on 14th June, 2013 as ordered by the Court at the inter- partes hearing of the certificate of urgency as it was listed as one of the matters taken out of the day's cause list, fresh dates were to be taken at the Registry. The Court record on this fact suffices.

17. The 1st Defendant frustrated the urgency of the plaintiff's Notice of Motion application by insisting on the date of 24th October 2013.

18. See also the averments made in the Supporting Affidavit sworn by Muturi Mwangi on 29th July 2013 in support of the Plaintiff's Notice of Motion dated the same date and also brought under a certificate of urgency of similar instant.

19. According to the Court record, this matter was again taken out of the day's cause list on 24th October, 2013 fresh dates to be taken at the Registry.

20. The Plaintiff's right to justice was being frustrated in the Application dated 13th May 2013 not being heard, the 1st Defendant and Paul Mwaniki Gachoka were insisting on progressing with the arbitration proceedings the subject of the Plaintiff's application dated 13th May, 2013.

21. They rely on the averments made in the Supporting Affidavit sworn by Muturi Mwangi on 13th November, 2013 in support of the plaintiff's Notice of Motion dated the same date and also brought under a certificate of urgency of similar instant.

The Plaintiff proposed the following Issues for Determination:

[5] The Plaintiff proposes the following to be the issues for determination;

(a) Was withdrawal on 18th June, 2012 by the 2nd Defendant as sole arbitrator in the dispute between the Plaintiff and the 1st Defendant in accordance with the direction and the judgment delivered herein on 21st March 2012 by Hon. Justice G.V. Odunga and is the same tantamount to terminating the arbitration proceedings the subject of the originating summons filed on 15th October, 2011 under section 26(a) of the Arbitration Act?

(b) In light of these proceedings as instituted and determined on 21st March 2012 by Hon. Justice Odunga, was the option available to the 2nd Defendant to withdraw from the arbitration proceedings?

(c) In light of the judgment delivered herein on 21st March 2012 was section 16 of the Arbitration Act available to the 1st Defendant and the Chairman of the Architectural Association of Kenya in seeking to have a substitute arbitrator appointed in place of the 2nd Defendant?

(d) Is Paul Mwaniki Gachoka a necessary party to these proceedings for the effectual and final determination of the issues herein between the Plaintiff and the 1st Defendant?

(e) In the circumstances portending in the instant Application can this court be deemed functus officio post-delivery of judgment on 21st March 2012 by Hon. Justice G.V. Odunga?

[6] According to the plaintiff, it challenged/objected to the **ARBITRATOR'S JURISDICTION** and not **HIS SUITABILITY** to sit as sole arbitrator in the dispute between the Plaintiff and the 1st Defendant. The Court's attention is drawn to document number 28 [Muturi Mwangi & Associate letter dated 13th October, 2011 addressed to the 1st Defendant and the 2nd Defendant's lawyers – Havi & Co. Advocates] in the 'Plaintiff's list of Documents' filed on **15th December, 2011 together** with the Originating Summons as the evidence of this fact. This document forms part of the court record.

[7] The plaintiff submitted further that as evidenced on page 2 of Muturi Mwangi & Associates letter dated 13th October, 2011, the plaintiff lodged the challenge/objection to jurisdiction as a preliminary question under the provisions of Sections 17(2), 17(3), 24(1) and 26(a) of the Arbitration Act and Rules 15A, 15B (4) of the Arbitration Rules of the Chartered Institute of Arbitrators. They invite the court to read the entire judgment delivered on 21st March, 2012 by Hon. Justice Odunga but for ease of quick reference they set forth his observations at page4s 9, 10 and 11as follows –

> ***"However, the 1st Defendant did not comply therewith but instead, on 15th September, 2011, through its new advocates, Havi & Company advocates requested for extension of time for compliance to 22nd September 2011. The arbitrator did not , however, issue any direction with respect to the said request. The said statement of claim together with accompanying documents were nevertheless served on 22nd September, 2011 prompting the plaintiff to lodge ……..***

That objection to jurisdiction was, however, dismissed by the arbitrator thus prompting the institution of these proceedings.

> ***The plaintiff submits that the 1st Defendant filed and served its said documents on 22nd September, 2011 and the challenge to jurisdiction was made on 13th October, 2011 on account of the said default. It is therefore submitted that the arbitrator's decision in not terminating the arbitral proceedings was erroneous contrary to the mandatory provisions of section 26(a) of the Arbitration Act."***

[8] In addition, the Plaintiff attacked the 1st Defendant's Grounds of Opposition filed on 24th May, 2013 that they seek refuge in the provisions of sections 15 and 16 of the Arbitration Act. The grounds of objection are oblivious of the preceding relevant sections 13 and 14 which the court should consider. The sections provide-

> **13(1) when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.**
>
> **(2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.**
>
> **(3) <u>An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conduction the proceedings or there are justifiable doubts as to his capacity to do so.</u>**
>
> **(14(1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.**
>
> **(2) Failing an agreement under subsection (1), <u>a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13 (3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.</u>**
>
> **<u>(3) If a challenge under agreed procedure or under subsection (2) is</u>**

unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

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

(5) The High court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(8) While an application under subsection (3) is pending before the High court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

15(1) The mandate of an arbitrator shall terminate if –

(a) he is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch; or

(b) he withdraws from his office; or

(c) the parties agree in writing to the termination of the mandate.

(2) **If there is any dispute concerning any of the grounds referred to in subsection (1) (a), a party may apply to the High Court to decide on the termination of the mandate.**

(4) Where under this section or section 14 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, that shall not imply acceptance of the validity of any ground referred to in this section or section 16 (3)

16(1) Where the mandate of an arbitrator is terminated under section 14 or 15, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.

(2) Unless otherwise agreed by the parties –

(a) where a sole arbitrator or the Chairman of the arbitral tribunal is replaced, any hearing previously held shall be held afresh; and

(b) where an arbitrator, other than a sole arbitrator or the Chairman of the arbitral tribunal is replaced any hearing previously held may be held afresh at the discretion of the arbitral tribunal.

(3) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalidated solely because there has been a change in the composition of the arbitral tribunal.

(4) The Authority of an arbitrator is personal and ceases on his death.

[9] The Plaintiff's made the following specific rejoinders to the 1st Defendant's Grounds of Opposition and particularly paragraph 9 thereof –

a. The Plaintiff sought the relief granted on 21st March 2012 after the 2nd Defendant had made a ruling pursuant to Section 17(5) of the Arbitration Act.

b. The determination made in this suit on 21st March 2012 by Hon. Justice Odunga was to set aside the ruling on his jurisdiction by the 2nd Defendant pursuant to Section 17(5) of the Arbitration Act and hence necessitating the institution of this suit by the Plaintiff seeking relief under the provisions of sections 17(6), 24(1) and 26(a) of the Arbitration Act. The highlight of the finding of Hon. Justice Odunga at page 28 is necessary. He stated –

> **"Without extension of the said orders, I find that the arbitrator had no jurisdiction to take any step in the matter since there was no valid Statement of Claim before him. The ONLY THING he could validly do was to invoke the provisions of section 26(a) of the Arbitration Act and terminate the proceedings. In conclusion the 2nd defendant's ruling issued as an arbitrator is hereby set aside. The plaintiff will also have the cost of the originating summons to be borne by the 1st Defendant."**

(c) The 2nd Defendant did not act as required, nor further conduct the proceedings properly as directed by this court on 21st March, 2012 by invoking the provision of section 26(a of the Arbitration Act whose provisions state –

> **26. Unless otherwise agreed by the parties, if, without showing sufficient cause (a) the claimant fails to communicate his statement of claim in accordance with section 24(1), the arbitral tribunal shall terminate the arbitral proceedings;**

(d) The mandate of the arbitrator could not have been borne out of section 16 in the circumstances of this suit because section 16 can only come into play where the mandate is terminated under section 14 and 15 of the Arbitration Act. They refer to the express provision of section 16(1) of the Arbitration Act.

(e) That nowhere in his letter of 18th June, 2012 does the 2nd Defendant anchor his decision to withdraw on section 15 of the Arbitration Act.

(f) In light of the very specific finding of Hon. Justice Odunga that the ONLY action available to the 2nd Defendant was to invoke the provisions of section 26(a) and terminate the arbitral proceedings before him, the action and decision of the 2nd Defendant to withdraw and communicated in his letter of 18th June 2012 cannot be valid, legal or justifiable even under the provisions of section 15 of the Arbitration Act.

[10] The plaintiff made further observations on the 1st Defendant's submissions on the

Preliminary Objection filed on 20th November, 2013 as follows –

a. Paragraph **1:** The Court is functus officio post-judgment delivered on 21st March 2012.

(i) The Plaintiff reiterate the foregoing submissions and particularly that the 2nd Defendant has not complied with the determination of 21st March 2012 in that he did not invoke the provisions of section 26(a) of the Arbitration Act and terminate the arbitral proceedings before him and to date has not done so.

(ii) They further point out the 2nd Defendant withdrew as sole arbitrator and directed the plaintiff and 1st Defendant to go and resolve their dispute at other fora whereas the court had made it clear the ONLY thing he could do was invoke the provisions of section 26(a) of the Arbitration Act and terminate the arbitral proceedings before him.

(iii) By the 2nd Defendant withdrawing from the arbitral proceedings between the Plaintiff and the 1st Defendant instead of complying with this court's direction, he clearly did not conduct the proceedings properly after his assertion of jurisdiction was reversed and set aside by this court on 21st March 2012.

(iv) Section 15(2) allows a party who takes the view that inter alia an arbitral tribunal is not or has not conducted the proceedings properly to apply to the High court for determination of termination of mandate.

(v) The Plaintiff availed itself of the High Court forum allowed at section 15(2) and moved the court on 13th May 2013 by way of Notice of Motion.

(vi) The plaintiff further seeks to rely on the provisions of the Civil Procedure Act at sections 1a, 1B and particularly sections 3A, 7 and 8.

(vii) Both the Plaintiff's Notice of Motion Application dated 13th May, 2013 and this suit commenced by way of an Originating Summons filed on 15th December, 2011 are with respect to a dispute between the Plaintiff and the 1st Defendant and the jurisdiction of the 2nd Defendant acting as an arbitrator and now by extension Paul Mwaniki Gachoka the successor to the 2nd Defendant as arbitrator.

(viii) The Plaintiff has come back to this court asking it to enforce its determination made on 21st March 2012 and sanction those it determines to have disobeyed and disregarded its express determination.

(ix) The 2nd Defendant was and is a party to this suit and the current proceedings and has been accordingly served. The Civil Procedure Act at section 1A (3) stipulates that –

> **"(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the court and to comply with the directions and orders of the court."**

(x) It is the ardent submission of the Plaintiff that this court is not functus officio and its jurisdiction is saved in the inherent powers of the court as asserted at section 3A of the Civil Procedure Act.

b. **Paragraph 2:** Joinder of Paul Mwaniki Gachoka.

(i) The plaintiff in response to this objection by the 1st Defendant relies on the fact that as demonstrated afore, the 1st Defendant sought from the Chair of the Architectural Association of Kenya a substitute arbitrator to the 2nd Defendant pursuant to section 16 of the Arbitration Act.

(ii) The Plaintiff submits that it is admitted and submitted by the 1st Defendant in its submissions of 23rd January 2014 that Paul Mwaniki Gachoka was appointed by the Chair of the Architectural Association of Kenya pursuant to section 16 of the Arbitration Act.

(iii) It becomes necessary within this matter to examine if indeed the provisions of section 16 of the Arbitration Act would apply and it would be wrong and illegal to lock out Paul Mwaniki Gachoka in the examination of his mandate without affording him the right to be heard. Hon. Justice Odunga in his judgment herein of 21st March, 2012 delves succinctly into this legal concept.

(iv) The Chairman of Architectural Association of Kenya appointed Paul Mwaniki Gachoka after taking cognizance of the 2nd Defendant's 'resignation' and implores Paul Mwaniki Gachoka to confirm acceptance of his appointment and proceed with hearing immediately.

(v) It therefore becomes clear that the appointment envisaged by the Chairman of the Architectural Association of Kenya is for Paul Mwaniki Gachoka to substitute the 2nd Defendant and he accepts the appointment and hence assumes liability under this suit for a defective mandate in light of the court's judgment of 21st March 2012 and becomes a necessary party.

(vi) The Plaintiff further seeks comfort in the provision of the Civil Procedure Act at section 3A and the rules made under the Act of 2010 at Order 1 rules 4 and 10(2).

c. **Paragraph 3:** Jurisdiction of the court and Paul Mwaniki Gachoka as Arbitrator

(i) It is trite law that jurisdiction is everything and the moment the same is impugned a tribunal must down its tools.

(ii) Jurisdiction is a question and consideration of law and not fact; it flows from law and ebbs therefrom.

(iii) In the context of the relationship between the Plaintiff and the 1st Defendant jurisdiction of the 2nd Defendant was derived from an arbitration clause in a contract between them and the Arbitration Act. The provisions of the same Arbitration Act took away the 2nd Defendant's jurisdiction on 21st March 2012 before he could give it up by purporting to withdraw/resign on 18th June, 2012. By 18th June, 2012 the 2nd Defendant **had no jurisdiction to give up/withdraw or resign from.**

(iv) Hon. Justice Odunga did not leave it to conjecture and states in his judgment at page 28 that any orders made by the arbitrator after the expiry of the period stipulated for filing and service of the statement of claim and supporting documents are , accordingly, invalid, null and void.

(v) If the immediately foregoing position portends with respect to orders made by the 2nd Defendant after 14th September, 2011; what of those made by the 2nd Defendant after 21st March 2012 which do not include invoking the provisions of section 26(a) and terminating the arbitral proceedings?

(vi) Paul Mwaniki Gachoka according to the Plaintiff was appointed to take up the jurisdiction of the 2nd Defendant by the Chairman of Architectural Association of Kenya as the appointing authority under the contract by and between the Plaintiff and the 1st Defendant on a recorded understanding by the Chairman that the Defendant had resigned as sole arbitrator in the dispute between the Plaintiff and 1st Defendant.

(vii) The withdrawal/resignation of the 2nd Defendant was in glaring disregard of the determination made on 21st March 2012 by this court and which he was aware of.

(viii) Accordingly, the jurisdiction of an arbitral tribunal is subordinate to that of the High Court.

(ix) Article 165(6) of the Constitution of Kenya 2010 clearly states that the High court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(x) This suit was commenced on the strength of jurisdiction asserted by the Arbitration Act at section 17(6) where the High court is mandated to receive an application from a party aggrieved by an arbitral tribunal asserting its own jurisdiction. The Arbitration Act further states at section 17(7) that a decision on an application brought before the High court pursuant to section 17(6) shall be final and not subject to appeal.

(xi) A decision on the jurisdiction of the 2nd Defendant and Paul Mwanika Gachoka, was made on 21st March 2012 and the Court was moved on 13th May 2013 by the Plaintiff to re-assert itself in the face of the clear disobedience by the 2nd Defendant of its judgment and Order and now Paul Mwaniki Gachoka both sitting as arbitrators.

(xii) Article 165(3) of the Constitution of Kenya 2010 clearly states that the High court has unlimited original jurisdiction in criminal and civil matters.

(xiii) The Constitution of Kenya 2010 at Article 159(2) (c) makes it abundantly clear that the promotion of arbitration as a means of settlement of disputes is subject to sub-article (3) which fetters the promotion to the extent that the forum cannot be used in a way that is repugnant to justice or morality or inconsistent with the Constitution or any written law.

(xiv) The withdrawal of the 2nd Defendant as arbitrator was inconsistent with section 17(7) & 26(a) of the Arbitration Act and further and more particularly the determination on 21st March 2012 by this court in its supervisory jurisdiction over an arbitral tribunal.

(xv) The further conduct of proceedings before Paul Mwaniki Gachoka a purported substitute with tainted mandate succeeding the 2nd Defendant is also inconsistent with the provision of section 17(7) & 26(a) of the Arbitration Act and

further and more particularly the determination on 21st March 2012 by this court in its supervisory jurisdiction over an arbitral tribunal.

(xvi) The actions of the 2nd Defendant and Paul Mwaniki Gachoka that are complained of by the Plaintiff are repugnant to justice and if not reversed and stopped will result in self-evident injustice to the Plaintiff as an outcome. The Court pronounced itself clearly on 21st March 2012; there is no provision for appeal.

(xvii) The 1st Defendant wants a second illegal bite at the cherry by purporting that Paul Mwaniki Gachoka has jurisdiction separate from that of the 2nd Defendant after the 2nd Defendant's assertion of jurisdiction in his ruling of 15th November, 2011 was set aside by this court on 21st March 2012 pursuant to a challenge under section 17(6) of the Arbitration Act. How can Paul Mwaniki Gachoka be clothed with jurisdiction as substitute for the 2nd Defendant when the 2nd Defendant has been decloaked of his jurisdiction?

(xviii) The contract between the parties is not disputed, the arbitration clause between the parties is not disputed, what is disputed by the plaintiff is the action of withdrawal by the 2nd Defendant post-judgment delivery on 21st March 2012 and the appointment of Paul Mwaniki Gachoka as a substitute for the 2nd Defendant by the Chairman of the Architectural Association of Kenya.

d. **Estoppel:**

(i) The 1st Defendant very disingenuously alleges in their submissions that the Plaintiff through its lawyers on record made an application before Paul Mwaniki Gachoka sitting as arbitrator which resulted in a ruling dated 8th July 2013. This is unequivocally submitted to be untrue and mischievous.

(ii) The plaintiff through its lawyers on record herein have from before the appointment of Paul Mwaniki Gachoka and after the purported withdrawal by the 2nd Defendant contested the appointment of another arbitrator.

(iii) The plaintiff on 13th May, 2013 filed the Notice of Motion Application the subject of these submissions wherein the jurisdiction of Paul Mwaniki Gachoka to sit as arbitrator in the dispute between the Plaintiff and the 1st Defendant has been brought to question and sought to be terminated.

(iv) The plaintiff has through its lawyers on record refused to participate in any proceedings before Paul Mwaniki Gachoka on account of his lack of jurisdiction and the same is captured as page 2 paragraph 4 in the said ruling of Paul Mwaniki Gachoka on 8th July 2013.

(v) The Plaintiff has addressed the continued assertion of jurisdiction by Paul Mwanini Gachoka in a letter dated 2nd September, 2013 addressed to him from Muturi Mwangi & Associates and copied to and served on the Registrar of the High court on 3rd September, 2013.

Conclusion:

[11] They concluded by strongly and fervently submitting that in concordance with the many pronouncements of this and other Superior courts, orders made by Courts are to be obeyed by

ALL regardless of what any party may think of their propriety. They, therefore, seek the court to do grant the orders sought for by the plaintiff in its Notice of Motion Application dated 13th May, 2013.

SUBMISSIONS BY 1ST RESPONDENT

[12] The 1st Respondent submitted on the motion dated 13th May 2013. It relied on the Replying Affidavit and Notice of Preliminary Objection filed herein on 20th November, 2013. The 1st Respondent reproduced the Preliminary Objection as below:

" 1.THAT the Application is incompetent, misconceived, bad in law and does not lie; the suit having been determined by the court by its judgment delivered on 21st March 2013, hence the Court is functus officio.

2.THAT the application is incurably defective for seeking Orders against a person who is not a party to the proceedings. In any event, joinder cannot obtain post judgment.

3. THAT the Court has no jurisdiction to entertain the application, such jurisdiction vest in the Arbitrator under Section 14 of the Arbitration Act, 1995 and paragraph 15 (3) and (4) of the Arbitration Rules 1998, and who has already pronounced himself on the same.

4. THAT the matter the subject of the Application is also pending in the application filed herein and dated 13th May 2013 and as the matter comprised in the application dated 13th November, 2013 are therefore sub judice.

5. THAT the Application offends Article 159 of the Constitution of Kenya, 2010."

The Preliminary Objection

[13] The Preliminary Objection raises points of Law which essentially go to the jurisdiction of the Court and propriety of the Application before the Court. The Respondent believes the Preliminary Objection deals with the Application in its entirety and will render decision of finality.

Court jurisdiction vis-à-vis the Arbitrator's Jurisdiction

[14] The 1st Defendant/Respondent states that the Court has no Jurisdiction to entertain the application and that such jurisdiction vests in the Arbitrator under Section 14 of the Arbitration Act, 1995 and Rule 15(3) and (4) of the Arbitration Rules 1998. The Arbitrator had already pronounced himself on this matter hence the Plaintiff is estopped from revisiting the same. Section 14 of the Arbitration Act, 1995 provides:

> **14 (1) Subject to subsection (3) the parties are free to agree on a procedure for challenging an Arbitrator.**
>
> **(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of any circumstances referred to in Section 13(3), send a written statement of reason for challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge**
>
> **(3) If a challenge under agreed procedure or under subsection (2) is of the decision to reject the challenge, apply to the high court to determine the matter.**

[14] Three matters are discernible from the legal provision afore quoted;

> **(i) THAT the Arbitral tribunal has the original jurisdiction to hear and determine a challenge on its composition and jurisdiction.**
>
> **(ii) THAT the High Court only possesses appellate jurisdiction.**
>
> **(iii) THAT the challenge should be brought within 15 days of being aware of the composition of the arbitral tribunal or the matter upon which the challenge is based.**

The purported challenge before the court fails the above tests. It was filed 2 months after Mr. Mwaniki Gachoka was appointed Arbitrator. See the letter of appointment annexed as JM4 to the Affidavit in support of the Notice of Motion dated 13th May, 2013.

[15] Section 17 of the Arbitration Act is even more succinct. It provides:

> **17. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement,**
>
> **(6) Where the tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the high Court, within 30 days after having received notice of that ruling to decide the matter.**
>
> **(7) The decision of the high court shall be final and shall not be subject to appeal.**

[16] Rule 15(3) and (4) of the Chartered Institute of Arbitrators, Rules 1998, provides:-

> **"15B (3) Subject to Act, to decide any question of law arising in the arbitration;**
>
> **(4) to decide any questions as to its own jurisdiction including any objections with regard to the existence or validly of the arbitration agreement."**

[17] It is apparent that the Arbitrator is clothed by the Law with the jurisdiction to determine his own jurisdiction when appropriately moved and that the High Court is thereafter vested with appellate jurisdiction. What the applicant is asking the Court to do is to usurp the mandate of the Arbitral tribunal and to engage in an illegality or nullity and an obvious breach of the law/statute. The three above quoted provisions are succinct that the Arbitrator possesses the requisite jurisdiction to determine the question as to his jurisdiction. In Arbitration parlance this is referred to as the doctrine of **Kompetenz Kompentez.** This doctrine is replicated in most UNICITRAL Model Law Arbitration Law jurisdictions. The Kenyan Arbitration Act **Mutatis Mutandis** domesticates the UNICITRAL Model Law on Arbitration. Nyamu JA, (as he then was) sitting in the Court of appeal in the case of **SAFARICOM LIMITED V. OCEAN VIEW BEACH HOTEL LIMITE & 2 OTHERS (2010) EKLR** held that the principle Act gives the Arbitral tribunal the powers to rule on its own jurisdiction and substantively determine the subject matter in dispute before the Arbitration, and stated as follows:-

> **"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 an 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 provision 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 "compliance to decide upon its competence" and as expressed elsewhere this ruling in German it is "Kompetenze/Kompetenz and in France 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 wrong but with jurisdiction" (emphasis original)"

[18] It is, therefore, apparent that the Court does not possess the original jurisdiction to determine questions of the Arbitrator's jurisdiction. This is the function of the Arbitrator. The Court should adopt the words of the binding decision of the Court of Appeal above quoted. The rationale for reserving the Court's jurisdiction to the appellate/residual function of reviewing the Arbitrator's findings is to be found in Section 10 of the Arbitration Act which enunciates the principle of non-interference (or limited interference) with Arbitration by the Court. The said Section 10 of Arbitration Act provides-

10. Expect as provided in this act, no Court shall intervene in matters governed this Act.

Scholars in Arbitration Law and Courts have underscored the essence of Arbitration as a private mode of dispute resolution with which there should be very limited court interference or intervention, if at all. Dr. Kariuki Muigai FCI Arb, Phd and current Chairman of the Chartered Institute of Arbitrators, Kenya Branch in his book, **Settling Dispute through Arbitration in Kenya (2012) 2nd Ed. Glenwood** at page 91 illuminatingly states:-

"The fundamental principle, embodied in the Arbitration Act, 1995 (the Act), is that where there is a valid arbitration clause, all issues falling within the jurisdiction of the arbitrator should be decided by the tribunal, and the court should not intervene. This preposition was well captured in the case of Shamji v. Treasury Registrar Ministry of Finance the court stated that it was a well settled proposition that where a dispute between the parties has been referred to the decision of a tribunal of their choice, the Court should direct that the parties go before the specified tribunal other than interfere with the party's choice of that forum".

Estoppel

[19] By way of a ruling on an application moved by the Plaintiff and in line with Section 14 of the Arbitration Act, 1995, the Arbitrator gave direction that the Plaintiff does file his Objection to the Arbitrator's Jurisdiction within 15 days of the said Order made on 8th day of July, 2013 (annexure MM3 to the Application). The Arbitrator held that he had jurisdiction under Section 17 of the Arbitration Act to rule on his jurisdiction. The pertinent portion of the Arbitrator's ruling reads:-

"The parties have right to challenge my jurisdiction and the procedure for challenging the jurisdiction is set out in section 14 of the Arbitration Act, 1995. Further, the Arbitrator has power under Section 17 of the Act to rule on his jurisdiction. I direct any party that wishes to oppose my jurisdiction to do so by filing and serving a formal application within fifteen (15) days from today's date."

The plaintiff did not file the application as directed by the Arbitrator or at all. It therefore follows that the matter having been dealt with conclusively by the Arbitrator the same is now **res judicata** and the Plaintiff is **estopped** by its own conduct (failure to file an objection) from raising the same before this Court or before the Arbitrator. This is the essence of the notion that litigation must come to an end.

Res Judicata

[20] The 1st Respondent argues that the application before Court is incompetent for want of jurisdiction, the suit herein having been determined by Judgement of the Court delivered by Odunga J. on the 21st day of March, 2012. The said judgment has not been impeached on an appeal nor is there an appeal at all and hence the matters which from the substance therefore are now res judicata. The Applicant has sought to have substantive Orders in a spent suit by way of an application which is not premised on the prayers in the main suit. The Application also seeks to have orders made against a person not a party to this suit or subject to the orders in the determined suit. It is trite law that Orders cannot be enforced against a person not party to a suit. This principle emphasizes the doctrine of natural justice that one cannot be condemned unheard.

[21] It is also trite law that orders cannot issue against a person who is not a party to a suit and that the creativity of trying to present a new suit in the guise of a post judgment application is most irregular and cannot be countenanced by the Court. The suit the subject hereof was brought against specific persons raising complaints germane thereto and to stretch it to include proceedings which only came into existence post judgment renders such attempts incompetent.

Joinder of parties post-judgment

[22] In its attempts in further creativity, the applicant has sought to join Mr. Mwaniki Gachoka, Arbitrator as a party to the current proceedings way after judgment in a matter in which the said Arbitrator was not a party in the first place and where his appointment was made way after judgment. It is the 1st Respondent's considered Submissions that joinder of a party cannot issue after judgment particularly after the case has been heard and conclusively determined. The Law on joinder of parties in civil proceedings is governed by Order 1 of Civil Procedure Rules, 2010. Rule 10(2) therefore is explicitly clear on when joinder can obtain. This can only obtain during the pendency of the suit.

[23] Joinder is usually followed by amendment of pleadings so as to specifically make allegations and include prayers seeking relief against the joined party. For this reason alone joinder cannot obtain. Not only can the pleadings not re-open but also that judgment has already been entered herein. The suit is concluded. Joinder is not of any help to the Plaintiff. Perhaps the only course available to the Plaintiff is to file a fresh suit particularly since the proceedings it seeks to impugn are fresh Arbitral proceeding commenced after this suit and which are subsequent to the terminated proceeding.

[24] It is therefore our submission that prayer number 3 of the Notice of Motion dated the 13th day of May, 2013 can only fail.

SUBMISSIONS ON THE MERITS OF APPLICATION

[25] Should the Court still want to consider the merits or lack thereof of the application, the 1st Respondent submitted the following.

<u>Merits of the Application</u>

[26] The long and short of the Plaintiff's application is that the Arbitral proceedings before Mr. Mwaniki Gachoka Arbitrator should be terminated because those before Qs Norman Mururu had been terminated following the judgment of Odunga J. Delivered herein on 21st day of March 2012. It is common ground that the proceedings before Qs Norman Mururu were terminated by Justice Odunga. What follows thereafter is what is in issue. The Arbitration Act, 1995 at Section 16 is very clear on the consequences to the pending dispute after or upon termination of the Arbitration's mandate or withdrawal of Arbitrator. This is a matter the Plaintiff has chosen to ignore to consider altogether or mischievously prevaricates. Section 16(1) of the Arbitration Act, 1995 provides:-

"....where the mandate of an arbitrator is terminated under Section 14 (after challenge) or 15 (failure or impossibility to act), a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the Arbitrator being replaced"

[27] It is therefore clear that the procedure for appointment of an Arbitrator is reignited upon termination or withdrawal. The Arbitrator is appointed afresh by the appointing authority under the Arbitration agreement. There is no contention that Mr. Mwaniki Gachoka was not appointed in accordance with the process provided for in the Act or the Mechanisms set out in the Arbitration agreement. The new arbitrator is therefore properly in office and should be allowed to discharge his mandate without any further ado.

[28] The Plaintiff's contention is really academic. Even in academic terms the Plaintiff's position does not hold. Dr. Kariuki Muigua (supra) at page 84 authoritatively interprets Section 16 of the Arbitration Act as having the same aftermath upon both termination of an Arbitrator's or his withdrawal. What precedes is the same, he says:-

"**4.9.1 <u>Aftermath of challenge or Temination of Arbitrators…..</u>**

In instances of termination of an arbitrators mandate, another arbitrator shall be appointed as per the procedure applicable for appointment".

[29] Article 159 of the Constitution of Kenya enjoins the Court and all tribunals to support and encourage parties to promote Alternative Dispute Resolution Mechanisms (ADR) including Arbitration. This Court is thereby enjoined to breathe life into an Arbitration agreement to give effect to the intentions of the contracting parties who freely choose the said mode of dispute resolution in a private contract so as to take advantage of the trilogy of benefits which are said to be attendant to Arbitration. These are expeditious disposal of disputes, privacy and costs effectiveness. Unfortunately the Claimant has failed to live up to this hallowed principles and calling of the constitution and has at every opportunity and turn frustrated and delayed the determination of the matters the substance to the Arbitration proceedings. The reason being quite obvious, to delay as much as possible the day of reckoning and to keep the 1st Respondent as far away for the longest period from its day before the Arbitrator and in turn deny it the fruits due to it from the Arbitration.

[30] The suggestion by the Plaintiff in his application, if accepted, leaves the 1st Respondent without recourse which is not and can never be the intention of judicial justice, as eloquently proclaimed in our Constitution. The Respondent urges the court to dismiss the said notice of Motion dated 13th day of May, 2013 with costs to the first Respondent and the interim orders made on the 21st day of November, 2013 be discharged.

<u>COURT'S RENDITION</u>

Issues

[31] As I stated in the partial decision I rendered on 18th January, 2014, I am impressed by the pitch at which counsels for the parties have expressed themselves in support of their respective standpoints on the matters at hand. I have taken time to consider the said submissions, the facts of the case and the law applicable in this matter, and I can see the following four issues for determination by the court:-

(a) Whether the court became functus officio upon the judgment by Odunga J and delivered on 21st March, 2012 in respect of the arbitral proceedings in question such that; 1) the application herein would not lie; and 2) the joinder of parties would also not be legally possible in post-judgment.

(b) What was the legal import of the said judgment by Odunga J and delivered on 21st March, 2012 on; 1) the arbitrator; and 2) the arbitral proceedings in existence then, and does it proscribe any and every arbitral proceedings on the dispute herein as well as appointment of another arbitrator?

(c) Whether the withdrawal by the 2nd defendant as the sole arbitrator in the arbitral proceedings between the parties herein was in accordance with the Constitution and the Arbitration Act; and

(d) Whether the appointment of Mr Paul Mwaniki Gachoka, is as the successor of the 2nd defendant as the sole arbitrator in the arbitral proceedings between the parties herein and is it in accordance with the Arbitration Act.

[32] These issues I have formulated are inextricable; interface with one another. There are also other smaller strands which are appurtenant to the main ones, and I will discuss them as well. Save it should be known that each and every aspect of the issues and the strands thereof shall be given appropriate proportion of importance. None will be insubordinate. I will, not however, discuss these issues in the order they appear above. I propose to first deal with the question on whether the arbitral proceedings by Mr Paul Gachoka are the same as or separate from those that had been conducted by the 2nd defendant: It is the linchpin issue around which all the others will rotate and be determined. The other will coherently fall into place thereafter.

PARTIAL RULING

[33] The court took time to consider the gist of the issues the parties were raising in this matter, and after much thought and evaluation, the court decided to be addressed on one specific issue; i.e. whether the arbitral proceeding by Mr Gachoka was the same as or separate from the one that had been conducted by the 2nd defendant. The court rendered itself on that issue as follows:

> **The above recapitulation of the submissions by the parties and the numerous issues I need to determine brings me to the point where I am convinced that the issue on whether the proceeding before Mr Gachoka is different from that which had been presided over by the 2nd defendant is the substantial question on which the decision of the court may well turn on. But that particular issue has not been sufficiently or has barely been addressed by the parties. It being a factual as well as legal issue, I find no sufficient material on the record which will ascertain that fact. Now therefore, as this matter emanates from arbitral proceeding, the best practice in the sphere of arbitration impels the court to call upon the parties to address it on that particular point before pronouncing the final decision on the application dated 13th day of May, 2013. The course I have taken is also guided by prudence and diligence in judicial practice and adjudication of disputes. That way, the court will not only give parties the opportunity to appreciate the importance of the issue at hand, but will be enabled to resolve the real issues in controversy effectually and completely, and deliver justice of quality that meets the constitutional threshold in Article 159 of the Constitution; i.e. upholding fair, just and proportionate resolution of disputes including Alternative Dispute Resolution. Accordingly, in the best interest of justice and legitimate exercise of the judicial power of the court, I call upon the parties to provide further information or address the court on whether or not the arbitral proceeding being conducted by Mr Gachoka is a new one and is separate from the one which was being conducted by the 2nd defendant. The address or further information shall be rendered in the form of written submission or affidavit if additional evidence is needed or as shall be agreed among the parties; to be filed not later than three days of today. I will then deliver the final ruling on the application...**

THE QUESTION OF DISTINCT ARBITRAL PROCEEDINGS BEFORE MR GACHOKA

[34] Parties filed further submissions specifically on this issue. I have considered them intensely. The Applicant had insisted and still insists that the arbitral proceedings by Mr Gachoka are just but a continuation of the proceedings commenced before the 2nd defendant. The 1st defendant on the other hand holds to his previous standpoint that it is a new proceeding. According to the Applicant, the 2nd defendant contemptuously withdrew before he had complied with the order by Odunga J, i.e. to terminate the arbitral proceedings before him. The 1st defendant in its letter dated 23rd January, 2013 asked for appointment of ‘’a substitute Arbitrator’’. The Applicant urged that appointment of Mr Gachoka was, therefore, in succession of the 2nd defendant; which also is in furtherance of the contemptuous act by the 2nd defendant. It further argued that, since there has never been any new proceeding filed before Mr Gachoka, the arbitral proceeding he is presiding over is the existing proceeding that the 2nd defendant did not terminate. On that basis, Mr Gachoka has no jurisdiction to proceed with it. Mr Gachoka accepted appointment to a proceeding which was flawed, and therefore, he assumed liability of a defective suit in light of the order by Odunga J made on 21.3.2012.

[35] The 1st defendant on the other hand posits that the arbitral proceeding before Mr Gachoka is a new proceeding, his appointment having been done post the judgment by Odunga J. His appointment cannot, therefore, be said to have been under consideration or impugned by the order of Odunga J. The judgment by Odunga J found the proceeding before the 2nd defendant to have been terminated and the arbitral mandate of the 2nd defendant was accordingly terminated, Thus, the termination of an arbitral mandate under sections 14, 15, 16 and 26 of the Arbitration Act took effect by operation of law, and there was no need of taking any other or further steps on the matter. The appointment of Mr Gachoka was done by a competent appointing authority under the arbitration agreement. New pleadings were filed before Mr Gachoka. Those proceedings are therefore not part or a continuation of the previous proceedings by the 2nd defendant. To the 1st defendant, the withdrawal of the 2nd defendant is of no consequences. Section 16 is most instructive; the consequences or subsequent processes after termination of mandate and withdrawal of an Arbitrator are the same notwithstanding the semantic differences of the two words. Any objection to that appointment of Mr Gachoka should be raised before the Arbitrator and not in these proceedings. See sections 17 and 14 of the Arbitration Act. The role of the High court then becomes that of an appellate court rather than usurping the role of the Arbitrator. The curt should abide by the desires of Article 159(2) (d) and promote arbitration and other forms of dispute resolution mechanisms. This court should also be guided by equity; not to allow a party to suffer wrong without a remedy. The plaintiff by its conduct is not ready to submit to arbitration in order to circumvent the course of justice and subvert the right of the 1st defendant.

[36] Before finally resolving the question of whether or not the arbitral proceeding by Mr Gachoka was a continuation of the previous arbitral proceeding by the 2nd defendant, the court sees two salient points appurtenant to this issue, and need prompt settlement. The first issue is on termination of the arbitral proceedings by the 2nd defendant. The Applicant says that proceeding was not terminated as directed by the court, while the Respondent says it was terminated by operation of the law. Both propositions are eminently attractive. The Appellant’s suggestion makes an appeal in a technical and conceptual sense in law; that the arbitrator needed to have obeyed the court order herein and simply terminate the arbitral proceedings before him. The Applicant insisted that the proceedings were still subsisting and the arbitrator did not have jurisdiction to withdraw; in any event the withdrawal was contemptuous of the order of the court by Odunga J. I will, however, decide that question of jurisdiction and the true character of the withdrawal by the 2nd defendant in detail under a separate cover below. Meanwhile, contrary to the proposition by the Appellant, is it possible in law that termination of the arbitral proceedings before the 2nd defendant was by operation of the law? The position taken by the Respondent is that the order by Odunga J effectively terminated the arbitral proceeding, and there was no need for any other order to that effect. No doubt the learned judge clearly made a finding *that the arbitrator had no jurisdiction to take any step in the matter...The only thing he could validly do was to invoke the provisions of section 26(a) of the Arbitration Act and terminate the proceedings.*

The term in section 26(a) of the Arbitration Act and language of the learned judge are mandatory. All that the 2nd defendant had done was declared null and void. There was nothing left. Supposing for a moment we were to take the view by the Applicant, it means the arbitral proceedings in question are still alive, which I think negates the purpose of section 26(a) and the pronouncement by Odunga J. Again, that proposition falls short of one thing; is it suggesting that the arbitrator should be recalled or another one appointed to make the recording of consequences which the law has clearly spelt out? That kind of approach is preposterous. We are talking about jurisdiction and it follows that the Arbitrator or any other person had no authority to proceed with the arbitral proceedings in question other than as directed by the judge. And for all practical purposes, the proceeding stood terminated from the time the judge made the order in point herein, although sometimes, and as far as is practical, it is convenient that a formal order is recorded. But that was not done; partly because the parties engaged in unnecessary and convoluted arguments on the purport of the said order, which I believe, eventually prompted the withdrawal of the arbitrator; and partly because of the arbitrator withdrew. These practical challenges in the matter should not be taken to be sustenance or revival of the arbitral proceedings that were being conducted by the 2nd defendant; those proceedings were dead and nothing would have conferred any jurisdiction to any person to revive them. That position was not changed by the withdrawal of the arbitrator. Therefore, if there was to be any subsequent appointment solely based on the assumption that the arbitral proceedings in question still subsisted is legally objectionable, and not permissible. I find a lot of merit and support in the statement made in the substantive submissions by the Applicant/plaintiff that:

> **Hon. Justice Odunga did not leave it to conjecture and states in his judgment at page 28 that any orders made by the arbitrator after the expiry of the period stipulated for filing and service of the statement of claim and supporting documents are , accordingly, invalid, null and void.**

But what is more puzzling, however, is the conclusions the plaintiff makes in its submissions after making the foregoing pronouncement; I think, could not have been coherently, logically or legally flowing from that pronouncement. As I have already stated, the judgment of Odunga J could only have been that the arbitral proceedings were as good as terminated. And for the avoidance of doubt, I declare them to be so. Now that I have taken that view, was Mr Gachoka appointed as a successor or substitute of the 2nd defendant or independent sole Arbitrator upon new arbitral proceedings?

[37] This question is inextricable to the gist of my decision on whether the proceedings by Mr Gachoka were separate from or a continuation of the proceedings by the 2nd defendant. The sure start-point is to ask; when does arbitral proceedings commence? Section 22 of the Arbitration Act holds the answer. I will reproduce it below:

Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.

[38] From the record, the 1st Respondent who is one of the substantive parties in the Arbitration Agreement wrote to the Chairman of the Architectural Association of Kenya on 23rd January, 2013. In the letter, the 1st Respondent informed the Chairman of the Architectural Association of Kenya that the 2nd defendant had withdrawn as the sole arbitrator over the disputes in the project in question. it also informed the Chairman of the Architectural Association of Kenya that they had invited the Applicant to agree on a sole arbitrator but in vain. Various correspondences on the matter written by the 1st Respondent to the Applicant on the dispute were forwarded to the Chairman of the Architectural Association of Kenya. The letter dated 23rd January, 2013 was also copied to the Applicant. That letter is not disputed or its receipt by the Applicant. Although the 1st Respondent denied any discussion on resolution of the dispute herein, there is no doubt there was

a dispute which had been declared but not yet resolved between the parties. The Applicant in its letter dated 28th January, 2013 in response to the letter by the 1st Respondent dated 23rd January, 2013 acknowledged that the 1st Respondent was asking for ***another arbitration process*** to which the 1st Respondent said it believed was not necessary. Arrogantly, the 1st Respondent declined the intervention of the Chairman of the Architectural Association of Kenya. Ironically, the 1st Respondent stated in its said letter that it is more than willing to sit down with the 1st Respondent and discuss the dispute herein. Meanwhile, what is important is that, in law, the said letter is a sufficient commencement of arbitral proceedings as it constituted ***a request for the dispute to be referred to arbitration*** and was ***received by the respondent [read Applicant].*** I reckon that the Applicant, in his application has attacked that letter as having asked for a substitute arbitrator. But in the context of the law and the circumstances of this case, it was not possible for a substitute arbitrator to have been appointed on account of arbitral proceedings which had been terminated by law. As I have stated, the evidence and the tenor of the letter indicate a dispute existed and the 1st Respondent wanted it resolved to be in arbitration through appointment of a sole arbitrator. The appointment of Mr Gachoka by the Chairman of the Architectural Association of Kenya is contained in the letter dated 14.1.2013 and it is not indicated it was in succession of or substitution for the 2nd defendant. Moreover, the Applicant insisted and raised objections to the arbitral proceedings on account of reasons being advanced in this application, but were all disallowed by Mr Gachoka who found, and correctly so, that his appointment is independent of the earlier one by the 2nd defendant, and that any objection to his jurisdiction should be raised as provided for under section 14 of the Arbitration Act. That should be the right course the Plaintiff should follow and get legal vindication rather than applying the way it has done in this application. The above evaluation leads me to hold that: 1) The arbitral proceedings before Mr Gachoka are separate from the ones held by the 2nd defendant; and 2) His appointment is on the basis of the new arbitral proceedings and therefore, proper and in order. As such, I am not able to accede to the argument by the Applicant; that Mr Gachoka assumed a liability under the suit for defective mandate in light of the court's judgment by Odunga J.; or that *the actions of.... Paul Mwaniki Gachoka... complained of by the Plaintiff are repugnant to justice and if not reversed and stopped will result in self-evident injustice to the Plaintiff as an outcome.*

[39] Except, one more thing on this issue; I take the view that termination of arbitral proceedings under section 26(a) of the Arbitration Act does not preclude parties from utilizing the arbitration agreement, for such termination may not have the finality of an arbitral award in the sense of the Arbitration Act. And none of the parties seem to suggest any contrary view on that point. In making the decision above, I find reinforcement and support in the latitude in Article 159 of the Constitution of Kenya; that Courts of law should support and encourage parties to promote Alternative Dispute Resolution Mechanisms (ADR) including Arbitration. If as a court, I entertain any contrary opinion, will be a complete negation of the duty of the court under the said Article 159 of the Constitution of Kenya.

THE ARGUMENT ON *FUNCTUS OFFICIO*

[40] I am now in a position to determine the argument on whether this court is ***functus officio*** following the decision by Odunga J; the 1st Respondent is of the view the court cannot, therefore, exercise any authority on any matter arising from the said proceeding. Let us see what the law says about the subject of ***functus officio***. According to the **BLACK'S LAW DICTIONARY, 9TH EDITION** *functus officio* in relation to an officer or official body, like the court, denotes;

> **...without authority or legal competence because the duties and functions of the original commission have been fully accomplished**

See also the rendition by the Court of Appeal in **COURT OF APPEAL AT NYERI, CIVIL APPLICATION NO. 21 OF 2013: DICKSON MURICHO MURIUKI V TIMOTHY KAGONDU MURIUKI AND 6 OTHERS** that:

> **20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of tis judgment and pending the hearing and determination of an intended appeal to the Supreme court, we are of the view that once this court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan Courts of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts.**
>
> **21. We take cognizance that when this Court has delivered judgment; all pertinent issues and points of law have been fully canvassed and considered. Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed. The submissions by counsel, evidence on record, points of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made. What new point of law can subsequently be raised in an interlocutory application for stay of execution that will make this Court change its mind after delivery of judgment and order stay of execution? If there are new points of law or circumstances that arise after judgment, this Court is functus officio and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court.**

But the foregoing pronouncement of the court on the issue of ex officio should be seen within the jurisdiction of that court vis-à-vis finality of litigation, and the nature of the relief which was being sought. Nonetheless, it is profitable to note that the concept of *functus officio* should not be confused with the doctrine of *res judicata* although both have an element of prohibition of exercise of authority over the subject of the suit. The former prohibits exercise of authority by any court in the same suit the court has determined completely, while the latter relates to a situation where there are two suits; a current suit, and another previous; the issues in the current suit must have been directly and substantially in issue in the previous suit between the same parties, or litigating under the same title, and the issues had been determined by a court of competent jurisdiction. Properly understood, whereas the court becomes functus officio when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court.

[41] Now that I have taken that position, are the orders herein capable of litigation under this suit in which a judgment has been rendered? Look at the prayers in the application.

Joinder of parties and injunction

[42] Joinder of parties is possible after judgment. I will give some example where such joinder of parties is permitted; 1) in cases of representative suits; or 2) substitution of one or more parties, for instance, in case of death, or incapacity of a party or change of status of a party; or 3) in execution process. In the broader sense, it is deemed to be a kind of joinder of parties where a contemnor was not a party in the suit where judgment has already been entered and for which he is being cited for contempt of court. Equally, it is a joinder of parties where an objector raises objection to execution under Order 22 rule 51 of the CPR. However, any joinder of parties post-judgment will have to surmount any possible constitutional objections on the front of rules of natural justice and the principle of finality of litigation. Applying the said test on the present case, I find that Mr Paul Mwaniki Gachoka was not the subject of the earlier arbitral proceedings which were the subject of these proceedings. I have also found he was not a successor of the 2nd defendant although his appointment was after the resignation of the 2nd defendant herein. Although the 1st Respondent alludes to some sort of contempt, I have also found that Mr Gachoka has not been cited for contempt of court as by law required and this application is not one for contempt of court. I hold that he is not even a necessary party and should not be joined as a party in these proceedings.

Did the 2nd defendant have jurisdiction to withdraw?

[42] I have found that the proceeding before the 2nd defendant was as good as terminated under the law and by the pronouncement of the court on 21.3.2012. Accordingly, the mandate of the 2nd defendant as an arbitrator, was also blown away, and there was really nothing or anything substantive which he ought to have done in the circumstances. The court was clear of that position when it put out a rider: ***The only thing he could validly do was to invoke the provisions of section 26(a) of the Arbitration Act and terminate the proceedings.*** I am hesitant to fathom that in such a scenario, the withdrawal of the 2nd defendant may be challenged as such, especially when his mandate was legally over and there was no outstanding liability or entitlement which needed settlement by the court under section 16A of the Arbitration Act. Keeping to that thought, I do not think this application is an application by the arbitrator under section 16A of the Arbitration Act. Yet still, even if it were, I would not label the 2nd defendant 'a negligent or indignant arbitrator'; for, he gave his reasons of withdrawal, which was that parties were not able to agree on the proper interpretation of the court ruling, i.e. the judgment by Odinga J. The reason given is reasonable, although much prudent approach would have been for him to have understood the purport of the order of the court, made a decision thereof and terminated the arbitral proceedings. That course would certainly have pre-empted the present application which is reminiscent of the same arguments that caused him to withdraw.

FINDINGS AND ORDERS

[43] The upshot of the above analysis and evaluation of the submissions of parties, the law and the circumstances of the case before me, is that the application dated 13the May, 2013 is dismissed with costs to the Respondents. Consequently, I make the following specific findings and orders:

> ***a) THAT the arbitral proceedings presided over by the 2nd defendant were terminated, in law, when Odunga J declared them to be so through his judgment delivered on 21st of March, 2012. For clarity and avoidance of doubt, I declare the said arbitral proceedings to have been terminated on 21st of March, 2012;***
>
> ***b) THAT the arbitral proceedings before Mr Paul Gachoka Mwaniki, the sole arbitrator, are distinct from the arbitral proceedings which were presided over by the 2nd defendant, and should proceed as such;***

c) THAT the appointment of Mr Paul Gachoka Mwaniki as the sole arbitrator in respect of arbitral proceedings between the 1st Respondent and the Applicant is proper and in accordance with the Arbitration Act. Any challenge to the arbitrator should be raised in accordance with section 14 of the Arbitration Act. As such, it is necessary that any direction or order which may have been issued by the arbitrator, whose effect is to foreclose the right of any party to utilize the said section 14 of the Arbitration Act, should and is hereby stayed for only 21 days from today to enable any party to take advantage of the said section 14 of the Arbitration Act. Once a challenge is so initiated, any such previous order foreclosing the right under section 14 of the Arbitration Act shall lapse. And in default of initiating a challenge as ordered herein, the orders by the arbitrator will stand as are or as may be extended by the arbitrator in accordance with the law.

d) THAT the said Mr Paul Gachoka Mwaniki, the sole arbitrator is not a necessary party to these proceedings and shall not be so joined; and

e) THAT accordingly, the orders of injunction and stay sought by the Applicant are not merited and are denied.

Dated, signed and delivered in open court at Nairobi this 8th day of April 2014

F. GIKONYO

JUDGE