



THE REPUBLIC OF KENYA

THE HIGH COURT AT NAIROBI

MISC HIGH COURT CIVIL NO 559 OF 2011

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF LEISURE LODGES LIMITED

BETWEEN

VADAG ESTABLISHMENT.....APPLICANT

AND

Y.A. SHRETTA.....1ST RESPONDENT

LEISURELODGESS LIMITED.....2ND RESPONDENT

AND

THE REPUBLIC OF KENYA

THE HIGH COURT AT NAIROBI

MISC HIGH COURT CIVIL NO 457 OF 2011

IN THE MATTER OF THE ARBITRATION ACT 1995

Y.A. SHRETTAAPPLICANT

AND

LEISURELODGESS LIMITED.....1ST RESPONDENT

VADAG ESTABLISHMENTS2ND RESPONDENT

AND

WINDING UP CAUSE NO 28 OF 1996

IN THE MATTER OF LEISURELODGES LIMITED

RULING

INTRODUCTION

1. A brief background of this matter is that the arbitral proceedings arose out of **Winding Up Cause No 28 of 1996 In the matter of Leisurelodges Limited** following grievances by the minority shareholder Y.A Shretta who held 10% shares in Leisurelodges Limited while Vadag Establishment held 60% shares. The third shareholder was Numised AG which held 30% of the shares. During the pendency of the said Winding Up Cause, Vadag Establishment offered to purchase his shares but he declined. There was a dispute as to whether Y.A Shretta was entitled to a sum of Kshs 43,772,599/=. Parties were unable to agree on the value of the shares which was then to be determined through an arbitral process.
2. On 3rd March 2000, Mbaluto J (as he then was) outlined the terms of reference to arbitration against Vadag Establishment, the majority shareholder of the Leisurelodges Limited.
3. Being dissatisfied with the decision of the said judge, Vadag Establishment filed **Civil Appeal No 83 of 2000 Vadag Establishment vs Y.A Shretta & Others** in which by an order of 16th February 2001, the Court of Appeal modified the terms of the arbitration. The said terms of reference were contained on pp 5 -6 of the Arbitral Award. The Petition in the said Winding Up Cause was also struck out on 16th February 2001.
4. The relevant parts of the terms of reference for purposes of the applications herein were that:-
 - i. **Vadag, the Petitioner and the tribunal shall for the purposes of such fair market valuation of the Petitioner's shares have full access to the accounts and financial records of the Company up to the date of such submission.**
 - ii. **The tribunal shall have authority to investigate and carry out all necessary enquiry into the affairs of the Company and/or call for information so far as may be necessary for the purposes of such valuation;**
 - iii. **The tribunal shall specific authority to:-**
 - a. **Value the Petitioner's shares in the Company taking into account all the issues in the Petition and any other relevant matters.**
 - b. **Investigate all the allegations of fraud raised by the Petitioner in the Petition and the Company or its Directors in the affidavits in so far as any such allegations affect the net asset value of the Company and subsequently the fair market value of the Petitioner's shares.**
 - c. **Investigate and enquire into all the complaints by Vadag Establishments and/or against the Interim Liquidators in so far as any such allegations affect the net asset value of the Company and subsequently the fair market value of the Petitioner's shares.**
 - d. **Determine and ascertain any money owed to the Company by anyone.**
 - e. **Determine whether the Petitioner was entitled to the sum of 43,772,599/=.**
 - f. **Determine whether the Petitioner owes or is liable to the Company or to Vadag in respect of any claims made by the Company or Vadag.**
 - iv. **Upon determination of such value, Vadag Establishment shall pay the price of the Petitioner's shares to the Petitioner within 15 days of filing the award.**
 - v. **The fees of arbitration shall in the first instance be shared equally by the Petitioner and the majority shareholder and thereafter shall be deemed to be costs of the cause.**
 - vi. **The decision of the arbitral tribunal shall be final and binding on the parties.**
 - vii. **Each of the parties and the arbitrators shall be at liberty to apply to this court.**
5. Vadag Establishment and Y.A. Shretta subsequently appointed the arbitrators namely, Sharad Rao and Mukesh K.R.Shah who in turn appointed the umpire, Daniel Ndonge.
6. On 29th April 2011, the Arbitral Tribunal made its Arbitral Award. The said Arbitral Tribunal was uncertain whether it had jurisdiction to award interest on the sum of Kshs 43,772,599/= and requested the parties to refer the issue of interest to the court.
7. All the parties namely, Vadag Establishment, Y.A. Shretta and Leisurelodges were aggrieved by

- some parts of the award leading to their respective applications showed hereunder. The court will address the same separately in an effort to manage the bulk documentation that was filed in this matter.
8. While the court will set out brief details of the three (3) applications under separate heads, this ruling will be in respect of all applications as they were more or else related as will be seen later. This was a proposal that was made by the parties which request this court acceded to. The court deemed it necessary to refer to the parties by their respective names to avoid confusion as they were applicants and respondents in the various applications.
 9. The date of the said applications, the case number and the firm of advocates representing each of the said parties have been shown hereunder for ease of reference:-
 - a. **The Originating Summons by Yashvin Shretta was dated 9th May 2011. It was subsequently amended and filed on 24th May 2011. It was filed in HCCC Misc Civil Suit No 457 of 2011. The said party's advocates in these proceedings were M/S Kamau Kuria & Co Advocates.**
 - b. **The Chamber Summons application by Leisurelodges was dated 17th May 2011 and filed on 18th May 2011. The same was filed in WC No 28 of 1996. The said party was represented by M/S Oraro & Co Advocates.**
 - c. **The Chamber Summons application by Vadag Establishment was dated and filed on 24th June 2011. It was filed in HCCC Misc Civil Case No 559 of 2011. The party was represented by the firm of M/S Ochieng', Onyango, Kibet & Ohaga Advocates.**
 10. It was agreed by all parties that **HC Misc No 559 of 2011 Vadag Establishment vs Y.A. Shretta & Leisurelodges Limited** would be the lead file. The ruling herein will thus be rendered in this file but the same will be applicable in the other two (2) matters mentioned hereinabove.
 11. This matter came up severally in court but it did not proceed for one reason or the other. After several attempts by counsel to highlight their respective submissions which they had each filed, they finally managed to do so on 15th May 2013. Unfortunately, Dr Kamau Kuria, counsel for Y.A Shretta overshot the time that had been allocated to him leading to the matter being adjourned to 24th May 2013. Subsequently, the matter came up in court several times but parties were unable to proceed with the highlighting from where Dr Kamau Kuria had left due to adjournments occasioned by Mr Ochieng Oduol being at the Court of Appeal and Mr Amoko and Dr Kamau Kuria being indisposed at different times.
 12. In view of the time that had been expended and to progress in this matter, on 20th February 2014, Dr Kamau Kuria agreed to have the oral submissions he had made on 15th May 2013 expunged from the court record to enable the court deliver a ruling in respect of the three (3) applications based on the written submissions on the court record, a proposal that was acceptable to Messrs Ochieng Oduol and Amoko advocates. The ruling herein is therefore based on the said written submissions.
 13. The prayers sought in the respective applications have been set out hereinbelow.

I. AMENDED ORIGINATING SUMMONS DATED AND FILED 24TH MAY 2011 BY Y.A.SHRETTA

14. This application was brought under the provisions of Sections 17, 35 and 36 of the Arbitration Act and Rules 4 and 5 of the Arbitration Rules, 1997. It sought orders which were generally as follows:-
 - a. **THAT a declaration do issue that the award made on 29th April 2011 contained a matter that was beyond the reference of the tribunal or that it dealt with a dispute that was not contemplated by the term of reference in that the tribunal excluded to award Y.A Shretta interest which unjustly enriched Leisurelodges at his expense.**
 - b. **THAT Clause 16.1.14 of the said award be deleted and be substituted a clause indicating**

- that Leisurelodges Limited owed Y.A Shretta the sum of Kshs 43,772,599/= which was payable as at 31st December 1999 which sum was payable by Leisurelodges Limited together with interest at the rate of 20% per annum from 1st January 2000 until payment.
- c. **THAT in the alternative, the issue of the rate of interest be remitted to the tribunal for determination.**
 - d. **THAT in the event the award was remitted as aforesaid, then the tribunal do deliver a supplementary award within thirty (30) days.**
 - e. **THAT the award made by Daniel Ndonge, Sharad Rao and Mukesh K.R. Shah be enforced as a judgment of this honourable court.**
 - f. **THAT costs incidental to this application be borne by Vadag Establishment and Leisurelodges Limited.**

15. The said application was based on the grounds that:-

- a. **THAT Y.A. Shretta had a right to enforce the award as a judgment of the court.**
- b. **THAT in a majority decision, the arbitral tribunal found that it did not have jurisdiction / power to award Y.A. Shretta interest whereas it was implied in every arbitration agreement that the tribunal had power to award simple and compound interest against any party and that in any event, he had made a claim for interest at the rate of 20% from 1st January 2000 in his Statement of Claim**
- c. **THAT Leisurelodges Limited had been justly enriched as it had been trading with the sum of Kshs 42,772,559/= since 1st January 2000.**

16. The said application was supported by an affidavit of Y.A. Shretta which was sworn and filed on 24th May 2011. He explained the historical background setting out facts that led to the matter being referred to arbitration and the eventual arbitral award. He attached copies of the arbitration agreement, his Statement of Claim, the Response by Vadag Establishment and the documents in support of the said claims, written submissions and the Arbitral Award. He pointed out the Leisurelodges Limited did not respond to his claim for the said sum and interest on the same.

17. On 25th May 2011, Vadag Establishment filed Grounds of Opposition and Notice of Preliminary Objection dated 24th May 2011. It raised several grounds which can be summarised as follows:-

- a. **The Arbitration Act, 1995 was not applicable to the facts of this case.**
- b. **The application was brought in breach of the mandatory provisions of Order 46 of the Civil Procedure Rules and the same being misconceived, an abuse of the court process and bad in law, the same ought to be dismissed.**
- c. **The application was seeking to enforce the award in a manner that was contrary to Order 46 of the Civil Procedure Rules.**
- d. **The awards made as to costs under clauses 16.1.3, 16.1.6., 16.1.7 and 16.1.11 were not matters that had been referred to arbitration.**
- e. **The arbitral award was tainted with illegality as it was in breach of Sections 7 and 8 of the Exchange Control Act Cap 113 (laws of Kenya) (then in force) and thus violated Sections 56, 191 and 200 of the Companies Act Cap 486 (laws of Kenya).**
- f. **The genesis, basis and undertakings in relation to the sum of Kshs 42,772,599/= was improper, fraudulent, illegal, unenforceable and contrary to public policy and the Arbitral Tribunal could not grant a relief in respect thereof.**
- g. **Y.A. Shretta sought to enforce an award which was contrary to the positive law and the National Policy of the Republic of Kenya.**

18. Leisurelodges Limited did not file any documents in opposition to the Amended Originating Summons of Y.A. Shretta.

II. CHAMBER SUMMONS DATED AND FILED 24TH JUNE 2011 BY

LEISURELODGES LIMITED

19. In its Chamber Summons application dated 24th June 2011 on the same date, filed under the provisions of Order 46 Rules 13, 14, 15, 16 and 17 of the Civil Procedure Rules, 2010 and Section 203 of the Companies Winding Up Rules and Section 3A of the Civil Procedure Act Leisurelodges Limited was, Leisurelodges Limited sought prayers that this Honourable Court :-

a. **stays the awards in the following clauses:-**

- i. **Clause Paragraph 16.1.3 making an award on costs;**
- ii. **Paragraph 16.1.4 awarding Y.A Shretta the sum of Kshs 43,772,599/=.**
- iii. **Paragraph 16.1.6 awarding Y.A. Shretta costs based on the instruction fee for Kshs 43,772,599/= but otherwise calculated on the basis of one half of costs of the arbitration in all other respects.**
- iv. **Paragraph 16.1.7 awarding Y.A. Shretta one half of the sum of US Dollars 252,500 costs on the instruction fees on the sum of Kshs 43,772,599/=.**
- v. **Paragraph 16.1.11 directing that costs be agreed between the parties within 15 days of the award and in default of agreement the same be taxed by the Arbitrators.**

b. **Modifies and corrects the said clauses pursuant to the order of the court under Order 46 of the Civil Procedure Rules, 2010.**

c. **Makes a suitable order as to costs of arbitration between the parties herein.**

20. Its application was premised on several grounds, some of which were similar grounds to those that had been advanced by Vadag Establishment in the response to the Amended Originating Summons by Y.A Shretta regarding the question of the legality of his undertakings. Other grounds it relied on were that the majority decision by the Arbitral Tribunal which awarded Y.A. Shretta a sum of Kshs 43,772,599/= and costs created an obvious illegality and error on the award.

21. Leisurelodges Limited set out the grounds on the face of the application *in extenso* in an Affidavit sworn on its behalf by Rasik Chhotalal Kantaria on 17th May 2011. The deponent contended that as a director of Leisurelodges Limited, the said Y.A Shretta took advantage of his position and acted in breach of his fiduciary duties and responsibility and for improper purpose and personal gain. It also expounded other allegations of how the said Y.A Shretta breached his duty for fiduciary trust which this court duly noted.

22. It annexed to its Supporting Affidavit, copies of the Arbitral Award, the court order issued by Mbaluto J (as he then was) on 3rd March 2000, the court order issued by the Court of Appeal in **CA No 83 of 2000 Vadag Establishment vs Yashvin Shretta & Others** on 3rd April 2001 amongst other documentation.

23. In response to the said application, Y.A. Shretta filed a Notice of Preliminary Objection dated 24th May 2011 and filed on 25th May 2011. His Replying Affidavit was also sworn and filed on 25th May 2011.

24. His Notice of Preliminary Objection was premised on the grounds which can be summarised as follows:-

- a. **THAT the court had no jurisdiction to hear and/or entertain any application other than that of costs which was not the case in the application by Leisurelodges;**
- b. **THAT the court lacked jurisdiction to review judgments and orders of the Court of Appeal;**
- c. **THAT this court became *functus officio* after 16th February 2001 and cannot entertain the matter, the same having being referred to arbitration;**
- d. **THAT Order 46 of the Civil Procedure Rules did not apply to arbitral awards made pursuant to arbitration ordered by the court in exercise of its jurisdiction under Section 222 of the Companies Act which had its complete code of procedure;**
- e. **THAT in the event Order 46 of the Civil Procedure Rules was applicable, the said application was competent with the relevant provisions of the said rules.**

25. Y.A Shretta reiterated the same contentions he had raised in his said Notice of Preliminary Objection in his Affidavit. He said that Leisurelodges Limited was the one that requested the dispute to be referred to arbitration but that after that was done, it was the same one that now wanted the awarded remitted to the Arbitral Tribunal. He contended that its application was only designed to keep him from his entitlement under the said Arbitral Award.
26. He also objected to the said application on the grounds that it raised the same issues as those that were dealt with by the Arbitral Tribunal and thus prayed for its dismissal.

III. CHAMBER SUMMONS DATED AND FILED 24TH JUNE 2011 BY VADAG ESTABLISHMENTS

27. The Chamber Summons application by Vadag Establishments was brought under the provisions of Section 35 of the Arbitration Act and under Rule 4(2) and 11 of the Arbitration Rules, 1997. It sought the following orders:-

- a. **THAT part of the award under Clause 16.1.3 making the award on costs be set aside.**
- b. **THAT part of the award under Clause 16.1.4 awarding the Y.A. Shretta the sum of Kshs 43,772,599/= be set aside.**
- c. **THAT part of the award under Clause 16.1.6 awarding the Y.A. Shretta costs on the instruction fees on the sum of Kshs 43,772,599/= be set aside.**
- d. **THAT part of the award under Clause 16.1.7 awarding the Y.A. Shretta one half of the sum of USD 252,500 on the instruction fee on the sum of Kshs 43,772,599/= be set aside.**
- e. **THAT part of the award under Clause 16.1.11 directing that costs be agreed between the parties within 15 days of the award and in default of agreement the same be taxed by the Arbitrators be set aside.**
- f. **THAT this Honourable Court be pleased to make a suitable order as to costs of the Arbitration between the parties herein.**
- g. **THAT Vadag Establishment be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.**
- h. **THAT the costs of the application be provided for.**

28. The grounds under which the said application was premised were in broad and general terms as follows:-

- a. **THAT the clauses that Vadag Establishment was challenging dealt with matters that were beyond the scope of arbitration and were not contemplated or falling within the terms of the reference to the arbitration.**
- b. **THAT the award under Clause 16.1.4 was tainted with illegality and was against public policy as the genesis, basis and undertakings in relation to the sum of Kshs 43,772,599/= was improper, fraudulent, illegal, unenforceable and the Arbitral tribunal could not grant relief in respect thereof.**
- c. **THAT Y.A Shretta failed to disclose his interest in the sum of Kshs 43,772,559/= and breached his fiduciary duty by using his position for his own benefit and to the disadvantage of Vadag Establishment.**
- d. **THAT the firm of M/S Kamau Kuria & Co Advocates had demanded from Vadag Establishment a sum of Kshs 14,108,158/= which was part of the challenge herein.**
- e. **THAT there was real and imminent danger of Y.A Shretta proceeding to enforce his award against Vadag Establishment hence the need to dispose of the application herein expeditiously.**

29. The said application was supported by the Affidavit of Virendra Ponda. The same was also sworn on 24th June 2011. It set out the averments in the grounds on the face of the application *in extenso*.

30. In his Replying Affidavit sworn and filed on 19th July 2011, Y.A Shretta deponed that the Arbitral Award that was made herein was final and binding and that Vadag Establishment had not brought

itself within any of the grounds for setting aside such an award. He also stated that where the issue of public policy was dealt with by the Arbitral Tribunal, a party could not be brought up the same matter before the court. He also placed reliance on his affidavit sworn on 24th May 2011 in support of his Amended Originating Summons to buttress his arguments.

WRITTEN SUBMISSIONS

31. The written submissions by Vadag Establishment were dated and filed on 5th November 2011. Those of Leisurelodges Limited were dated and filed on 16th November 2011. Y.A. Shretta's three (3) sets of written submissions were filed on 29th May 2012, 26th November 2012 and 10th December 2012 respectively. His List of Authorities was dated and filed on 27th October 2011.
32. A perusal of the parties' pleadings showed that the court was essentially being called upon to set aside the Arbitral Award by all the parties. In addition to seeking the setting aside of certain parts of the Arbitral Award and remission of the same for consideration by the said Arbitral Tribunal, Y.A. Shretta also sought orders for the recognition and enforcement of the said Arbitral Award. It does appear to the court that the areas that were placed for consideration before this court basically fell under the following different heads:-
- i. **the award on costs;**
 - ii. **the award on interest;**
 - iii. **the award on the sum of USD 252,500;**
 - iv. **the award on the sum of Kshs 43,772,559/=;**
 - v. **the instruction fees on the sum of USD 252,500; and**
 - vi. **the instruction fees on the sum of Kshs 43,772,559/=.**
33. The court will, however, first set out in brief the submissions by the parties in respect of the various areas for consideration and thereafter address the issue of the competence of the applications with a view to establishing whether the said applications were competent to enable the court grant the orders sought by the different parties.

AWARD OF KSHS 43,772,559/=

34. Leisurelodges Limited submitted that this sum was subject of intense controversy as between the parties and the members of the Arbitral Tribunal. It argued that the same disclosed illegality due to violations of several provisions of the law which included illegal profit by a director as well as a company financing the purchase of his shares. It relied on several cases which this court fully noted.
35. It was its submission that the arbitrators ought to have interrogated the claims more deeply as Y.A. Shretta was its majority shareholder and Executive Chairman and that the sum amounted to an illegal windfall and which was in breach of his duties as a director. It went on to state that there were many questions that were left unanswered and gave a detailed chronology of events of what had transpired in its effort to prove that the claim of the said sum of money was based on fictitious debts in its books.
36. It contended that no fiduciary was allowed to enter into agreements in which they could have a personal interest conflicting or which could possibly conflict with the interests of those of the company. It also said that the award was against public policy. It relied on several cases to buttress its submissions in this respect.
37. It argued that the role of an umpire only came into play if the arbitrators were unable to come to a joint decision on an issue. It was therefore its submission that the umpire, Daniel Ndonge, misapprehended his role when he stepped in and rendered his decision despite the two (2) arbitrators namely, Sharad Rao and Mukesh K.R. Shah having arrived at a majority decision. It placed reliance on **Mustill & Boyd –The Law and Practice of Commercial Arbitration 2nd Edition pp 262-263** to buttress its point.
38. On its part, Vadag Establishment objected to the award of the sum of Kshs 43,772,559/= on the basis that this claim was tainted with illegality for having been in breach and in contravention of

- Sections 7 and 8 of the Exchange Control Act Cap 113 (laws of Kenya)(now repealed but then in force).
- 39.Its argument that the claim was illegal and contrary to public policy was based on the ground that Section 7 of the Exchange Control Act (now repealed) prohibited a transaction involving resident and non-resident without the approval of the Minister for Finance. It therefore contended that the Y.A. Shretta was not entitled to a relief in a court of equity on the ground of illegality of his own conduct.
- 40.It averred that the genesis, basis and undertakings in respect of that figure was improper, fraudulent, illegal, unenforceable and contrary to public policy on the ground that the resolutions Y.A. Shretta and the Board of Directors relied on in relation to the said amount were in breach of fiduciary duties and responsibilities owed to them by the said Y.A. Shretta which actions were contrary to Sections 58, 191 and 200 of the Companies Act Cap 486 (laws of Kenya).
- 41.It contended that the arbitrators disagreed on the issue of the legality and payment of the said sum of Kshs 43,772,559/= but that instead of making an independent decision, the umpire joined one of the arbitrators namely, Mr Sharad Rao, and awarded the said amount.
- 42.It relied on the case of **Ball vs Eden Project Limited and Eden Trust (2002) (Ch D) 1BCLC, 313** in which it was held that a director of a company had to act *bona fide* in the interests of and for the benefit of the company. In that case, the Applicant submitted, the House of Lords held that the claimant (Ball) was in breach of fiduciary duty by secretly and without the knowledge of the company, registering Eden Project and benefitting from the goodwill of the business carried. It also relied on several other cases in respect of this issue.
- 43.It was also its argument that the law was well settled that no cause of action could be founded upon an immoral or illegal act (*ex turpi causa nor oritur action*). It referred the court to several cases where the common thread was that a court will not entertain a claim that is against public policy. This was also an argument that was advanced by Leisurelodges Limited which also relied on several cases in this regard.
- 44.Vadag Establishment submitted that in the case of **Civil Appeal No 37 of 2003 Standard Chartered Bank of Kenya Limited vs Intercom Services Limited and 4 others** in which the Court of Appeal adopted the holding in the case of **North Western Salt Company vs Electrolytic Alkali Company Limited (1914) AC 461** in which the Privy Council stated thus:-

“...where in the Plaintiff’s case, it appears to the Court that the claim is contrary to public policy to entertain it, the court may and ought to refuse to do so...”

- 45.It did also raise legal issues regarding assignment and submitted that in view of the provisions of Section 130 of the Transfer of Property Act (now repealed), transfer of an actionable claim could only be effected on execution of an instrument in writing and could not be validly assigned orally or otherwise.
- 46.Further, it referred the court to several cases where it was held that an arbitral award could be set aside if it was contrary to public policy. In one of the cases **Christ for All Nations vs Apollo Insurance Company Limited (2002) 2 EA** the court held as follows:-

“an award can be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya it was shown either: (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten...”

- 47.It submitted that “it is not relevant whether the substantive law was applied correctly but rather whether or not the enforcement of the award in Kenya would lead to an outcome which taking into account all the relevant circumstances of the case would contravene Kenya’s conceptions of justice.” It was its argument that the court had to examine the Arbitral Award in the light of the caveat of Section 35 of the Arbitration Act.
- 48.On his part, Y.A. Shretta argued that Leisurelodges Limited was estopped from challenging the decision of the tribunal because it did not file its Defence in the arbitral proceedings. He stated that the Arbitral Tribunal considered the allegation that he brought a sum of Kshs 87,545,198/= in contravention of the Exchange Control Act. He added that M/S Bellhouse Mwangi Ernst & Young Auditors who were the auditors of Leisurelodges Limited prepared the books which it found had

- been properly kept. He contended that if indeed there had been anything illegal about the said sum of Kshs 87,545,198/=, then Leisurelodges Limited ought to have filed suit against the said auditors or called them as witnesses before the Arbitral Tribunal to testify.
49. He was emphatic the award in the sum of Kshs 43,772,599/= did not offend the public policy thus distinguishing the facts in the case of **Christ for all Nations vs Apollo Insurance Co Ltd** (Supra). He also relied on numerous other cases to argue his case point that the Arbitral Award did not offend public policy.

AWARD ON COSTS

50. The clause in contention was Clause 11 of the Terms of Reference referred to in Paragraph 2 (v) hereinabove. The same provided as follows:-

“The fees of arbitration shall in the first instance be shared equally by the Petitioner and the majority shareholder and thereafter shall be deemed to be costs of the cause.”

51. Vadag Establishment and Leisurelodges Limited submitted that an arbitral award could be set aside if the Arbitral Tribunal considered matters that were beyond its scope of reference or were not contemplated or falling within the terms of reference to it. They therefore objected to the award on costs and interest on the ground that the matters were not referred to arbitration and sought to have the same separated from other parts of the Arbitral Award.
52. On the other hand, Y.A. Shretta was emphatic that the Arbitral Tribunal had power to award him costs and to adopt the applicable scale therein. He averred that that is the reason that the Arbitral Tribunal awarded him half costs on other items other than the instruction fees in the sum of Kshs 43,772,559/=.

AWARD ON INTEREST

53. Y.A. Shretta prayed that this court award him interest on principal sum at the rate 20% per annum from 1st January 2000 until payment and/or in the alternative, the court do remit the Arbitral Award back to the Arbitral Tribunal for the determination of interest whether simple or compound.
54. It was his submission that the Arbitral Tribunal had power to award interest and cited numerous cases where the courts have held that an arbitral tribunal had power to award interest and others where the courts themselves awarded interest. He pointed out that the Arbitral Tribunal did not award interest as it was not certain of its jurisdiction on the said issue. It was his contention that failure by the Arbitral Tribunal to award him interest on the principal sum brought his claim within the ambit of Section 35 (2) (a)(iv) of the Arbitration Act.
55. He relied on Section 34 of the Arbitration Act which empowers the court, on application by any party, to suspend the proceedings to set aside the arbitral award for such time to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral tribunal.
56. Leisurelodges Limited argued that the issue of interest did not arise as the award of the sum of Kshs 43,772,559/= was based on an Arbitral Award that was bad on its face. It submitted that an award on interest was dependent on the validity of the said Award and that the award on interest as had been sought by Y.A. Shretta did not therefore come within the terms of Section 35 of the Arbitration Act.

ENFORCEMENT OF THE ARBITRAL AWARD

57. Leisurelodges Limited argued that Sections 17 and 36 of the Arbitration Act were inapplicable herein as the same dealt with jurisdiction, which ought to have been raised during the arbitral process, and recognition and enforcement of New York Convention awards upon the party seeking such recognition and enforcement of the award which required that documents set out in Section 36 (2) of the Arbitration Act be furnished.
58. Vadag Establishment contended that an arbitral award could not be enforced in Kenya if its

enforcement would violate public policy and which was the situation obtaining in this case.

COMPETENCE OF THE APPLICATIONS

59. Y.A. Shretta submitted that the application by Leisurelodges Limited which was premised on Order 46 of the Civil Procedure Rules, 2010 (which replaced Order 45 of the Civil Procedure Rules Cap 21 (laws of Kenya)) was incompetent as it was filed in **Winding Up Cause No 28 of 1996** which was non-existent having been struck out on 16th February 2001.
60. It was his argument that the arbitral proceedings herein were governed by the Arbitration Act, 1995 as had been held by Osiemo J on 17th July 2002 when he upheld a Preliminary Objection that had been raised by Leisurelodges Limited that no application could be filed in the said Winding Up Petition after the same was struck out.
61. He referred the court to the case **HCCC Misc Application No 1124 of 2002 Nova Chemicals Ltd vs Alcon International Limited** (unreported) where Ringera J held that the genesis of the arbitration therein was not pursuant to an order of the court under Order XLV (now Order 46 of the Civil Procedure Rules, 2010) but that the same was under Sections 5 and 6 of the Arbitration Act.
62. He submitted that the application by Leisurelodges Limited, which he termed as a busy body, could not find a relief under Section 35 of the Arbitration Act as an applying party had to bring himself within the provisions of the said Section. He contended that Leisurelodges Limited entered appearance but did not file its Defence in the arbitral proceedings and that as a result its application could not succeed because in law, it had admitted the sum of Kshs 43,772,559/=.
63. He averred that Leisurelodges Limited did not therefore have a right of appeal and its application not being an appeal, it did not fall under any of the grounds set out in Section 35 of the Arbitration Act. It was his argument that Article 159 (2)(d) of the Constitution of Kenya, 2010 which requires courts to administer justice without undue regard to technicalities could not assist it.
64. It was also his contention that it was only him and Leisurelodges Limited that had *locus standi* to make applications as the principle in company law was that a company had a separate entity. He thus prayed for the dismissal of the application by Vadag Establishments. He referred the court to the case of **Salomon vs Salomon [1897] AC 22** to emphasise his argument.

LEGAL ANALYSIS

65. A dispute can be referred to arbitration either by the court or by the parties. The court has come to the conclusion that the provisions of Order 46 of the Civil Procedure Rules, 2010 were those that were applicable in this case and not the Arbitration Act, 1995. This reasoning is based on two (2) grounds. Firstly, it is evident from the proceedings herein that the dispute between the parties was referred to arbitration by the court. Secondly, there was no arbitration agreement in the form of an arbitration clause or a separate agreement to refer the matter to arbitration.
66. The Arbitration Act, 1995 would not be applicable where there was no arbitration agreement in writing as was contemplated under Section 4(1) of the Arbitration Act, 1995. Such an agreement can never take any other form other than in writing.
67. Indeed, it is provided in Section 4 of the Arbitration Act, 1995 that:-

“2. An arbitration agreement shall be in writing.

3. An arbitration agreement is in writing if it is contained in-

a. a document signed by the parties;

b. an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

c. an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

4. The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

68. Accordingly, suspension of the proceedings herein to enable the Arbitral Tribunal take action so as to eliminate the grounds for setting aside under Section 34 of the Arbitration Act, 1995 as had been alluded to by Y.A. Shretta would not therefore be relevant in the proceedings herein as the said Act was not applicable herein.

69. However, in view of the fact that the applications herein have been brought both under the Civil Procedure Rules, 2010 and the Arbitration Act, 1995, the court will consider the requirements of setting aside an arbitral award under the two (2) procedures to establish whether indeed the parties would have succeeded in setting aside the Arbitral Award.

70. Under Order 46 Rule 1 (previously Order XLV) of the Civil Procedure Code, it is provided that:-

“ Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such a suit shall be referred to arbitration, they may agree, at any time before judgment is pronounced, apply to the court for an order of reference.”

71. Under Order 46 Rule 14 of the Civil Procedure Rules, 2010, it is stipulated that:-

“The court may modify or correct an award-

- a. **where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred;**
- b. **where the award is imperfect or contains an obvious error which can be amended without affecting such decision; or**
- c. **where the award contains a clerical mistake or an error arising from an accidental slip or omission.**

72. It is further stated in Order 46 Rule 15 of the Civil Procedure Rules, 2010 that:-

“1. The court may remit an award, or any other matter referred to arbitration, for reconsideration by the same arbitrator or umpire upon such terms that it deems fit-

- a. **where the award has left undetermined any of the matters referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;**
- b. **where the award is so indefinite as to be incapable of taking effect; or**
- c. **where an objection to the legality of the award is apparent on the face of it...”**

73. Further Order 46 of the Civil Procedure Rules, 2010 stipulates that:-

“1. The court may set aside an award on the following grounds only-

- a. **corruption or misconduct of the arbitrator or umpire; or**
- b. **that either party has fraudulently concealed any matter which he ought to have disclosed, or has wilfully misled or deceived the arbitrator.**

2. An application under this rule shall be served on the arbitrator or umpire...”

74. The court found it necessary to set out provisions of setting aside, modifying or correcting an arbitral award to address the application by Leisurelodges Limited. It is imperative that the court addresses the effect of the striking out of the **Winding Up Cause No 28 of 1996 In the matter of Leisurelodges Limited** with a view to establishing whether or not Leisurelodges Limited would have been entitled to the orders that it sought under the provisions of Order 46 of the Civil Procedure Rules, 2010.

75. The court did note the submissions by Y.A. Shretta that Osiemo J concluded that no proceedings could be brought in that cause as it had been struck out but finds no evidence of such holding. In view of the fact that the learned judge's ruling of 17th July 2002 mainly dealt with the question of *res judicata*, the court does not therefore find the same to have been very relevant in the proceedings herein.
76. While the court is of the view that the correct procedure would have been to enter judgment of the Arbitral Award pursuant to Order 46 Rule 18 of the Civil Procedure Rules, 2010 as the reference was pursuant to a court order, it cannot be ignored that the Petition in the said Winding Up Cause was struck out by the Court of Appeal on 16th February 2001.
77. The court therefore finds itself in agreement with the submissions by Y.A. Shretta that the application by Leisurelodges Limited was incompetent and that it could not be saved by Article 159 (2)(d) of the Constitution of Kenya, 2010 that mandates the court to proceed with matters without undue regard to procedural technicalities. Indeed, filing the application in a cause that had been struck out was an incurable defect as the Petition was non-existent having died on 16th February 2001. On this ground, the application by Leisurelodges Limited fails flat on its face.
78. Assuming the Petition had not been struck out, the court still finds that Leisurelodges Limited would not have succeeded in its application as it failed to demonstrate that any of the prerequisites set out in Order 46 Rules, 14, 15 and 16 of the Civil Procedure Rules, 2010 existed. The court noted that it instead gave a detailed chronology of events of how Y.A. Shretta breached his fiduciary trust when he took advantage of his position to enrich himself to its detriment.
79. It failed to defend itself in the arbitral proceedings which would have been the appropriate and proper forum to have tendered evidence that Y.A. Shretta had contravened the provisions of the Exchange Act (now repealed). Having failed to file its defence in the arbitral proceedings, it cannot therefore re-open the facts of this case as this court is not sitting on appeal. Its failure to participate in the arbitral proceedings was well captured in Paragraph 12.8.68 of the Arbitral Award as was correctly pointed out by Y.A. Shretta. In this respect the court is not persuaded that it has jurisdiction to re-open the facts of the dispute between the parties to find that there was violation of the provisions of the Companies Act Cap 486 as was contended by both Vadag Establishments and Leisurelodges Limited.
80. Consequently, the court therefore finds argument that the Arbitral Award ought to be set aside, remitted, modified or corrected on the ground that the same was contrary to public policy or that the umpire gave a decision when there was a majority decision as stipulated in Order 46 Rule 4(1) (b) of the Civil Procedure Rules, 2010 would still not have been adequate reasons for this court to have granted it the orders sought.
81. The fact that Daniel Ndonye rendered his decision in this matter as it alleged was also not a ground under which the Arbitral Award could be set aside as it was not a situation that obtained under the provisions of Order 46 Rules 14, 15 and 16 of the Civil Procedure Rules, 2010.
82. Therefore, bearing in mind that the Civil Procedure Rules, 2010 was the code that was applicable herein, the court also finds the applications by Vadag Establishment and Y.A. Shretta to have been incompetent for the reason that the same were filed pursuant to the Arbitration Act.
83. Turning to the question of costs, it does appear that the Arbitral Tribunal apportioned the costs but did not tax the same. It is clear that the terms of the reference did not limit the Arbitral Tribunal from awarding costs. Indeed Order 46 Rule 13 of the Civil Procedure Rules, 2010 which was applicable in the circumstances of this case provides as follows:-

“The court may make such order as it thinks fit in respect of the costs of an arbitration save to the extent to which an award of costs has been properly made by an arbitrator.”

84. However, assuming that the applications were proper, the court finds that the Arbitral Tribunal did not deal with a matter that was not contemplated by or did not fall within the terms of the reference to the arbitration or that it contained decisions on matters beyond the scope of the reference when it awarded costs to Y.A. Shretta.

85. As seen above, the term of reference that touched on costs provided as follows:-

“The fees of arbitration shall in the first instance be shared equally by the Petitioner and the majority shareholder and thereafter shall be deemed to be costs of the cause”

86. In the mind of this court, costs of the cause comprised costs of the award which were the fees of the Arbitral Tribunal and the costs of the reference which naturally followed the event. As costs ordinarily follow the event, the costs pursuant to the arbitral proceedings were to be paid by the unsuccessful party to the successful party, who in this case was Y.A Shretta.
87. It is therefore clear from the said terms of reference that the Arbitral Tribunal could award costs. In any event, Section 32B (1) of the Arbitration Act, 1995 which Act Vadag Establishment and Y.A. Shretta had contended to have been applicable herein provided that unless otherwise agreed by the parties, the expenses of the parties to an arbitration and the fees and expenses of the arbitral tribunal would be determined and apportioned by the arbitral tribunal in its award or as an additional award.
88. The court therefore has come to the conclusion that whether it was the Civil Procedure Rules, 2010 or the Arbitration Act, 1995 that was applicable in the matter herein, the Arbitral Tribunal had power and the jurisdiction to determine and apportion costs and it acted correctly when it made an award on costs. In the circumstances foregoing, the Arbitral Award could not and cannot be set aside on the ground that the Arbitral Tribunal exceeded its mandate of the terms of the reference as was alleged by Vadag Establishment and Leisurelodges Limited but instead concurs with the submissions of Y.A. Shretta in this regard. For the same reason, the court cannot make any other finding regarding the award on for one half of the sum of USD 252,200 costs on the instruction fees on the sum of Kshs 43,772,559/= as had been sought by Leisurelodges Limited.
89. Having said the above, it does appear to the court that the Arbitral Award herein was a Final Award save as to determination of costs. There was no determination of the actual costs payable and it did appear that the costs had not yet been taxed or agreed upon. Indeed, the Arbitral Tribunal had directed that it would tax the costs if the same were not agreed by the parties. Therefore Y.A. Shretta had to show the basis of how he arrived at the sum of Kshs 14,108,158/= being his costs because his actual costs had to be determined either by agreement between the parties, the Arbitral Tribunal or the court.
90. While Y.A. Shretta may have claimed interest, the court holds that the Arbitral Tribunal made a correct observation that it was not certain that it had the jurisdiction to award interest as had been claimed by Y.A. Shretta for the reason that this was not a term of the reference that it was given. It is clear that the terms of the reference did not mandate the Arbitral Tribunal to award interest and if it had done so, it would have essentially determined a matter that was not contemplated in the terms of the reference or gone beyond the terms of the reference if it had awarded the said interest.
91. The court has no power to re-open the facts of the case on this issue or make an order for the same as had been prayed for by Y.A. Shretta as the Arbitral Award was final and binding upon the parties. The only remedy to Y.A. Shretta would be accrual of interest at court rates once the Arbitral Award is recorded as a judgment of the court. The court agrees with the submissions by both Vadag Establishment and Leisurelodges Limited that it cannot make an award on interest and/or remit the Arbitral Award to the Arbitral Tribunal to award interest to Y.A. Shretta.
92. Turning to the claim for the sum of Kshs 43,772,559/=: the court has come to the conclusion that the Arbitral Tribunal acted within its mandate when it found in favour of Y.A. Shretta. The issue of public policy would not be applicable in this matter as the auditors of Leisurelodges Limited gave its financial affairs a clean bill of health when it found that the books of accounts had been properly held.
93. The court agrees with the submissions of Y.A. Shretta that the source of the sum of 87,545,198/= was resolved as the said auditors took note of the said sum that was contended he had obtained in contravention with the provisions of the Companies Act and the Exchange Act (now repealed) and the issue cannot be re-opened as this court is not sitting on appeal. As was rightly pointed out by Y.A. Shretta, the court became *functus officio* as far as the said sum of Kshs 43,772,559/= once the same was determined by the Arbitral Tribunal. The court therefore finds that the case of **Christ for All Nations vs Apollo Insurance Company Limited** (Supra) to argue that the Arbitral Award herein was against public policy was thus not applicable to the circumstances of the case herein.
94. For the reason that the said Arbitral Award was final and binding and that it cannot open facts of the case herein, the court does not find the submissions by Vadag Establishment regarding the provisions of Section 130 of the Transfer of Property Act (now repealed) that the transfer of an

- actionable claim could only be effected on execution of an instrument in writing and could not be validly assigned orally or otherwise to be a ground to set aside the Arbitral Award herein.
95. A careful perusal of the Arbitral Award reveals that the Arbitral Tribunal considered and determined the value and fair market value of Y.A. Shretta's shares in Leisurelodges Limited, it investigated allegations of fraud raised by Y.A. Shretta in the Petition for winding up of Leisurelodges Limited, it investigated and enquired into complaints by Vadag Establishments and/or against the Interim Liquidators in so far as the said allegations affected the net asset value of Leisurelodges Limited and it determined that Y.A. Shretta was entitled to the sum of 43,772,599/= as it had been mandated to do as per the terms of reference that had been drawn by the court.
96. It is therefore the holding of this court that the Arbitral Award cannot be set aside on the grounds that had been relied upon by Vadag Establishment and Y.A. Shretta.
97. The court will now address its mind to the prayer for recognition and enforcement of the Arbitral Award that had been sought by Y.A. Shretta. Evidently, the said prayer was brought under the provisions of Section 36 of the Arbitration Act, 1995. Having found that what was applicable herein were the provisions of Civil Procedure Rules and not the Arbitration Act, 1995, the court finds that the said prayer to have been misplaced. On this issue, the court agrees with the submissions by Leisurelodges Limited and rejects those of Y.A. Shretta.
98. The court also agrees with the preliminary objection by Vadag Establishment that enforcement of the Arbitral Award could not be effected until the same was brought in accordance with Order 46 of the Civil Procedure Rules, 2010. In particular, Order 46 Rule 18 (1) states as follows:-

“1. The court shall on request by any party with due notice to other parties enter judgment according to the award-

- a. **when no application has been made within the time allowed by rule 17;**
 - b. **when an application under rules 13, 14 and 16 has been heard and determined and no application has been made within the time allowed by rule 17;**
 - c. **when an application under rules 14, 15 and 16 has been heard and refused and no leave to appeal against such refusal has been granted within fourteen days of that refusal...”**
99. Notably, the applications referred to under Order 46 Rule 18(1)(a) and (b) of the Civil Procedure Rules, 2010 are those of in respect of costs, modifying, correcting, remitting for consideration to the arbitral tribunal or setting aside an arbitral award.
100. The court has perused the proceedings and has found Y.A. Shretta not to have complied with the provisions of the Order 46 Rule 18 of the Civil Procedure Rules, 2010. For reasons given hereinabove, recognition and enforcement as provided under the Arbitration Act would not be applicable herein. Order 46 Rule 18 of the Civil Procedure Rules, 2010 is couched in mandatory terms. Having failed to comply with the said provisions, the court finds that the application by Y.A. Shretta would not succeed.
101. Having carefully considered all the pleadings, submissions and case law in support of the parties' respective cases, majority of which the court did not find to have been helpful to the parties in any way, it is the conclusion of this court that none of the parties were able to persuade it to allow their respective applications.
102. For the reasons foregoing, the court hereby declines to set aside, remit, modify, correct, recognise or enforce the Arbitral Award made on 29th April 2011 as had been prayed for by Vadag Establishments, Leisurelodges Limited and Y.A. Shretta in their respective applications.
103. Finally, on the submissions by Y.A. Shretta that Vadag Establishment had no *locus standi* to bring its application herein, the court finds that it was within the right of Vadag Establishment to have filed its application for the reason that it was a party in the arbitral proceedings. It would be a travesty of justice and completely against the rules of natural justice for it to have been a party to the arbitral proceedings and then be locked out from seeking redress from this court when it felt it was aggrieved by the Arbitral Award. In this regard, the court finds his submissions that the case of **Salomon vs Salomon** (Supra) proved that Vadag Establishments was disentitled from taking any further action after the Arbitral Award was made, not to have been persuasive.

DISPOSITION

104. Accordingly, the upshot of this court's ruling is that the Amended Originating Summons by Yashvin Shretta amended and filed on 24th May 2011 filed in HC Misc Civil Suit No 457 of 2011, the Chamber Summons application by Leisurelodges was dated 17th May 2011 and filed on 18th May 2011 in WC No 28 of 1996 and the Chamber Summons application by Vadag Establishment was dated and filed on 24th June 2011 filed in HC Misc Civil Case No 559 of 2011 are not merited and the same are hereby dismissed.

105. In view of the fact that the court upheld submissions by the parties in certain instances shown hereinabove, it is the order of this court that each party shall bear its own costs.

106. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of May 2014

J. KAMAU

JUDGE