



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 506 OF 2012**

**CENTURION ENGINEERS & BUILDERS LTD. .... PLAINTIFF**

**VERSUS**

**KENYA BUREAU OF STANDARDS ..... DEFENDANT**

**R U L I N G**

1. Before Court is the Notice of Motion dated 20th January 2014 brought by the Applicant herein seeking to set-aside and/or vary the Award of the arbitrator, **Onesimus Mwangi Gichuri** (hereinafter “the arbitrator”) dated 28th November, 2013. The Application is brought under the provisions of **section 35** of the *Arbitration Act* and all other enabling provisions of the law. The Application was brought upon the following grounds:

- “a) THAT the learned Arbitrator never formally addressed in his mind the issue raised by the respondent challenging the validity of the contract variations which operated to unduly inflate the value of the contract.**
- b) THAT the learned Arbitrator did not deal with matters contemplated by the terms of reference to arbitration thus occasioning grave injustice to the applicants.**
- c) THAT the learned Arbitrator abdicated his duties under the reference letter, by declining to assess the value of work done and instead choosing to abide by the determinations made by the Ministry of Public Works (MOPW) regarding the same.**
- d) THAT the Arbitrator misconstrued the provisions of the underlying contract.**
- e) THAT the Arbitrator committed serious errors of the law as well as facts.**
- f) THAT the award is unrealistic, outrageous and has been improperly procured since the applicant was never fully heard before the award was made.**
- g) THAT the Applicant was unable to present its case.**
- h) THAT the Arbitrator never accorded the applicant an opportunity to be heard and instead proceeded to issue an award without a hearing.**
- i) THAT the award was released to the Respondents behind the back of the applicant.**

**j) THAT the Arbitrator went beyond the scope of the reference.**

**k) THAT there is sufficient cause to set aside the award.**

**l) THAT this application is made within reasonable time from the date of the award”.**

2. The Application was supported by the Affidavit of **Charles Gachahi** the Acting Managing Director of the Applicant sworn on 20th January 2014. The deponent outlined the contract as between the parties for building works dated 27th April 2009 in the total value of Shs. 79,910,440/-. He detailed the obligations of both the Respondent (contractor) and the project architect. The deponent then went into considerable detail concerning the progress of the contract and in the extension thereof by way of extra work. In my view, all these matters either were not or should have been brought to the attention of the arbitrator. However, the deponent maintained that the Applicant was never accorded an opportunity to be heard concerning these various matters and was shocked when served with a copy of the Award of delivered on 28th November 2013. He noted that the Respondent had been awarded the sum of Shs. 274,061,766.65 under the Award. He maintained that the arbitrator had never formally addressed his mind to the issues raised by the Applicant challenging the validity of the contract variations which operated to unduly inflate the overall value of the contract. He further maintained that the arbitrator had abdicated his duties by declining to assess the value of work done and, instead, to abide by the determination made by the Ministry of Public Works regarding the same. Mr. Gachahi went on to say that he had been advised by the advocates on record for the Applicant that the arbitrator had not dealt with matters contemplated by the terms of reference to arbitration. He had been further advised that the award to the Respondent as per the above amount was outrageous, unrealistic and unsubstantiated. He concluded his Supporting Affidavit by stating that he had been informed again by the Applicant’s advocates on record that the Award should not have been released to the Respondent behind the back of the Applicant. He maintained that the Award was unsatisfactory and also contemptible, unfair and clouded with illegalities and, accordingly, should be set aside by this Court.
3. The Respondent’s Managing Director **Eng. Samay Singh** swore the Replying Affidavit on 18th February 2014. He commenced his said Affidavit by accusing the Applicant of deliberately withholding material facts from this Court and attempting to mislead the Court through false averments. In his view, the arbitrator properly addressed his mind and dealt with the issues before him as can be discerned from the Court Order which referred the matter to arbitration as well as the pleadings in the arbitration. That Order had been granted on 8th October 2012 and issued out of this Court 12th August 2013. The deponent had been advised by the advocates on record for the Respondent that the arbitrator did not go beyond the scope of the reference neither was there any reference letter requiring him to assess the value of the work done to the exclusion of the findings of the Ministry of Public Works Report which had been submitted as per a Supplementary Agreement between the parties. He maintained that the deponent of the Supporting Affidavit had committed an act of perjury by detailing that the Claimant was unrepresented at all the hearing dates before the arbitrator. The Applicant had not disclosed that the arbitration was a technical one and the procedure adopted for the hearing thereof included interrogatories is, enquiries, discovery, documentation and final submissions. In Mr. Singh’s view, the Applicant was given more than sufficient chance and participated throughout the hearing up to the closure of its case by its advocates on record. It was not true that the Award was released to the Respondent behind the back of the Applicant. The arbitrator had written to both parties in advance and copied his letter to both sets of advocates informing them that the Award was ready for collection. The Award had been collected by the Respondent’s advocates upon payment of the arbitrator’s fees. In his opinion, there had been neither errors of law committed in the arbitration by the arbitrator nor any sufficient cause to warrant the setting aside of the Award.
4. Thereafter, Mr. Singh went into great detail as to the appointment of the arbitrator through the Court at the instance of the Applicant vide its Chamber Summons dated 7th September 2012. He noted that despite the reference to arbitration, the Applicant took no steps to progress the same leaving it to the Respondent to move forward the process. As the parties had been unable to agree upon the name of a suitable arbitrator, the Chairman for the time being of the Architectural

Association of Kenya had appointed the arbitrator under cover of a letter dated 24<sup>th</sup> June 2013. The deponent then traced the progress of the arbitral proceedings as regards the pleadings, payments of deposits et cetera. He had been advised by his advocates on record that there were no framed issues for determination in the arbitral proceedings either by this Court or by the parties themselves prior to the arbitration. The pleadings filed before the arbitrator, together with the documents relied upon by both parties, formed the basis upon which the issues for determination were settled. He noted that there was no counterclaim filed by the Applicant in the arbitral proceedings. There were no agreed or separate set of issues filed. He had been advised that the arbitrator had to determine the issues and that he correctly dealt with the matters in contention. He had not exceeded his mandate or determined matters outside the contract and the claim based on the pleadings and the documents filed before him.

5. In order to amplify the point as regards the hearing of the arbitral proceedings, the Respondent annexed to the Replying Affidavit a copy of what it termed the minutes of the record of proceedings. Mr. Singh noted that the Applicant had chosen to appear through their advocates only. They appeared at all times, albeit late and at no time did the arbitrator conduct the proceedings *ex-parte*. The deponent maintained that the arbitrator had been more than fair in entertaining the Applicant at all the hearings despite its failure to pay its part of the deposit of fees and its failure to return the engagement (of the arbitrator) mandate. During the course of the arbitral proceedings, the Applicant had requested of the arbitrator for an extension of time to file its Memorandum of Reply to the Statement of Claim as well as an extension to reply to the final submissions of the Respondent. Mr. Singh believed that the Applicant had full knowledge that the arbitrator had retired to write the final Award herein which was to be delivered on notice. Mr. Singh then commented extensively on the findings of the arbitrator in the Award finally commenting that it was not true that the same had been released behind the back of the Applicant. The arbitrator had informed the parties on the last hearing date before him, being 13th November 2013, that his Award would be delivered on notice. The arbitrator had notified the parties and their respective advocates that the Award was ready for collection upon payment of the balance of his fees being Shs. 6,368,870.85, by his letter dated 28th November 2013.
6. The Applicant's submissions identified two issues namely, whether the arbitrator went outside the terms of reference of the arbitration and whether there was a hearing. As regards the first issue, the Applicant detailed that the substance of the dispute between it and the Respondent was as follows:

**“1. Whether the contract between KEBS and Centurion was duly fulfilled (whether Centurion duly complied with their obligations under the contract)**

**2. Whether the inflation on the Contract value from Kshs 79,000,000 to over 400 million was proper and lawful**

**3. Whether the variations authorised by the Architects were lawful**

**4. Whether the amounts claimed by the contractor were the contract amounts due to them**

**5. Whether the scope of work indicated in the certificates issued by the architect confirmed strictly with the actual works done**

**6. Whether there was a collusion between the contractor and the architect.”**

It was the Claimant's position that rather than finding on the above 6 issues, the arbitrator had confined himself to deciding on only one issue namely whether the certificates issued by the architect and submitted to the Claimant were paid for. In the Claimant's view the arbitrator went outside the scope of the reference. As regards the point as to whether there was a hearing, the Claimant submitted that a fair hearing was not only a mandatory requirement for any judicial process but it was also a constitutional right. It referred to Article 50 of the Constitution in that every person had a right to be heard.

7. To this end, the Claimant referred the Court to the Court of Appeal's judgement in the case of

**M’kiara v M’ikiandi (1984) KLR 170.** The Claimant also referred the court to the case of **Senator Johnstone Muthama v Tanathi Order Services Board & 2 Ors (2014) eKLR** in which my learned brother **Odunga J.** had opined quoting from the volume entitled **Alternative Dispute Resolution in Northern Carolina (Jacqueline R. Clare)**:

**“Arbitration hearings are scheduled by the court and are held in a courtroom (if available) or in any other public rooms suitable for conducting judicial proceedings. The hearings are open to the public. The witnesses can be called, but their testimony is usually kept brief. The arbitrator is empowered authorised to administer oaths and affirmations in arbitration hearings.. Hearings are to be conducted with decorum, but are more informal than a trial in the sense that the Rules of evidence apply only as a guideline.”**

My own view is that the above may be the procedure for arbitration hearings in Northern Carolina but it is certainly not applicable in arbitration practice in Kenya. Although arbitration hearings should be conducted in suitable rooms therefore, they certainly are not open to the public, are confidential to the parties and the *Evidence Act (Cap 80, Laws of Kenya)* does not apply.

8. The Respondent’s submissions set out the background in relation to the dispute and noted that the Applicant’s Notice of Motion before Court was premised on **section 35** of the *Arbitration Act*. The Respondent noted that three documents had been annexed to the Affidavit in support of the Application but that it had supplied further documentation in relation to the proceedings before the arbitrator including the documents filed therein being pleadings and written submissions. As far as the Respondent was concerned, there was one single issue for determination and evaluation by this Court as regards the Application before it. Such was whether or not the threshold of **section 35** of the *Arbitration Act* had been met sufficient to set-aside the Award of the arbitrator. The Respondent set out the position adopted by the Applicant as regards only one issue being decided by the arbitrator rather than the 6 as set out above. The Respondent pointed out that there was no counterclaim by the Applicant in the arbitral proceedings. There was no third-party brought into those proceedings by either party. The Respondent emphasised the following points:

- **There were no framed issues for determination by this Honourable Court and/or parties prior to arbitration that were forwarded to the Arbitrator for determination either by way of a letter as alleged or at all.**
- **The Complaint filed herein prior to the reference contained the Plaintiff’s grievances and supporting documents did not proceed to trial as the Defendant applied for and the Court allowed stay of suit pending the reference to arbitration.**
- **The order by this Court for reference did not set out the issues for determination. We have exhibited the same and are apply as “ESS-1”.**
- **There were no framed issues for determination before the arbitrator as the Plaintiff’s attempt to have agreed issues filed did not succeed as the Defendant failed to respond to the proposed issues served upon them as per exhibit “ESS-10”.**

9. The Respondent maintained that the arbitrator had to determine the issues as between the parties from the pleadings filed before him and the supporting documents. In the Respondent’s view, the issue before the arbitrator was as to how much money was outstanding as unpaid contract sums and the interest thereon plus what order was to be made on costs. At page 4 of the Award the arbitrator had listed at the issues as follows:

**“01 Non-payment of interim certificate Clause 34.5**

**02 Non-payment of interest on delayed payments Clause**

### 03 Contractor's loss and prolongation costs”

It was the Respondent's submission that the arbitrator had properly addressed his mind with regard to those issues in his Award. It detailed its responses to the various matters addressed by the arbitrator before referring this Court to the law applicable more particular **section 32A** of the Arbitration Act which reads:

**“Except as otherwise agreed by the parties, the arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”**

Thereupon the Respondent set out the provisions of **section 35** of the *Arbitration Act* as follows:

**“(2) An Arbitral award may be set aside by the High Court only if:-**

- a. **The Party making the application furnishes proof:**
  - i. **That the party to the arbitration agreement was under some incapacity; or**
  - ii. **The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**
  - iii. **The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**
  - iv. **The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decision on matters not referred to arbitration may be set aside; or**
  - v. **The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or**
  - vi. **The making of the award was induced or affected by fraud, bribery, undue influence or corruption.**
- b. **The High Court finds that:**
  - i. **The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**
  - ii. **The award is in conflict with the public policy of Kenya.**

The Respondent concluded its submissions by referring the Court to its own decision in **Intoil Ltd & anor. v Total Kenya Ltd & 3 Ors (2013) eKLR.**

10. It is correct that the suit herein came before this Court on 8th October 2012, when it was ordered that the same be stayed pending determination through arbitration as provided for in the agreement entered into between the parties to the suit. The said agreement was dated 27th April 2009 and under clause 45.0 thereof the settlement of disputes was provided for. Clause 45.1 detailed that in the event that parties could not agree upon an arbitrator, he would be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya. This is what transpired and Mr. Gichuri was appointed by the said Chairman by letter dated 24th June 2013 and the appointment

accepted by the arbitrator 27th June 2013. I have noted from the Respondent's bundle of documents annexed to the Replying Affidavit marked as "ESS-2" that the Respondent herein submitted to the arbitrator its Statement of Claim dated 15th July 2013 going into a total of 210 pages. The Applicant's Reply ("ESS-3") was submitted to the arbitrator and dated 2nd August 2013 to which no documentation was attached. The Respondent's Answer to the Applicant's reply was dated 13th August 2013 ("ESS-4"). The Respondent provided further documentation annexed to its said Answer. At the request of the arbitrator made earlier on 9th of July 2013, both parties provided evidence of the authority to act on the Respondent's part by letter dated 10th July 2013 and on the Applicant's part by letter dated 12th August 2013. However, it is obvious from the documentation before this Court that the Applicant never signed the fee agreement/ arbitrator's engagement mandate as between the arbitrator and the disputing parties and, further, that it never paid a deposit towards the arbitrator's fees as requested, despite a reminder from the arbitrator to the Applicant by letter dated 1st November 2013. I have also noted that by letter dated 1st October 2013, the advocates on record for the Respondent forwarded to the advocates for the Applicant a draft statement of issues as well as a draft consent order for filing before the arbitrator. It appears that the Applicant's advocates never responded to that letter or the draft statement of issues.

11. From the Applicant's bundle annexed to the Affidavit in support of its Application before this Court, I note that the arbitrator held a Preliminary Meeting as between the parties on 9th July 2013 at which the Respondent's was represented by advocates Mathuva and Nyandieka as well as the deponent to the Replying Affidavit herein and the Applicant was represented by Erica Lumumbah, advocate. The minutes of the meeting opened by stating that although the Respondent's representatives had turned up on time at 9 AM, the Applicant's representative did not turn up until 10:15 AM. The Court noted nothing unusual as regards the directions of the arbitrator given at the said Preliminary Meeting. The next meeting was held on 8th August 2013 with the same parties being present. It was noted that the Applicant's representative had again come late to the meeting. Again the arbitrator dealt with preliminary matters including the programme for the completion of the submission of the parties' pleadings as well as his engagement mandate and his directions as to the discovery of documents. The next meeting was held on 19th August 2013 with the same parties representing the Respondent and Mr Arwa from Rachier & Amollo, Advocates representing the Applicant. The arbitrator noted the late arrival of the representative for the Applicant. The arbitrator also noted that the Respondent herein had filed a Notice of Motion before the arbitral tribunal seeking judgement on admission for a liquidated claim of Shs. 371,066,054.59 or alternatively that summary judgement be entered for it in the same amount. The arbitrator directed that the Applicant would file its written reply thereto by 28th August 2013 and that the Respondent would have a chance to respond to the same by 11th September 2013. The next meeting took place on 13th September 2013 with Mr Tom Omao, advocates representing the Respondent and Mr. Arwa representing the Applicant. It was noted that the Applicant had replied to the said Notice of Motion on 4th September 2013. As the Respondent's representation before the arbitral tribunal was deemed inadequate, a fresh date for the consideration of the Notice of Motion was set for the 20th September 2013. On that day it appears from the minutes taken by the arbitrator, that the Respondent was back to full strength as regards its representation and that Mr. Julius Juma appeared for the Applicant. The tribunal was informed that some agreement as regards the said Notice of Motion had been progressed as between the parties but was in hand written form. The arbitral tribunal directed that it could not accept such document and ordered that a typed and signed document be filed as soon as it was ready. The arbitrator also noted that the vital contract conclusion document referred to as the Architect's Final Account Certificate was not included in the documents annexed to the parties' pleadings. The arbitrator undertook to write to the architect to avail the tribunal of the same.
12. The next meeting was held on 3rd October 2013 with Messrs. Nyandieka & Muthuva (advocates) with Mr. Samay in attendance on behalf of the Respondent and Mr. Arwa representing the Applicant. The arbitrator noted that the architect had availed the tribunal of his Final Certificate which detailed the revised contract sum, previous instalments and the balance instalment of Shs. 37,758,907.32. Such was supported by an evaluation by the Ministry of Public Works dated 18th February 2013. As regards the finality of the said Final Certificate, the arbitrator directed that the parties would forward to him copies of interim payment certificates Nos. 1 to 9 and would detail any issue as to the claim of interest on delayed payments as per the conditions of contract clauses

- 31, 32 and 34. He also directed that the Respondent herein would finalise its claim by 10th October 2013 and the Applicant would reply thereto within 4 days. The arbitrator took the precaution of reminding the parties that it was a technical arbitration and they should be represented adequately. He also noted that the Applicant and the Respondent were equal in the contract. At the next meeting on 17th October 2013, the arbitrator noted that the Respondent had finalised its claim but that the Applicant had not yet responded thereto. He also detailed that the Applicant had failed to sign and return to him the arbitration mandate. He reminded parties as to the provisions of clause 34 of the Contract between them and directed that he had to be supplied with the buildup of all interim certificates as forwarded by the Respondent to the project Quantity Surveyor and as evaluated by that gentleman to the Project Architect.
13. There was a further meeting held on 7th November 2013 which opened again with the arbitrator noting with concern the inconsistency of the Applicant's representation before him as well as the timekeeping. The Respondent and the arbitrator had been kept waiting for representation from the Applicant for 1 ½ hours. The arbitrator noted that the Applicant had neither returned the arbitration mandate nor had made its fees deposit. It had also failed to comply to respond to the Respondent's final claim within four days as directed. The arbitrator further took note that the Respondent had withdrawn its Notice of Motion but left the issue of interest on delayed payments and any other order as the arbitral tribunal would deem just in the circumstances. After some discussion, the arbitrator noted that the Applicant's Reply to the Respondent's final claim would be filed by 12th November 2013 but that the Reply would be limited to the Applicant's position as regards to unpaid certificates in the amount of Shs. 114,590,383.32, interest thereon in the amount of Shs. 147,441,793.50 and the Respondent's claimed losses of Shs. 106,971,005.52. At the end of the meeting, the arbitrator noted that all forms of excuses by either party to delay or abort the tribunal proceedings would not be entertained.
14. The ninth and final meeting was held at the arbitrator's office boardroom (as had been the others) on 13th November 2013 with the usual representation from the Respondent and Mr. Julius Juma representing the Applicant. As regards action on the minutes of the previous meeting, the arbitrator noted that the Applicant had not acted as regards its Reply to the Respondent's final claim and its representative had confirmed that it had closed its case. Further, the Applicant had neither returned the Arbitrator's Engagement Mandate nor had paid its fee deposit. Instead, the Respondent had paid the Applicant's deposit amount of Shs. 500,000/- on 8th November 2013 as directed. The arbitrator noted that as both parties had closed their case there would be no further communication with the arbitrator until judgement was delivered. Such would be delivered on notice.
15. As I understand the submissions of the Applicant herein, it maintains that the arbitrator failed, in his Award, to take into account all matters that were referred to him for consideration and determination, confining himself to the issues in relation to unpaid certificates, interest thereon and losses to the Respondent. Indeed upon perusal of the Final Award, the arbitrator summarised that, as regards the balance of the unpaid certified amounts (certificates), he found an amount due by the Applicant to the Respondent of Shs. 114,590,383.30 together with interest on certified amounts but unpaid sums up to 13th November 2013 at Shs. 159,471,383.35. As regards the losses claimed by the Respondent, the arbitrator found that there were none. In my view, the Respondent is correct in its submissions that there were no specific issues put before the arbitrator and that he would need to determine the same from the Pleadings before him. As observed above, the Respondent had put to the Applicant's advocates, under cover of its letter dated 1st October 2013, a draft statement of agreed issues as well as a draft Consent Order with reference to its Notice of Motion for judgement on admission, alternatively summary judgement, dated 16th August 2013 before the arbitrator. I find that the Applicant failed to reply thereto. As a result, the pertinent document before the arbitrator as regards the issues before him, is that of the Applicant's dated 13th August 2013 being its Memorandum of Reply to the Respondent's Statement of Claim. I have closely perused that document which at paragraph 4 sets out the agreements entered into as between the parties, their individual obligations and the history of the project. At sub paragraphs q. and r. thereof, the Applicant maintained that the project architect (its agent) had issued instructions that greatly inflated the prices of the project as provided for in the contract between the parties. It went on to say that it was the Applicant's case that there was collusion as between the architect and the Respondent as regards such irregular inflation.

16. Further and with regard to the issues as between the parties, I consider it necessary to set out the contents of paragraphs 5 and 6 of the Applicant's said Memorandum of Reply dated 13th August 2013 as follows:

**“5. The respondent denies the contents of paragraph 7 of the claim and puts the claimant to strict proof thereof and further states THAT:-**

- a. **Clause 22.1 of the agreement regiments the contractor to comply with the architect's instructions, where the latter is empowered to issue the said instructions.**
- b. **Clause 22.4 of the Agreement provides that all the instructions issued by the architect were to be in writing and any instructions issued orally were to be confirmed in writing within seven days.**
- c. **Clause 22.3 of the Agreement requires the contractor to specifically request the architect to specify all instructions in writing, which clause was violated.**
- d. **It is clear from paragraph 7 of the statement of Claim that the claimant performed in accordance with the architect's site instructions, which acts were considered null and void due to the violation of the three abovementioned clauses.**
- e. **Clause 4.1 of the agreement provides that the contractor could carry out, superintend upon or execute works in accordance with the contract, which clause was violated. Accordingly, the respondent could not incur any obligations to make payments pursuant to such instructions as they were null and void.**
- f. **The architect could only lawfully issue instructions with regards to matters in respect of which he was expressly empowered by the contract. Most of the instructions issued by the architect were outside the contract, the same was illegal hence null and void.**
- g. **Clause 5.4 of the Agreement required the architect to exercise his discretion impartially in giving his decision, opinion, consent or approval or any action which may affect the rights of the employer or the contractor, which clause was violated.**
- h. **Further such the architect could only exercise such discretionary authority within the terms of the contract, which clause the architect violated.**
- i. **The respondent states that it could not be bound to make any payments as the project architect's instructions were illegal hence null and void, and that the claimant failed to perform his duty as per the agreement.**
- j. **The claimant's assertions that they completed within time is utterly false because the project was not complete. Most of the work had not been done yet the project architect proceeded and issued certificate for works. The said certificates could not therefore act as evidence of completion, and the respondent was not bound to make any payments.**
- k. **The claimant and the project architect breached the provisions of the contract in an attempt to fleece the respondent.**

**6. The respondent denies the contents of paragraph 8 of the claim and puts the claimant to strict proof thereof, and further states THAT:-**

- a. **As explained in paragraph 4 and 5, the contractor (claimant) did not carry out its duties in accordance with the contract but did so in accordance with the project architect's instructions, which by themselves were illegal, therefore null and void.**

- b. **Clause 30.2 of the Agreement empowers the architect to issue instructions requiring a variation to the contract and to sanction any variation made by the contractor. The clause goes on to state that no such instructions shall substantially change the scope or object of the contract without the consent of the employer, which clause was violated by the project architect.**
- c. **The claimant's assertions that they had performed the extra works to final completion are utterly false because the project was not complete. Most of the work had not been done yet the project architect proceeded and issued certificate for works. The said certificates could not therefore act as evidence of completion, and the respondent was not bound to make any payments".**

17. There is no doubt that we are talking about very large sums in relation to the contracts as between the Applicant and the Respondent herein. This Court is very concerned at the indolence of the Applicant particularly as regards the pursuit of its case as before the arbitrator. He noted the lateness of the Applicant's representatives at almost every meeting of the 9 that he held in respect of the arbitration. It was also interesting to note that the Applicant was only represented by advocates at the arbitral proceedings, no official from the Applicant's establishment appears to have attended even one of the meetings. As a result, this Court is faced with conflicting feelings as regards the Application before it. On the one hand, equity does not favour the indolent. On the other hand, *Article 50 (1) of the Constitution* is very clear in that it provides:

**"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**

The arbitration before Mr. Gichuri was quite clearly an independent and impartial tribunal. As regards the Applicant's second point that there were no hearings before the tribunal, I find that conclusion to be totally against the evidence before this Court. The arbitrator held no less than 9 meetings and, in my view gave, the Applicant, as well as the Respondent, every opportunity to air their cases before him. In my opinion, the Applicant failed to take that opportunity and now comes whingeing before this Court when the arbitrator's said Award goes against it. Fortunately for the Applicant, I think that it has provided proof before this Court in respect of the provisions of **section 35 (2) (a) (iv)** of the *Arbitration Act*, that the arbitral Award was confined to only one particular area of the dispute before the arbitral tribunal as per the 3 issues that I have outlined above. I find that the arbitrator did not take on board, consider or determine the contents and issues raised in the said paragraphs 5 and 6 of the Applicant's Memorandum of Reply dated 13th August 2013. Further, I do not think that the decisions made by the arbitrator can be separated from those upon which he made no determination. As a result, I set aside the Award of the arbitrator dated 28th November 2013. I direct that this matter be referred back to the arbitrator in order for him to take into account the contents of the aforesaid paragraphs 5 and 6 and to hear evidence in relation to the allegations made therein. In all the circumstances, I do not consider that the Applicant, as a result of its indolence as regards the arbitral proceedings, is entitled to the costs of its Application before Court. Accordingly, I make no order as to costs of the same.

**DATED and delivered at Nairobi this 26<sup>th</sup> day of June, 2014.**

**J. B. HAVELOCK**

**JUDGE**