REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

CIVIL SUIT MISC NO 714 OF 2012

SAMURA ENGINEERING LIMITED...PLAINTIFF

Versus

DON-WOODS COMPANY LIMITED.....................................DEFENDANT

RULING

Arbitral award; stay of execution and setting aside judgment

[1] The Defendant is the Applicant. It is asking the court, by a Motion dated 8th March, 2013, to stay execution of the Decree dated 5th February, 2013, and to bar M/S Kindest Auctioneers, their servants and agents from visiting or entering the Applicant's premises for purposes of execution. The application is also seeking; for the judgment herein together with all consequential orders to be set aside; and costs. The application is supported by the affidavit of DONALD K. MWAURA, the grounds on the face of the application and the submissions filed here. I will analyse the submissions of the parties in ex tenso for their worth.

The submissions by the Applicant

[2] The case by the Applicant can be summarized as follows. That Clause 35 of sub-contract (herein Agreement) entered into between the Respondent and the Applicant on 11th November, 2002, for the installation of a PAXB machine and related equipment to the then proposed Kenya Pipeline Company headquarters at Nairobi Terminal for a contract amount of Kshs.14,235,815/-, any dispute or difference whether arising during the execution or after the completion or abandonment of the subcontract works or after the determination of the employment of the sub contact under the subcontract, shall be referred to arbitration, whose arbitrator would be appointed upon the request by either party by the Chairman for the time being of the Architectural Association of Kenya.

[3] After a dispute arose, the Respondent misled the Chairman of the Kenya Institute of Arbitrators into appointing one Haron G. Nyakundi as arbitrator on 24th September, 2008 by citing a clause 31.2 of the Agreement which clause is non-existent in the contract executed by the parties herein. Even clause 31 of the said Agreement does not deal with arbitration but with Bonds.

[4] The Applicant raised a preliminary point on jurisdiction but the Honourable Arbitrator ruled that the Tribunal had jurisdiction to hear and determine the claim before him. The Applicant filed HCC No. 591 OF 2009 (Milimani) challenging jurisdiction and a simultaneous chamber summons application seeking a stay of the arbitration proceedings but the court declined to stay the arbitral proceedings. The said case

was later dismissed for want of prosecution during the courts routine dismissal of suits via advertisement on the website and which never came to the attention of the Applicant's advocates.

[5] According to the Applicant, the Arbitrator proceeded to hear the claim and made an awarded in favour of the Respondent; the amount of the award was determined despite the fact that there was no clear final account with respect to the sum claimed thereby exceeding the mandate by not applying the strict provisions of the contract between the parties and in particular with respect to the roles of all parties and the consultants named in the contract.

[6] Therefore, Applicant opines that its application should succeed on the following reasons.

Appointment of arbitrator and arbitral proceedings not under Contract

[7] The Applicant argued that arbitration is a consensual process which draws its mandate from the arbitration agreements of the parties which set out the manner in which the disputes should be resolved and the procedures to be followed. The arbitrator's mandate and appointing authority are derived from the contract of the parties. The centrality of contract of the parties as the primary document of consideration is recognised in the Arbitration Act at S.29 (5) which states:

"In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction".

[8] The material contract in this case that was executed by the parties is the one dated 11th November 2002 (DKM1) – which is the 1983 edition of the form of contract published by the Kenya Association of Building and Civil Engineering Contractors. The arbitration clause in this agreement is contained in clause 35 and is very clear that, the appointing authority is the "Chairman for the time being of the Architectural Association of Kenya". Therefore, the fact that the wrong procedure was followed and the person other than the appointing authority made the appointment; the arbitrator who is presiding over such process should have dropped his pen for lack jurisdiction. But this did not happen in the instant case.

Jurisdiction is fundamental

[9] The Applicant takes the view that Jurisdiction is of such a fundamental nature in any arbitral proceedings such that the law recognises that the decision on jurisdiction could in fact come after the arbitral proceedings are complete. The Applicant found support in section 17 of the Arbitration Act.

Respondent deceived ''appointing authority''

[10] More was said by the Applicant. The issue for determination in the High Court was whether in fact the Arbitrator had jurisdiction in view of the fact that he had been appointed by the Chartered Institute of Arbitrators (Kenya Branch) who were never at any one time envisaged as the appointing authority in the contract between the parties. Annexure DKM4 shows that the Chartered Institute of Arbitrators (Kenya Branch) was deliberately misled by the Plaintiff herein into exercising a non-existence authority to appoint. The letter of 15th August, 2008 is a good illustration here as it cites clause 31 of the agreement but only a copy of the clause itself was supplied to the Institute. That was a deliberate act to deceive. More confusion is caused by the letter dated 6th August, 2008 which cites clause 31.2 and the one dated 14th July, 2008 which cites clause 31.

[11] Again, the Applicant added that, the Chartered Institute of Arbitrators (Kenya Branch) itself confirms that it can only appoint an arbitrator when it is named as the appointing authority. See letter dated 18th August, 2008. The Respondent cited clause 31.2. The agreement signed by the parties does not have that clause nor does it name the Chartered Institute of Arbitrators (Kenya Branch) anywhere. The Respondent was advised by the letter of 16th August, 2006 from Armstrong and Duncan to request the "appointing authority stated in their contract" to make the appointment of Arbitrator. But it

deliberately ignored this advice.

Enforcement Application

[12] The Applicant did not stop there. Arbitration was appointed by the Chartered Institute of Arbitrators (Kenya Branch) and the proceedings went on despite challenges to the arbitrator's jurisdiction and an award was published. Under 36 (2) of the Arbitration Act; "Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement MUST furnish.

a. The duly authenticated original award or a duly certified copy of it; and
b. The original arbitration agreement or certified copy of it."

The above provision is mandatory and failure to comply with it would mean that the award for enforcement ought to be declined. The omission cannot be cured by later submission. On perusal of the court file after the Applicant was served with a proclamation, it was evident that the original arbitration agreement or a certified copy of the same was not attached to the application for enforcement when it sought to enforce the award. We content that it was not an oversight, but another deliberate subversion of procedure and to mislead the bodies involved in the arbitral process by the Plaintiff. Had the Respondent attached the agreement as required by S. 36 (2), the due diligence would have revealed to the court that the Respondent had obtained an award by an arbitrator who had no mandate to arbitrate under the contract. This would have been fatal to the Respondent's application hence, in our view, the omission to attach a copy.

[13] The above is not all; the Applicant submitted that Section 37 of the Arbitration Act provides the ground on which the High Court may refuse to recognise an arbitral award. At the request of the party against whom the award is sought to be invoked the court may refuse to enforce award if the party proves amongst other things the following: S.37 (1) (a) (v) "the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place. It is clear that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. Clause 35 of the agreement was consistently breached by the Respondent. Parties were required to agree on a person to be appointed as Arbitrator failing which either party could request the Architectural Association of Kenya to appoint one. There is no mention of the Chartered Institute of Arbitrators (Kenya Branch) or of the court as is misleadingly suggested by Mr. Ngaruiyah in paragraph 7 (a). At pages 2 & 3 of the award the arbitrator cites the procedure followed. Instead it is clear that the Applicant declared a dispute then unilaterally proceeded to deliberately circumvent the provision of the arbitration clause in the agreement.

[14] The arbitral award has not yet become binding if the issue of the jurisdiction is still being pursued and is yet to be determined. This is clear from S.17 (8) referred to earlier.

[15] The Applicant minced no words in stating that the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence." Fraud according to Chambers Concise Dictionary is "an act of deliberate deception with the intention of gaining some benefit. This act would include producing false documents or information". It is clear from this definition that the Applicant has been consistently fraudulent right from the time of appointment of arbitrator to the point of execution of the decree herein and even further in the averments in their Replying Affidavit which have been controverted in the further affidavit of Mr. Mwaura.

[16] The Applicant pressed on. Under S.22, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for the dispute to be referred to arbitration is received by the Respondent. The award and the decree should be set aside on the grounds above and the court refuse to recognise the arbitral award. But the Applicant made further submission on service. That, in furtherance of its fraud the Respondent did not even bother to serve the Applicant with the application to enforce the award. The Applicant became aware of the application and the decree when auctioneers were sent to proclaim the Applicant's properties.

Monies not with Applicant but Employer

[17] The Applicant argued that, from the award sought to be enforced, the monies sought are actually with Kenya Pipeline Company Limited who were at all times the employer – See page 35 of the award sought to be enforced. See also the admission by the employer (DKM 6) in their letter dated 12th October 2012 and 6th February 2013. To enforce the award against the Applicant would therefore be a travesty of justice given all the factors mentioned and the fact that the disputed money is not even in the custody of the applicant. It is not in contention that the employer has paid the Respondent Kshs. 20,536,876/- (See Further Affidavit – DKM1) meaning that the Respondent will suffer no prejudice if the decree herein is set aside and the matter of jurisdiction allowed to be canvassed to its ultimate determination.

Applicant disputes amount claimed

[18] The Applicant took issue with the suggestion that it does not dispute the amount claimed. The absolute truth, according to the Applicant, is that the claim has never been evaluated to date and this was consistently maintained by the Applicant since the inception of this matter. It is the employer KPC not the Applicant who has admitted liability for the sum and have since acted on the said admission. However, KPC's admission has nothing to do with the matters that affect the process and procedure followed in the arbitral process, does not rectify the situation and cannot be wished away. It is important that the two issues are separated. In effect, the matter raised by the Applicant remain unresolved hence its valiant and untiring crusade to prove its point and defend its position. The Applicant filed the following judicial authorities in support of its application.

1. **High Court of Kenya, Mombasa – Misc. Civil Application 719 of 2004 Siginon Maritime Ltd V Gitutho Associates & other [2005] eKLR –** ***where the procedure was followed contrary to the arbitration agreement, award was set aside***
2. **High Court of Kenya, Nakuru – Civil Appeal no. 78 of 1990 Elijah Kogi Dichaga & 2 Others V Samuel Munyua Gichaga [2005] eKLR-*****Jurisdiction cannot be conferred by consent or default.***

3. **Court of Appeal, Kisumu – Civil Appeal No. 167 of 1986 Khayadi V Aganda [1988] KLR 204** ***– where wrong procedure was followed matter was not found to be properly before the court.***

RESPONDENT'S SUBMISSIONS

[19] The Respondent regurgitated the grounds of the application by the Applicant herein, DONWOODS LTD. I need not reproduce that part of the submissions once again. It however, gave an account of the genesis of the dispute to be: The Respondent herein was contracted to install a PABX Machine and the client was Kenya Pipeline Company. The applicant was the Main Contractor. The client paid the Respondent's fee to the Applicant but the applicant failed to forward the fees to the Respondent and this dispute became the subject of the arbitration. The applicant confirmed the appointment of the arbitrator and the confirmation is marked as 'MN TWO" of the Respondent's replying affidavit dated 15th March, 2013. Both parties agreed to pay Kshs. 50,000/- each as a deposit of the arbitrator's fees. The Applicant had a change of heart during the arbitration proceedings and decided to file a suit challenging the jurisdiction of the arbitrator, suit no. 591 of 2009 under originating summons. Justice Koome dismissed the application in her ruling which is annexed and marked as MN3. The ruling is dated 5th February, 2010. The suit was later dismissed for want of prosecution. The Applicant filed an application to stay the award but the application was dismissed on 21st November, 2012 on grounds that there was no suit the same having been dismissed for want of prosecution. The Applicant filed another application on 5th February, 2013 to set aside the orders of the court dismissing the suit for want of prosecution and to reinstate the suit (OS 591 OF 2009) so that they could stay the award but this application was also dismissed on 29th April, 2013.

[20] The Respondent said more. The parties went back to the arbitrator and the Applicant participated by summoning his witnesses. The applicant contended that they were not holding the fees payable to the

respondent and the fees ought to be paid by the client (Kenya Pipeline), the arbitrator dismissed their contention after finding that they had been paid by the Client and that they did not forward the Respondent's fees to the Respondent. The award was published on the 22nd day of March, 2012. The award was of course made known to the Applicant as they had to pay the final fees for the arbitrator. The director for the Respondent MUNGAI NGARUIYA also notified the Applicant's lawyers which forms part of their bundle of documents and is marked as 'DKM 3" in the applicants documents.

[21] The Respondent took the view that the jurisdiction of the arbitrator was determined by Justice Koome and cannot be revisited by a judge of equal jurisdiction. The applicants ought to have appealed that ruling which was delivered 4 years ago. The applicants are mischievous in stating that they were not aware that the award had been adopted yet the Respondent's letter computing the amount due and interest was received by M/s Tongoi & Co. on the 12th day of November, 2012 and which forms part of their bundle of documents. They submitted further that on the PRIVITY OF CONTRACT and said that the decision to enjoin the employer M/s Kenya Pipeline Company Ltd was determined by the Arbitrator. The Respondent quipped: Why have the applicants not filed an appeal on the decision of the arbitrator? The arbitration act is clear that a party who is dissatisfied with the decision of the arbitrator should fie and appeal within 90 days. This court has no jurisdiction to entertain an application of this nature as it seeks to interfere with an award that has already been published and one that has been adopted by this very court. The applicants have filed a flurry of applications to try ad obfuscate matters which are really very simple. Finally, this Application was filed so that this court can issue orders for stay of execution pending the decision of the Court in OS 591 of 2009 to stay the award, but their application was dismissed hence this court cannot also entertain this application as it has now been overtaken by events.

COURT'S RENDITION

Partial Ruling

[22] Most issues in this matter were settled in the partial ruling which the Court delivered on 12th May, 2014. The part of the Partial Ruling in so far as it is relevant to this final Ruling is reproduced below:

[2] I must admit that after considering the elaborate submissions by the parties, and the pertinent issues that emerge, I should say the application before me is quite a convoluted one. More trouble is found in the fact that there has been another suit by the Applicant which the Respondent submitted was anchored on similar grounds like the ones being raised before me. But the court is experienced at resolving such complex matters, and in that competence, the court has chosen to determine one issue at preliminary stage, to wit:

> ***a) Whether the recognition order made by the court on 5th February, 2013 should be reviewed and set aside the judgment, decree and eventual execution thereto; or***

[3] The other issues listed below will be determined after compliance of the orders I will issue upon this partial decision. The issues are:

> ***a) Whether the arbitrator was appointed in accordance with the arbitration agreement; or***
>
> ***b) Whether the arbitral proceedings were in accordance with the arbitration agreement and the law; or***
>
> ***c) Whether the arbitral award should be set aside or recognized, adopted by the court and enforced accordingly.***

[4] While I will be determining the above issues, I will take into account all the other strands that are appurtenant to the issues I have formulated. For instance, I reckon that issue (c) above entails other strands or arguments around alleged failure to make true and correct disclosures, concealment of material facts, fraud and corruption on the part of the Respondent. Those strands will be accorded

appropriate weight in my final decision. Meanwhile, let me determine the first Issue which bears preliminary connotation. Once again, the justification of the course I have taken will be borne out after I have made my decision.

Probity of the Recognition and Enforcement of award herein

[5] Two arguments were advanced by the Applicant to demonstrate that the recognition of the award and the eventual execution thereto ought not to have been granted in the first place. The first argument was that the applicant did not supply the court with; a) a duly authenticated original arbitral award or a duly certified copy of it; and b) the original arbitration agreement or certified copy of it as required in section 36(2) of the Arbitration Act. The other argument is that the Respondent did not bother to serve the Applicant with the application for recognition and enforcement of the award; an act that denied the Applicant an opportunity to bring to the attention of the court the issues it is raising now. The Applicant is even more categorical in paragraph 3 of the Further Affidavit by DON K. MWAURA that the application before the court now is seeking to set aside orders which were made against him- I presume he is referring to the Applicant- without being afforded an opportunity to be heard on the issue of enforcement of the award which led to the decree herein. That request embodies a request for a review of the orders of the court, which, contrary to the submission by the Respondent, I find to be in order within our legal regime governing civil litigation. Such request for review and setting aside of orders which had been made in error of law and process should not be confused with an appeal, and needless to state, is a remedy available where the Applicant, as is here, has not proposed an appeal. Indeed in law, such orders by the court should be set aside ex debito justitiae for irregularity or because they are tinctured with breach of statutory provisions. I understood the argument on behalf of the Respondent, to be that the only option available to the Applicant in this case is to appeal against the adoption orders issued on 5th February, 2013. I am not able to accede to that argument by the Respondent and I reject it. Thus, my formulation of the issue below:

a) Whether the recognition order made by the court on 5th February, 2013 should be reviewed and set aside the judgment, decree and eventual execution thereto.

[5] Without administering any sudden shock, I am convinced there was an error that was apparent on the face of the record, for which a court of law would be entitled to vacate its orders ex debito justitiae; in this case, the orders which adopted the award herein as the decree of the court on 5th February, 2013. Judicial authorities on this point of law are legion and I need not multiply them except I am content to adopt from a work of this court in ANTHONY KALAMU & 14 OTHERS [2013] eKLR where the court cited landmark decisions on the subject and held that:

An irregular order can be set aside by the court that made it on application being made to that court either under the rules of court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warrant (e.g. where there has been a breach of the rules of natural justice)

[6] The irregularity in this case emanates from the error on the face of the record, which is really an omission arising from breach of statutory requirements by the Respondent, and breach of rules of natural justice in the way the adoption orders were procured; and that will be borne out in the following rendition of the court. The Chamber Summons application for enforcement of the award dated 22nd March, 2012 was expressed to be made under section 36 of the Arbitration Act and Rule 9 of the Arbitration Rules, 1997. Section 36(1) of the Arbitration Act provides that:

A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37

Therefore, the application for recognition was subject to all the requirements under section 36 especially 36(3) of the Act which provides as follows:

Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its

enforcement must furnish.

a. *The duly authenticated original award or a duly certified copy of it; and*
b. *The original arbitration agreement or certified copy of it."*

[7] I pose there. I have perused the record and the Chamber Summons and I can only see a duly signed award in original ink by the arbitrator, but I do not find the original agreement or a certified copy of it. That is one error on the face of the record which is readily and easily discernible by cursory perusal of the record. Section 36(2) of the Arbitration Act is strict and in the absence of any express order of the court authorizing a departure from the requirements of the section, strict adherence to the said section is not negotiable. I do not even think the discretion given to the court under section 36(2) of the Act would include excusing a party from filing any or all of the documents required under that section, because those are the primary documents which form the basis of the recognition and enforcement of the award as the order of the court. Perhaps, the discretion would only entitle the court to accept the award irrespective of the state in which it was made in which case the court will accept an exemplification or a certified or duly authenticated copy thereof, but the documents must be present lest the court should be acting on nothing or anything which is never an acceptable judicial practice. To say the least, any practice to the contrary of what I have stated would be the most awful and extravagant exercise of discretion.

[8] There is no doubt that the application for enforcement of the award dated 22nd March, 2012 was made ex parte through a Chamber Summons dated 26th November, 2012. It was never served on the Applicant, and it proceeded ex parte. It was also granted as such by Mabeya J on 5th February, 2013. Section 36(1) of the Act allows a party to file an application for recognition and enforcement of the award. Rule 9 provides for the procedure of applying as follows:

An application under section 36 of the Act shall be made by summons in chambers.

Another further but important detail: Rule 6 provides for an ex parte application in the following manner:

If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply ex parte by summons for leave to enforce the award as a decree.

A cursory and shallow reading of rule 6 above may found a justification of sort that the application envisaged under section 36(1) of the Arbitration Act and rule 9 of the Arbitration Rules is to be made Ex parte especially where the person against whom the recognition and enforcement of the award is being invoked, has not filed an application to set aside the award under section 35 of the Arbitration Act. But, that kind of approach or interpretation will certainly excite serious constitutional objections on the front of the right to be heard. At least in this case, the objection has already been raised in that behalf; and it being a major constitutional matter, gives the court occasion to settle it in a more resounding manner.

[9] Let me go back to section 36(1) and (3) of the Act which provides as follows: 36(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37 36(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish.

a. *The duly authenticated original award or a duly certified copy of it; and*
b. *The original arbitration agreement or certified copy of it."*

Of course, section 36(1) of the Act requires an application in writing for recognition and enforcement of an award to be made. But, the application is subject to sections 36 and 37 of the Act, and I should add, to the Constitution. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file; 1) the duly authenticated original award or a duly certified copy of it; and 2) the original arbitration agreement or certified copy of it. Doubtless, the

award must be filed. Accordingly, by that requirement, I think, a notice will invariably be required and the provisions of rules rule 4 and 5 of the Arbitration Rules on filing of the award will abide, which provide that

The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.

[10] The proposition I have made, finds support in the provisions of section 37 of the Arbitration Act with which an application under section 36(1) of the Arbitration Act must comply. Section 37 gives the party against whom the recognition and enforcement of the award is being invoked, an opportunity to file an application in court for the setting aside or suspension of an arbitral award on the grounds set out in subsection (1)(a)(vi); and the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security. There are striking similarities on the grounds of setting aside the award under section 35 and 37 of the Arbitration Act. It is also clear that both sections give the party against whom an award has been made opportunities at different stages of the proceedings. But despite that clear position, I have heard many practitioners posit that there is a conflict between section 35 and 37 of the Arbitration Act, and that argument has breed two school of thought on the matter. The proponents of one school of thought favours strict application of section 35 of the Arbitration Act and seem to assign legitimacy to an ex parte application being made under section 36(1) of the Arbitration Act without reference to the other party; while there are others who ascribe to the constitutional desire and principle of fair trial and right to be heard. The latter advert themselves to the argument that the right to a fair trial which includes the right to be heard in all substantive processes in a judicial proceedings is a constitutional right which cannot be circumvented, and in arbitration the right extends to the process of recognition, adoption and enforcement of the award as the order of the court. The process in section 36 and 37 of the Arbitration Act leads to the adoption of the award by the court thus, the court super-adds its authority into and embodies the award as the order of the court; from that time, the person in whose favour the award is made can enforce the award, and the person against who the award is made runs the risk of suffering execution. On that basis, I agree that there is justification and merit in the argument that an application for recognition and enforcement of the award under section 36(1) of the Arbitration Act and Rule 9 of the Arbitration Rules should be served on the other party. Again, I do not think there is any conflict between section 35 and 37 of the Arbitration Act. Equally, I do not think section 35 of the Arbitration Act is a claw-back on the opportunity to be heard granted under section 37 of the Arbitration Act. In any event, the Arbitration Act as an existing law as at the effective date of the Constitution of Kenya, is the exemplar and classic promoter of the principles of justice enshrined in the Constitution. The opportunity to be heard in section 37 of the Arbitration Act is not, therefore, rendered otiose just because the person against whom execution of the award is sought has not filed an application under section 35 of the Arbitration Act. Accordingly, by making specific reference in section 36(1) of the Arbitration Act that, recognition and enforcement of the award will be subject to section 36 itself and section 37, Parliament was not under any delusion, and the opportunity to be heard in section 37 of the Arbitration Act is not an unnecessary or superfluous addition or appendage; it is a substantive provision of the law aimed at providing substantive justice to all the parties in the arbitral proceedings. The process provided for in the Arbitration Act should also be seen within the nature of arbitration as a consensual and voluntary process. There is absolutely no prejudice that the party applying will suffer in adhering to the law and serving all processes on the other party. The practice of adhering to procedure in the Arbitration Act will only reinforce the probity of and sanctify the courts willingness to issue adoption orders, and undoubtedly, execution will be freed from unnecessary applications by unscrupulous parties who do not wish the arbitral process to end. I hope parties will so comply with the law and obviate a situation where the court will waste the precious judicial time on a convoluted matter such as this. I also would wish to see a recast of the Arbitration Rules in order to reconcile them with the requirements of the Act and the Constitution which encourages Alternative Disputes Resolution.

FINDINGS AND ORDERS

[11] Ultimately, I find that only the award was filed. The original arbitration agreement or a duly certified copy of it was not filed. The ''agreement'' annexed in both the supporting affidavit and the replying affidavit are photocopies which, a court of law, cannot rely upon as 'the original arbitration agreement or a duly certified copy of it''. That is a grave omission, an error that is apparent on the face of the record and goes to the root of the orders sought for and granted on 5th February, 2013. I also find and hold that the Applicant was not afforded an opportunity to be heard under section 37 of the Arbitration Act because of the approach the Respondent adopted in filing the award and not serving the Applicant with the relevant notice of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed. I, therefore, set aside the orders of adoption made on 5th February, 2013, and all consequential orders arising therefrom.

[12] However, I have not set aside the award as that issue is yet to be determined. Instead, I hereby order the Respondent to file the original arbitration agreement or a certified copy of it and serve the same on the Applicant within 14 days of today. I will determine the other issues which have been raised in the application herein once the original agreement is filed and I have given further directions thereof. It is so ordered.

[23] Following the said Partial Ruling, the Respondent provided the Court with the original agreement between the parties. Now, the Court is in a position to determine the following issues which remained outstanding after the Partial Ruling:

a) Whether the arbitrator was appointed in accordance with the arbitration agreement; or

b) Whether the arbitral proceedings were in accordance with the arbitration agreement and the law; or

c) Whether the arbitral award should be set aside or recognized, adopted by the court and enforced accordingly.

[24] I reckon that arguments around alleged failure to make true and correct disclosures, concealment of material facts, fraud and corruption on the part of the Respondent should also be accorded appropriate weight in my decision. I will do so as that is my calling.

[25] The above issues are inextricable and I will deal with them as such.

Composition of the arbitral tribunal

[26] The Applicant is saying that the Arbitral Tribunal herein was not constituted in accordance with the agreement of the parties which is in itself a ground for the refusal of adoption, or setting aside of an award under section 37 of the Arbitration Act. Doubtless, the arbitration agreement is the one dated 11th November, 2002 and its Clause 35, provided for arbitration and the appointment of the Arbitrator. The appointing authority was to be ***''the Chairman for the time being of the Architectural Association of Kenya''***. But, it turned out that the Arbitrator was appointed by the Chartered Institute of Arbitrators (Kenya Branch) upon representations by the Respondent. Several things are suspect. The letters dated 14th July, 2008 and 6th August, 2008 cited clause 31 and 31.2, respectively as the enabling provisions for the appointment of an arbitrator. The letter dated 15th August, 2008 again insisted that clause 31 of the agreement is the basis for the appointment of the arbitrator. Things got convoluted; a copy of the said clause, not the arbitration Agreement, was supplied to the Chartered Institute of Arbitrators (Kenya Branch). The Respondent was advised through the letter dated 16th August, 2006 from Armstrong and Duncan to request the "appointing authority stated in their contract" to make the appointment of

Arbitrator. Contrary to that advice, the Respondent insisted on the appointment being made by the Chartered Institute of Arbitrators (Kenya Branch). The Chartered Institute of Arbitrators (Kenya Branch) was alive to the fact that it can only appoint an arbitrator where it is the named appointing authority in the Arbitration Agreement and the letter dated 18th August, 2008 is clear on that. The Applicant calls that chain of events, a deliberate act to deceive. The way events turned out is unsatisfactory state of affairs. Nevertheless, I find no evidence that the arbitral award was induced or affected by fraud, bribery, corruption or undue influence. I am unable, therefore, to utilize the definition of "Fraud'' according to Chambers Concise Dictionary cited by the Applicant.

[27] Without impugning the true intention or conduct of the Respondent on the events which took place in the appointment process of the arbitrator, one thing is clear; that the Arbitration Clause 35 designated the appointing authority to be ''the Chairman for the time being of the Architectural Association of Kenya" and not the Chartered Institute of Arbitrators (Kenya Branch). Also, the Clause 31 or 31.2 cited by the Respondent as the Arbitration Agreement was non-existent. The law is very clear that appointment of arbitrators is in accordance with the agreement of the parties or, failing any agreement by the parties, in accordance with the Arbitration Act which is the law of Kenya. All these things are contained in PART III of the Arbitration Act titled ***COMPOSITION AND JURISDICTION OF ARBITRAL TRIBUNAL***, and lawful composition of the arbitral tribunal is the one done in accordance with the agreement of the parties and the law. The appointment herein was contrary to the Arbitration Agreement and the law and is, therefore, a potent ground to set aside the award arising out of such impugned arbitral proceedings. The said violation of the law is not atoned for because the party complaining submitted itself to or participated in the arbitral proceedings or paid the arbitrator's fee. Annexure marked as 'MN TWO" secured to the Respondent's replying affidavit dated 15th March, 2013 is not sufficient given the express deprecation of the entire exercise that was exhibited by the Applicant in all the efforts it employed to get justice on the matter. The arbitral proceeding was not consensual or sanctioned by law. Its legitimacy has been put to question. Thus, the entire proceeding is null and void. I so declare them. The following cases are relevant: **1) MSA HC MISC APP NO 719 OF 2004 SIGINON MARITIME LTD v GITUTHO ASSOCIATES & OTHER [2005] eKLR; 2) NKR HCCA NO 78 OF 1990 ELIJAH KOGI DICHAGA & 2 OTHERS v SAMUEL MUNYUA GICHAGA [2005] eKLR; AND 3) COURT OF APPEAL, AT KISUMU CA NO. 167 OF 1986 KHAYADI v AGANDA [1988] KLR 204.**

[28] Before I close, I should state that the fact that OS 591 of 2009 was dismissed ''for want of prosecution'' does not deny the Applicant the opportunity afforded in section 37 of the Arbitration Act to challenge the adoption and enforcement of the award. And a successful applicant may have the recognition or enforcement refused or the award set aside or suspended. Needless to say the said OS 591 of 2009 was not even decided on merit. The partial decision I delivered and the case of **NATIONAL OIL CORPORATION OF KENYA LIMITED v PRISKO PETROLEUM NETWORK LIMITED** expound on the said position of law.

[29] In the circumstances of this case, it is safe to conclude that the arbitral tribunal as constituted fell afoul of the law and justifies invocation of Section 37(1) (a) (v) of the Arbitration Act; that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of Kenya being the state where the arbitration took place. Accordingly, such award under Section 37(1) (a) (vi) of the Arbitration Act has not yet become binding on the parties and the arbitral award published on the 22nd day of March, 2012 is hereby set aside. As a consequence, the recognition or enforcement of the said award is hereby refused by the Court. Parties are at liberty to initiate appropriate arbitral proceedings in accordance with their Arbitration Agreement dated 11th November 2002. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 22nd day of September 2014

F. GIKONYO

JUDGE