REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 445 OF 2010 (O.S.)

VICTORIA FURNITURES LIMITED ……. PLAINTIFF/RESPONDENT

VERSUS

ZADOK FURNITURES

SYSTEMS LIMITED ……... DEFENDANT/APPLICANT

R U L I N G

1. The Defendant/Applicant's Chamber Summons dated 6th March 2012 seeks the appointment of Mr. Festus Litiku as the sole arbitrator to resolve the dispute as between the Applicant and the Plaintiff/Respondent. The Application follows closely upon my learned brother **Odunga J's** Judgement delivered on 1st February 2012 in which he set aside the purported appointment by the Applicant herein of the said Mr. Festus Litiku as sole arbitrator in the alleged dispute between the Applicant and the Respondent. The Application however seeks, in the alternative, that this Court be pleased to appoint an independent and impartial sole arbitrator with expertise in the construction industry. The Application is brought under the provisions of Article 159 (2) (c) of the Constitution, **section 12 (7) (9)** of the *Arbitration Act* as well as **Rule 3 (2)** of the Arbitration Rules 1997. The same is supported by the Affidavit sworn by **Victor Ogeto** on 6th March 2012.
2. The Grounds upon which the Application is based were detailed by the Applicant as follows:

> **"a) THAT the Plaintiff/Respondent and the Defendant/Applicant entered into a sub-contract agreement dated 4th of July 2006 for the Defendant/Applicant to supply and install partitions and furniture at Kenya Pipeline Complex Industrial Area.**
>
> **b) THAT clause 11 of the sub-contract agreement provided that all disputes, differences or questions between the Parties with respect to any matter or thing arising out of or in relation to the Contract shall be referred to an Arbitrator mutually agreed to by both parties.**
>
> **c) THAT there is a dispute between the Plaintiff/Respondent and the Defendant/Applicant as the latter supplied the furniture but has not been paid to date**.
>
> **d) THAT the Plaintiff/Respondent has refused to concur in the appointment**

of an arbitrator despite several requests by the Defendant/Applicant.

e) THAT the Honourable Justice Odunga in his Judgment delivered on 1st of February 2012 found that High Court had jurisdiction to appoint a sole arbitrator between the parties herein where one party refused to concur in the appointment of the arbitrator.

f) THAT Mr. Festus Litiku is the sole arbitrator in the dispute between the Plaintiff/Respondent and main contractor, Don Woods Company Limited, where the main subject matter in dispute is substantially the Defendant/ Applicant's claim against the Plaintiff/ Respondent.

g) THAT Mr. Festus Litiku is an independent, impartial, qualified quantity surveyor with technical expertise in the construction field and an experienced arbitrator".

3. The said supporting Affidavit outlined the facts in relation to this suit which are largely not in dispute. It appears that the Kenya Pipeline Company Ltd entered into a contract with a company known as Don-Woods Company Ltd ("the Main Contractor") to undertake certain building works at the former's headquarters building in the Industrial Area, Nairobi. Under the said contract, the Main Contractor subcontracted the supply, installation and fit-out of partitioning and furniture at the said premises to the Respondent herein. In turn, the Respondent subcontracted the part of the works to the Applicant vide an agreement dated 4th July 2006 (hereinafter "the Sub-contract") under which the Applicant was to make, deliver, install, commission and test certain office furniture and demountable partitions. The Sub-contract price was Shs. 65,687,520/- exclusive of VAT. There is no dispute that the Applicant performed its part of the Sub-contract and that it is entitled to payment. It is a question of certification and liability to make payment. All disputes, differences or questions between the Respondent and the Applicant arising out of the Contract were to be referred to an Arbitrator mutually agreed upon by the parties under the provisions of the Arbitration Act. From the Supporting Affidavit, it does appear that efforts were made for the Respondent and the Applicant to join in the arbitration presided over by the said Mr. Festus Litiku as between the Respondent and the Main Contractor. However, there was no agreement between the Respondent and the Applicant as to just how the Applicant would join in those arbitral proceedings. To this end, the Applicant considered that the conditions set out by the Respondent for the Applicant to join in the proceedings were onerous, unreasonable, unjust and prejudicial. There followed extensive correspondence as between the Applicant's and the Respondent's advocates requesting agreement from the former as to the appointment of the said Mr. Festus Litiku as sole arbitrator in relation to the dispute between the parties. To cut a long story short, the Applicant having nominated the said Mr. Festus Litiku as sole arbitrator, the Respondent filed an application before this Court to set aside his appointment. The deponent stated that the matter had come before my brother **Justice Odunga,** as above, who set aside the appointment of the arbitrator on the grounds that due process had not been followed but found that the dispute between the parties should be determined by way of arbitration. The Supporting Affidavit concluded by detailing that, as the said Mr. Festus Litiku was already the arbitrator between the Respondent and the Main Contractor, he knew all the circumstances in relation to the contracts and consequently would be the most suitable person to arbitrate the dispute as between the parties. The dispute would be resolved more quickly and more efficiently if it was heard by the same arbitrator.
4. The Respondent filed Notice of Preliminary Objection on 31st May 2012. Its first objection was that as the Application invoked the provisions of Article 159 (2) (c) of the Constitution, this matter had been wrongly brought before the Commercial Division of this Court and should have been filed in the Constitutional Division. Secondly, as the Application sought the appointment of Mr. Festus Litiku as the sole arbitrator with regard to the dispute between the parties, such was *res judicata* as **Odunga J**. had already set aside the appointment by his Judgement delivered on 1st February 2012. Further, as Judgement had been delivered on that date, this matter and the proceedings were spent and not capable of accommodating the Application. Finally, the

Respondent observed that as the Application invoked an Article of the Constitution, it was incurably defective for failure to comply with the rules and procedure applicable to Constitutional applications.

5. On the same day as it filed its Notice of Preliminary Objection, the Respondent filed the Replying Affidavit of the Respondent's director one **Pankaj Shah** sworn on 29th May 2012. The first part of the Replying Affidavit concentrated upon what the deponent had been informed by the advocates on record for the Respondent in relation to the grounds of the Preliminary Objection. He maintained that the Application before Court was a poorly disguised attempt to appeal against or review the Judgement of **Odunga J.** aforesaid. He also maintained that all the disputes between the Respondent and the Applicant arising out of the Sub-contract were fully and finally compromised under the terms of a Compromise and Settlement Agreement dated 31st August 2006 (hereinafter "the Compromise Agreement"). He annexed a copy of the said Compromise Agreement as Exhibit "PS 2". Mr. Shah observed that this Court cannot impose arbitration on parties who had a contract at arms' length and which had now been compromised. He further noted that the Compromise Agreement did not have an arbitration clause within it.
6. Mr. Shah, continuing with his said Affidavit, maintained that if there was a dispute between the parties then the same should be determined in the normal manner by way of a suit filed in Court. He insisted that there was no real dispute as between the parties arising from the Sub-contract which was lawfully capable of being referred to arbitration since the Respondent's only obligation thereunder was to instruct the client, the Kenya Pipeline Company Ltd., to make payment directly to the Applicant in respect of the goods supplied and installed by it. In the alternative, Mr. Shah stated that if there was an obligation falling upon the Respondent to make payment to the Applicant in respect of the partitioning and furniture supplied and installed, then under the said Sub-contract, the Applicant would only be entitled to such payment as against appropriate certificates being issued by the Project Architect and no such certificates had been so issued. As regards the appointment of Mr. Festus Litiku, Mr. Shah was of the opinion that he would be unsuitable as sole arbitrator, due to a serious conflict of interest, since he was already seised of an arbitration between the Respondent and the Main Contractor. Thereafter, the deponent maintained that the said Judgement of **Odunga J.** did not detail that the alleged dispute between the parties should be determined by arbitration. The Judge had clearly found that the procedure invoked by the Applicant to be wrong. The Judge had mentioned, in his Judgement, that the Constitution promoted arbitration as well as referring to the relevant section of the Arbitration Act in that connection. Mr. Shah maintained that promoting arbitration was not the issue. What was the issue was that the dispute had been settled by the Compromise Agreement which had not been set aside by this or any other Court. He also re-emphasised, in concluding his Replying Affidavit, that all sums payable to the Applicant under the Sub-contract were to be paid to it directly by the client, the Kenya Pipeline Company Ltd and not the Respondent.
7. The Applicant's submissions apart from setting out the basic facts before Court as above, reviewed the said Judgement of **Odunga J.** and commented that the Judge had considered the Respondent's conduct as to the issue of the appointment of an arbitrator. It noted that the Court had declined to award the costs of the Originating Summons which the Judgement addressed to the Respondent on the grounds of its obstinacy in concurring with the appointment of an arbitrator. The Court, according to the Applicant, had also made further findings as follows:

> **"(a) That there was a contract executed by the parties which contains an arbitration clause.**
>
> **(b) That though the Defendant/Applicant had sought Plaintiff/respondent's concurrence in the appointment of an arbitrator, the Plaintiff/ Respondent had been unco-operative.**
>
> **(c) The Court found that the integrity and qualifications of MR. FESTUS LITIKU had not been questioned and that there was no basis or any allegation of bias or likely bias on his part and that the mere fact that he was conducting another arbitration whose outcome may have a bearing on the dispute between the Plaintiff and the Defendant herein was not, in the court's view,**

sufficient to disqualify him were he to be appointed in a proper manner.

(d) That the Court has the power to appoint an arbitrator where one of the parties fails and/or obstructs the appointment and that the court's hands have been strengthened by the Provisions of Article 159 (2) (c) of The Constitution of Kenya 2010 which enjoins the court to be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

(e) That parties to a contract binding them to refer a dispute to arbitration should not be allowed to evade their obligations.

(f) That merely because a party is of the view that there is no dispute does not oust the jurisdiction of the arbitrator under a contract.

To this end, the Applicant maintained that there was a general legal principle in that where a tribunal is handling a dispute touching on the same set of facts, it would be proper for the same tribunal to handle any other dispute related to the same facts/issues, so as to avoid the possibility of different tribunals giving conflicting decisions.

8. Addressing the issues raised by the Respondent herein, the Applicant noted that most of the same had been raised before **Justice Odunga** in the previous Application before Court. As regards the Preliminary Objection of the Respondent, the Applicant took issue with the fact that merely because Article 159 (2) of the Constitution had been referred to in the heading of the Application, such did not turn the Application into one for enforcing a Constitutional right. It noted that Article 159 (2) (c) of the Constitution set out general principles guiding the Judiciary when exercising its judicial authority. The same enjoins this Court to promote arbitration and other methods of alternative dispute resolution. **Odunga J.** had dealt with and determined that the said Article is one of the judicial sources that empowers a court to appoint an arbitrator.
9. As regards the Respondent's position that the proceedings before this Court are spent, the Applicant pointed to the provisions of **Rule 3 (1) and (2)** of the *Arbitration Rules 1997*. It maintained that the rule was meant to prevent a multiplicity of proceedings in arbitration matters. It noted that the Originating Summons dated 29th June 2010 was filed under the provisions of **section 12 (5)** of the *Arbitration Act* which was one of the provisions envisaged under the said **Rule 3 (1)**. Turning to the Respondent's objection that the Application was *res judicata*, the Applicant maintained that it was a basic principle, as regards the doctrine, for the party seeking to rely upon it to demonstrate that the matter in issue in the subsequent application before court was the same one that was an issue in the first application. It noted that the Originating Summons dated 29th June 2010 addressed the position as to whether or not the said Mr. Festus Litiku had been properly appointed by the Applicant and, consequently, whether such appointment was premature. The current Application before this Court sought the appointment of the said Mr. Litiku as arbitrator as a result of the Respondent's failure to concur in the appointment of an arbitrator. The Applicant submitted that **Judge Odunga** had held that the Court was vested with the power to appoint an arbitrator if one of the parties to a dispute obstructs such an appointment in order to frustrate the determination of the same. This was the first application made by the Applicant seeking the appointment of an arbitrator. In his Judgement as regards the earlier application before Court, the learned Judge had found:

> **"Unfortunately, the defendant in this matter proceeded to appoint the arbitrator under a provision of law which was not applicable instead of moving the court to make the necessary orders. To that extent, the defendant jumped the gun and acted prematurely."**

10. Turning to the Respondent's contention that the Compromise Agreement had compromised the disputes between the parties, the Applicant detailed that such contentions were raised before **Odunga J.** by the Respondent and the Judge had dealt with such issues at pages 15 to 21 of his

Judgement, dismissing the Respondent's argument. The relevant provision as to jurisdiction under the Arbitration Act was to be found under **section 17 (1)**. The learned Judge had said that this provision had pointed the way out to the Respondent as to how to raise the validity of the arbitration agreement. The Applicant also noted that, as regards the suitability of Mr. Litiku as an arbitrator, the Judge had found that there was no basis upon which his integrity and/or impartiality could be challenged and dismissed the Respondent's contention in that regard. As regards the law, the Applicant explained that it was now generally accepted that where parties have decided to have their disputes addressed in arbitration, the Court should give effect to that choice. See **Shamji v Treasury Registrar Ministry of Finance (2002) 1 EA 273**. The Applicant also referred to the English case of **Harbour Assurance Company (UK) Ltd v Kansa General Co. Ltd & Ors (1993) 3 All ER 897** (as quoted in **Shamji** supra) as well as **William Oluane v American Life Insurance Company (K) Ltd NAI HCC 721 of 2007)**.

11. The Respondent's submissions commenced by detailing the proceedings as brought before **Odunga J.** more particularly the Replying Affidavit filed by the Applicant in relation to that first application in which the deponent had stated:

> **"In the unlikely event that this court sets aside the appointment of Festus Litiku as an arbitrator then we hereby apply and request the court to appoint an arbitrator to determine the dispute."** (Emphasis added by the Respondent).

Similarly this wording was repeated by the Applicant in the final paragraph of its submissions in relation to the first application before Court. In answer to those submissions, the Respondent had maintained that there was not a real value dispute as between the parties capable of being referred to arbitration. The Respondent then quoted from the Judgement of **Odunga J.** as follows:

> **"I accordingly find that in the absence of a provision permitting the court to enforce an arbitration clause by a mutually agreed arbitrator, where one of the parties declines to co-operate, the court has power and is constitutionally inspired and emboldened in effecting such a provision."**

In the Respondent's view, it could not be doubted that the Applicant had already applied to this Court to appoint an arbitrator and that the Court had considered such application referred to it under **section 12 (7)** of the *Arbitration Act*. In all the circumstances, the Respondent submitted that the current Application before this Court was *res judicata* quoting the provisions of **section 7** of the *Civil Procedure Act*, to this end. It also pointed to **Mulla's The Code of Civil Procedure (12th edition)** quoting a passage from the **Duchess of Kingstone's** case. The Respondent also referred to the case of **Garden Square Ltd v Kogo & Anor. (2003) KLR 20**. The Respondent went on to say that by the Judgement delivered on 1st February 2012, the Originating Summons dated 29th June 2010 had been determined, fully and finally. It submitted that this suit, being spent, was incapable of accommodating the Application which was consequently incompetent. The Respondent referred to the case of **Esther Chebiegon v Kiplagat Arap Biator (2005) eKLR** in which the court declared that having struck out an application for extension of time, where it was held that once a suit has been struck out, the court ceases to have jurisdiction to grant any orders subsequent thereto. With due respect to the Respondent, I do not consider that this authority is pertinent to the matter before Court. What it is necessary for this Court decide is whether the Judgement of **Odunga J.** fully and finally determined this matter. The Respondent submitted that the Application was, in effect, an appeal against or a review of the said Judgement delivered on 1st February 2012, such being specifically and expressly barred under **section 12 (8)** of the *Arbitration Act*.

12. Taking issue further with the Applicant's position as regards Article 159 (2) of the Constitution, the Respondent maintained that such did not empower the Court to impose an arbitration upon parties or to rewrite the terms of an arbitration clause. The Article called upon the court to promote alternative forms of dispute resolution and where the parties had not agreed upon arbitration, the Article did not empower the Court to force parties to go to arbitration. This contention by the Respondent, to my mind, rather shot down its own preliminary objection that the Application should have been filed in the Constitutional Division of this Court rather than the Commercial Division. However, undeterred, the Respondent, later in its submissions emphasised

that, in its opinion, the Application was incompetent and improper for having been brought in the wrong Court and consequently it was also improper and incompetent for failure to comply with the practice and procedure applicable to Constitutional applications. What the Respondent seems to have failed to have grasped is that whether a matter is filed in the Constitutional Division, Commercial Division or even the Criminal Division, it is still one Court – the High Court of Kenya. Thereafter, the Respondent then referred and spelt out the provisions of the Arbitration clause being clause 11 of the Sub-contract. It noted that there was no provision in the clause as to the power to appoint an alternative arbitrator where the parties had not agreed upon an arbitrator. It maintained that the parties clearly did not intend to be bound to any arbitration in the absence of agreement between them on the appointment of a single arbitrator. The Respondent also pointed to the provisions of **section 12 (2) (c)** of the *Arbitration Act* where it detailed that the parties shall agree on the arbitrator to be appointed. (Emphasis added by the Respondent). It contended that where there was no agreement on the appointment of an arbitrator by the parties, the Act did not allow the Court to appoint an arbitrator. The Respondent submitted that for the Court to grant the prayers as sought in the Application, such would amount to a rewriting by the Court of the arbitration clause. The Respondent pointed to the case as cited by the Applicant being **William Oluande v American Life Insurance Company (K) Ltd** (supra). The Court therein quoting from *Chitty on Contract, 26th Edition, Vol. 1* at stated:

> **"On the other hand, where, even by the use of general words, the intention of the parties is clearly and unequivocally expressed, the court is bound by it, however capricious it may be, unless it is plainly controlled by other parts of the instrument."**

13. The Respondent's submissions continued by detailing that there was, in any event, no real dispute between the Applicant and the Respondent arising out of the Sub-contract which was capable of being referred to arbitration. The Respondent went into great detail as to the provisions of the said Sub-contract to this end. Basically, the Respondent reaffirmed the contents of the Replying Affidavit, in that it was the Kenya Pipeline Company Ltd who was liable to pay the Applicant for the items supplied and fitted by it, under certificates issued by the Project Architect. The Respondent then went into details of the Compromise Agreement and maintained that the Applicant had fully and finally discharged the Respondent from any and all claims arising from the Sub-contract. In this regard, the Respondent referred to the cases of **Lochab Transport Ltd v Kenya Arab Orient Insurance Co. Ltd (1986) eKLR,** as well as **Kenya Oil Company Ltd & Kobil Petroleum Ltd v Kenya Petroleum Refineries Ltd (2010) eKLR**. It also submitted that the arbitrator proposed – Mr. Litiku was unsuitable due to a serious conflict of interest, again this matter had been referred to in the Respondent's Replying Affidavit. The Respondent concluded its submissions by detailing that it was entitled to costs on the Application on an Advocate/Client basis principally grounded upon the contents of the Compromise Agreement. Finally, the Respondent dwelt upon the authorities cited by the Applicant, commenting upon each of them as it considered necessary.
14. Looking at the Respondent's objections to the Application before this Court, what clearly comes over is the Respondent's ardent desire to avoid the arbitration process, come what may, as it knows very well that such may end up with an Award against it to pay the monies due to the Applicant under the Sub-contract. It has done its best to deflect responsibility to make such payments by pointing out that under the Sub-contract, it is the client, Kenya Pipeline Company Ltd which is responsible for making such payments. That may be and that is a matter which should be dealt with by an arbitrator not this Court. In considering whether the Application before Court is *res judicata*, I have commenced consideration of the same by perusing the prayers in the Originating Summons dated 29th June 2010 as filed by the Respondent herein. That Application sought the principle Order:

> **"The purported appointment by the Respondent of FESTUS M. LITIKU as sole arbitrator in an alleged dispute between the applicant and the respondent concerning or arising from the contract dated 4th July 2006 between the Applicant and the Respondent be set aside;"**

In my opinion, that is somewhat different to the current Application before this Court which seeks:

> **"1. THAT this Honourable Court be pleased to appoint Mr. Festus Litiku as a Sole arbitrator to resolve the dispute between the Plaintiff/Respondent and the Defendant/Applicant.**
>
> **2. THAT in the alternative this Honourable Court be pleased to appoint an independent and impartial sole arbitrator with expertise in the construction industry and an experienced arbitrator to determine the dispute between the Plaintiff/ Respondent and the Defendant/Applicant."**

15. Further, the Respondent's Originating Summons was brought under the provisions of **section 12 (5)** of the *Arbitration Act 1995* and **Rule 3 (1)** of the *Arbitration Rules 1997*. The current Application before this Court (leaving aside the quoted Article 159 (2) (c) of the Constitution), is brought under **section 12 (7) (9)** of the *Arbitration Act* and **Rule 3 (2)** of the *Arbitration Rules 1997*. To my mind, these are two entirely different applications before Court. In this connection, I do not find that there is any merit in the points raised by the Respondent that, by detailing in the heading to the Application dated 6th March 2012 that it is brought under Article 159, this matter should have been brought in the Constitutional Division and have complied with the practice and procedure applicable the constitutional applications. The Respondent would do well to consider the provisions of Article159(2)(d) of the Kenya Constitution, 2010 to ***'administer justice without undue regard to procedural technicalities'*** and, indeed, the provisions of **sections 1A and 1B** of the *Civil Procedure Act* as well as **Order 51 rule 10 (2)** which reads:

> **"No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."**

As a consequence, I dismiss ground no. 1 of the Respondent's Preliminary Objection.

16. Moving on to the second ground of the Respondent's Preliminary Objection, I have considered at length the submission that the Application before Court is *res judicata*. I have no doubt of the principle as pointed out by the Respondent in its reference to **Mulla's The Code of Civil Procedure** in the reference to the **Duchess of Kingstone's** case as per the judgement of **Sir William de Grey** is correct, as follows:

> **"The present section bars the trial of this suit or issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit. That, if A sues B for damages for breach of contract, and the suit is dismissed, a subsequent suit by A against B for damages for breach of the same contract is barred. This is the rule of res judicata stated in its simplest form. The question of A's right to claim damages from B having been decided in the previous suit, it becomes res judicata, and it cannot therefore be tried in another suit. It would be useless and vexatious to subject B to another suit for the same cause. Moreover, public policy requires that there should be an end of litigation. The question whether the decision is correct or erroneous has no bearing on the question whether it operates or does not operate as res judicata; otherwise, every decision would be impunged as erroneous and there would be no finality."**

The decision in the **Garden Square** case as cited by the Respondent also endorses this position.

17. In reading the Judgement of my learned brother **Odunga J.** delivered on 1st February, 2012, I note that he dealt with various submissions made by the Respondent herein more particularly the question of the Compromise Agreement and whether it overruled the arbitration clause in the Sub-contract. Quoting the cases of **Republic v Kenya Anti-corruption Commission Ex-parte Okoth (2006) 2 EA 276, Halsbury's Laws of England Vol. 44 (1) Para 1447, Melas & Anor. v New Carlton Hotels Ltd (1970) EA 672, Hercules Insurance Co. Ltd v Trivedi & Co (1962) EA**

358 as well as **Kenya Pipeline Company Ltd v Datalogix Ltd & Anor. (2008) 2 EA 193**, the Judge found that the Compromise Agreement (or "variation agreement" as the Judge called it) did not invalidate the arbitration clause in the Sub-contract. The Judge also found that the arbitration clause in the Sub-contract provided for the appointment of an arbitrator to be mutually agreed upon by the parties but was silent in the event of disagreement. He found that the Arbitration Act, as it stands, does not provide for the situation where the arbitrator is to be mutually agreed yet one party declines to cooperate in the appointment. Relying on Article 159 (2) (c) of the Constitution as well as the aforesaid authorities cited, the Judge found that in the absence of a provision permitting the court to enforce an arbitration clause by a mutually agreed arbitrator, where one of the parties declines to cooperate, the Court has power and it is constitutionally inspired and emboldened in effecting such a provision. As a result, the Respondent's submissions as regards the Compromise Agreement as well as the validity and extension of the Arbitration clause under the Sub-contract have already been determined and are *res judicata*.

18. The *res judicata* points upon which the Respondent is relying relate to the Replying Affidavit and the submissions of the Applicant as regards the Originating Summons dated 29th June 2010. What I understand the Respondent to be saying is that the Applicant, as well as saying that the appointment of Mr. Festus Litiku was proper, had submitted, in the alternative, that if it was wrong in this regard, then it requested of the Court to appoint another arbitrator. In my view, **Judge Odunga** in his conclusion found that the purported appointment of Mr. Litiku was not proper and he set the appointment aside. Indeed, this was the prayer in the Originating Summons before him. I do not find that he responded, quite rightly, to the Applicant's plea as above and, as a result, I find that there was no *res judicata* in relation to the appointment of another arbitrator. However, the fact that the learned Judge set aside the appointment of Mr. Litiku, it may well be taken that he had disposed of prayer 1 of the Application before me. Accordingly, I find no merit in ground no. 2 of the Respondent's Preliminary Objection.

19. That leaves me with preliminary objection No. 3 to deal with – whether the Judgement dated 1st February 2012 disposed of the whole matter before Court and whether these proceedings consequently are spent. The Applicant relied upon the provisions of **Rule 3 (1) and (2)** of the Arbitration Rules 1997 to refute this submission of the Respondent. The provisions of **Rule 3 (1) and (2)** detail:

> **"3. (1) Applications under sections 12, 15, 17, 18,**
>
> **28 and 39 of the Act shall be made by originating summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date.**
>
> **(2) Any other application arising from an application made under sub-rule (1) shall be made by summons in the same cause and shall be served on all parties at least seven days before the hearing date".**

With due respect to the Respondent, the Application before court fits into the description of **"any other application"** as referred to in **sub-rule 2** above. It was the Respondent itself that opened up these proceedings before Court by the filing of this Originating Summons dated 29th June 2010. I don't believe that it has any cause to complain to the extent that the Applicant has ridden on its back in pursuing these further proceedings before Court.

20. The up-shot of all the above is that I allow the Applicant's Chamber Summons dated 6th March 2012 in terms of prayer 2 thereof. It should be noted that despite the question mark raised by the Respondent as to this Court's jurisdiction on the appointment of an arbitrator, it may do so of its own motion under the provisions of **Order 46 rule 20** of the *Civil Procedure Rules, 2010*. I direct that the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch shall, within 30 days of the date hereof, appoint an arbitrator (other than Mr. Litiku) to preside over an arbitration involving the two parties hereto in relation to the Sub contract. Such arbitrator will necessarily be a person with expertise in the construction industry. For clarity's sake, I should point out that the Respondent itself has raised the question of payments being made under the Sub-

contract to the Applicant only upon certificates being issued by the Project Architect. These are matters which the arbitrator is best qualified to decide upon. The Applicant will have the costs of this Application.

DATED and delivered at Nairobi this 31st day of July, 2013.

J. B. HAVELOCK

JUDGE