REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISC. CIVIL APPLICATION NO.166 OF 2009

IN THE MATTER OF THE ARBITRATION ACT, NO.4 OF 1995

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

SAMUEL KAMAU MUHINDI.....CLAIMANT

VERSUS

BLUE SHILED INSURANCE COMPANY LTD.....RESPONDENT

R U L I N G

The claimant was at the time material to this case employed by the respondent as its managing director. In the course of his employment, the respondent made the decision to sell some of its ordinary shares to the claimant. By an agreement dated 31st March 2004 (whose legality the respondent subsequently challenged), the respondent is said to have agreed to allot and sell to the claimant one (1) million ordinary shares of the company. The purchase consideration of each share was Kshs.20/-. The agreement was drawn by PM Kamaara, advocate. A dispute arose between the management of the respondent and the claimant that resulted in the claimant ceasing to be the respondent's employee. The claimant lodged a claim with the respondent in regard to the shares that had been allotted to him. The respondent denied that it had allotted or sold any of its shares to the claimant. Pursuant to clause 9 of the said agreement dated 31st March 2004 which provided that:

> *"Any dispute arising between the parties hereto under this Agreement shall be referred by the parties for arbitration by one arbitrator to be appointed in accordance with the ArbitrationAct. In case of disagreement on the appointment of the arbitrator, the arbitrator shall be appointed by the Chairman of the Chartered Institute of Arbitrators, Kenyan Branch. The decision of the arbitrator shall be final and conclusive",*

the parties having disagreed on the appointment of an arbitrator, the Chairman of the Chartered Institute of Arbitrators appointed Njeri Kariuki (Mrs) BA, LLB, FCIArb, to be the sole arbitrator to determine the issues in dispute between the claimant and the respondent arising out of the said agreement.

The claimant and the respondent agreed with the arbitrator on the terms that the arbitrator was required to conduct the arbitration proceedings. The arbitrator's terms of reference of the arbitration proceedings is contained in an agreement dated 22nd May 2007. After hearing the parties, the arbitrator published a final award on 6th February 2009. In the said final award, the arbitrator substantially found in favour of the claimant. She found that the claimant was entitled to one (1) million ordinary shares in the respondent company. She directed the respondent to release and deliver to the claimant a share certificate or share certificates in respect of the said one (1) million shares in the respondent company. She further directed the respondent to, *inter alia*, pay the claimant dividends in respect of the said shares from the year

2006 and the subsequent years thereafter. The claimant was awarded the costs of the arbitration.

On 16th March 2009, the claimant moved the court pursuant to the provisions of **Section 36** of the **Arbitration Act 1995** and **Rule 6** of the **Arbitration Rules 1997** seeking to be granted leave to enforce the final award that was made in his favour by the arbitrator. The application is supported by the annexed affidavit of the claimant. The application is opposed. The respondent did on 19th March 2009 filed an application pursuant to the provisions of **Section 35** of the **Arbitration Act** and **Rules 7** and **11** of the **Arbitration Rules** seeking the setting aside of the arbitral award made and published by the arbitrator on 6th February 2009. The grounds in support of the application are stated on the face of the application. The respondent contends that the agreement pursuant to which the arbitral tribunal was constituted and the arbitration was conducted was not valid under the Laws of Kenya. The respondent argued that the arbitrator took extra evidence after the closure of the hearing without the concurrence of the respondent and thereby undertook a procedure that had not been agreed by the parties or otherwise derogated from the cannons of natural justice and the provisions of the **Arbitration Act**. It was the respondent's further contention that the arbitrator's award was in conflict with the public policy of Kenya. The application is supported by the annexed affidavit of Peter Kulova Wanjala and Peter Mwendwa Malonza. The application is opposed. The claimant swore a replying affidavit in opposition to the application. In summary, the claimant argued that the respondent had not put forward a case that would entitle this court to set aside the arbitral award. The claimant stated that the parties had agreed that the decision of the arbitrator would be final and therefore by purporting to appeal to this court, the respondent was acting contrary to the agreement that gave the arbitrator jurisdiction to finally determine the dispute between the claimant and the respondent. The arbitrator, Njeri Kariuki also swore a replying affidavit in answer to some of the claims deponed to by the respondent in its application.

Mr. Regeru, counsel for the claimant and Mr. Mbigi, counsel for the respondent agreed by consent that both the claimant's application seeking the enforcement of the arbitral award and the respondent's application seeking the setting aside of the said arbitral award to be heard together. The court was required to subsequently deliver one ruling in respect of both applications. This decision was informed by the fact that in the event that the court will set aside the arbitrator's award, there will be no award for the claimant to enforce. If the court reaches a decision that the respondent's application seeking the setting aside the arbitrator's award has no merit, it naturally follows that the claimant's application seeking the enforcement of the arbitrator's award will be granted. The said counsel further agreed to file written submissions in support of their clients' respective opposing positions. The said submissions were duly filed. They also filed lists of authorities that they relied on in their submissions.

The parties were allowed by the court to highlight their written submissions. Over the course of several days, this court heard oral submissions made by Mr. Nowrojee on behalf of the respondent and by Mr. Regeru on behalf of the claimant. Mr. Nowrojee submitted that the agreement dated 31st March 2004 that formed the basis of the arbitrator's award was invalid since it was not properly executed in accordance with the Article 41 of the respondent company's Articles of Association that requires any instrument signed on behalf of the company to be sealed with the seal of the company in the presence of at least one director and the secretary of the company or such other persons as the directors may appoint for the purpose. He explained that the particular agreement was signed by the claimant and a director of the respondent in the presence of one Floric Nyawira, who was neither a director nor a secretary of the respondent's company. There was dispute whether Floric Nyawira was a personal assistant to the claimant or the personal assistant of the chair of the board, Mrs. Beth Mungai.

It was Mr. Nowrojee's submissions that since the said agreement was not executed and witnessed in accordance with the **Articles** that constituted the respondent's company, it was not valid and therefore could not be enforced. He further submitted that the arbitrator failed to appreciate the fact that an instrument that was not properly executed could not be validated by the argument that it was the manner in which the respondent used to execute its instruments. He submitted that the arbitrator fell in error when she upheld an agreement that was obviously illegally executed on the grounds that the respondent's directors conducted their business in a *"Kienyeji"* manner. He reiterated that it was the duty of the claimant as the then managing director of the respondent to ensure that the agreement was executed in accordance with the Memorandum and Articles of Association of the respondent's company. It was the respondent's contention that the arbitrator could not in the circumstances have upheld an illegal agreement by making the award in favour of the claimant. Mr. Nowrojee further submitted that the share purchase agreement was entered into in circumstances by which there was no specific resolution of the respondent company authorizing the transaction. It is the respondent's case that the share purchase agreement was entered into without the authority of the directors of the respondent company. Mr. Nowrojee explained that the failure by the claimant to abide by the requirements of the memorandum and articles of association of the respondent's company precluded the claimant from laying claim on the basis of such an illegal agreement. He submitted that the issue regarding the validity of the agreement was raised before the arbitrator and is a live issue for this court to consider when determining whether or not to set aside the arbitral award.

It was the respondent's case that the arbitrator reached her decision after she had derogated from the procedure that had been agreed between the parties prior to the hearing of the dispute by the arbitral tribunal. In particular, it was submitted on behalf of the respondent that the

arbitrator has sought legal advice without first obtaining the opinion of the parties to the arbitration. The respondent was aggrieved that the arbitrator had relied on the opinion of Mr. Vohra in regard to the conduct of affairs of the company without first seeking the views of the parties before reaching the final determination of the dispute. Mr. Nowrojee explained that this was contrary to **Clause 12** of the Arbitrator's terms of reference that was agreed between the parties prior to the hearing of the dispute by arbitration. He submitted that by reaching a determination on a crucial issue that was in dispute on the basis of legal advice that was not tested by the parties, the arbitrator had acted contrary to **Section 19** of the **Arbitration Act** that requires the arbitrator to treat with equality parties appearing before her. He further submitted that the arbitrator had acted contrary to **Section 20(1)** of the **Arbitration Act** which mandates an arbitrator to conduct proceedings before her in the manner agreed to by the parties to the arbitration.

Mr. Nowrojee further submitted that the arbitrator had put undue weight to the legal advice that she obtained from Mr. Vohra and thereby ignored the evidence that had been adduced on behalf of the respondent by Livingstone Registrars, the respondent company's secretaries. He argued that the arbitrator acted contrary to the principles of natural justice that requires parties to be given a hearing before they are condemned. It was his view that the legal advice given to the arbitrator by Mr. Vohra constituted expert evidence which ought to have been tested by the parties being given an opportunity to give their comments before the arbitrator relied on it to reach the determination that she did. He further submitted that the arbitrator made the award in conflict with the public policy of Kenya. In particular, the respondent was aggrieved that the arbitrator had made the award on the basis of a claim that should not have been entertained in the first place. It was the respondent's case that the arbitrator ought not to have considered the claimant's claim that he was a shareholder of the respondent's company before confirming that indeed the claimant had been allotted shares and his name entered as a shareholder in the company's register of shareholders. Mr. Nowrojee submitted that the allotment of shares made to the claimant was cancelled before the same was entered in the company's register of shareholders.

It was the respondent's case that since the claimant had not been registered as a shareholder of the respondent's company, he had no *locus standi* to claim anything in the assumed capacity of a shareholder. He reiterated that the arbitrator fell in error when she failed to first determine whether indeed the shares that the claimant claimed were allotted to him were infact so allotted to entitle the arbitrator reach the finding that she did. He further explained that pursuant to Clause 4 of the Share Purchase Agreement, once an employee of the respondent company cease to be so employed, the shares would be sold if the allotment of the shares were proper and paid for. It was Mr. Nowrojee's submissions that the claimant was not entitled to lay a claim for the shares once he left employment of the respondent company but was only entitled to be paid cash in lieu of shares. It was the respondent's case that once an employee ceased to be employed by the respondent company, he could not be considered as a shareholder.

Mr. Nowrojee submitted that taking into consideration the errors that were evident in the award that was made by the arbitrator, especially where the arbitrator had made an obvious and wrong interpretation of the law, this court was entitled to set aside the award under the principles laid down in the case **Rashid Moledina & Co. Limited vs Hoima Ginners Limited [1967] EA 645**. He explained that the arbitrator failed to appreciate the fact that the claimant had not fully paid for the shares that he was claiming and was not therefore entitled to be awarded the shares. He reiterated that the arbitral award ought to be set aside because the conclusion that was reached was not justified taking into account the entire facts and the circumstances of the case. In particular, it was the respondent's contention that the arbitrator ought not to have proceeded and considered the dispute on the basis that the claimant was a shareholder of the respondent company.

Mr. Nowrojee submitted that the respondent was relying on the provisions of **Sections 35(2)(a)(ii), 35(2)(a)(v)** and **35(2)(b)(ii)** of the **Arbitration Act** in its quest to have the arbitrator's award set aside. In particular, Mr. Nowrojee submitted that the arbitrator's award ought to be set aside because it was made on the basis of an agreement that was not validly executed. He reiterated that the procedure adopted by the arbitrator in considering Mr. Vohra's evidence was contrary to the arbitrator's terms of reference that was agreed prior to the hearing of the dispute by arbitration. He explained that the arbitrator acted contrary to the dictates of natural justice by considering evidence which the parties did not have an opportunity to render their comments. He finally submitted that for all the reasons submitted above, the award was made contrary to the public policy of Kenya. Mr. Nowrojee urged the court to set aside the award and dismiss the claimant's application seeking the adoption of the arbitral award as the judgment of the court. He further prayed for the respondent to be awarded costs of both applications.

Mr. Regeru for the claimant opposed the respondent's application seeking the setting aside of the arbitrator's award. He submitted that the respondent's application was misconceived and devoid of merit. It was the respondent's case that the respondent's application was in actual fact an appeal disguised as an application to set aside the arbitral award. Mr. Regeru explained that the parties had prior to the arbitration, agreed that the arbitrator's award, upon being made will be final and will determine the dispute between the claimant and the respondent. As regard the claim by the respondent that the share purchase agreement was invalid, Mr. Regeru submitted that the respondent initially wanted to raise the issue regarding the validity of the agreement as a jurisdictional question before the arbitrator but chose to adduce evidence to establish whether or not the said agreement was indeed invalid. Mr. Regeru explained that the evidence that was adduced established beyond

any doubt that the agreement was valid. In particular, he submitted that the board of directors of the respondent company had passed a valid resolution authorizing the respondent company to sell the one (1) million ordinary shares to the claimant. He stated that the respondent company needed to recapitalize its share capital and the directors had resolved to sell some of the shares to its employees. Among the employees who benefited from the share allotment was the chairman of the board of directors who was allotted shares through her company known as Bermuda Holdings Limited. He submitted that at the time the claimant was recruited to join the respondent's company as the managing director, he was induced by being promised that he would be a beneficiary of the share allotment scheme.

It was the claimant's case that the share purchase agreement between the respondent company and the claimant was not the only one that was prepared at the time. Mr. Regeru submitted that several employees benefited from the share purchase scheme. All the share purchase agreements were prepared by Mr. Kamaara advocate who testified during the hearing of the dispute by the arbitrator. He stated that Mr. Kamaara confirmed that the share purchase agreement was prepared on instructions of the chair of the board of directors of the respondent company and not at the instance of the claimant. It was the claimant's case that Floric Nyawira, was a personal assistant to the chair of the board and was duly authorized by the board of directors to be a signatory to the said share purchase agreement. He submitted that the chair of the board had exclusive possession of the common seal of the company and therefore no instrument of the company could be sealed without her say so.

Mr. Regeru reiterated that the arbitrator assessed the evidence adduced by the said Floric Nyawira and reached the decision that she was not a credible witness. He submitted that the court did not have jurisdiction to overturn a decision which was reached after the arbitrator had considered the facts and the evidence that was placed before her. It was the claimant's case that the arbitrator had properly evaluated the evidence that was placed before her before she reached the decision that the agreement was indeed properly executed. He urged the court to take into consideration the fact that the arbitrator had properly made the inference that if the respondent was indeed serious that the said agreement was invalid, it should have called the chair of the board who was a signatory to the agreement to shed some light in regard to its alleged invalidity. Mr. Regeru submitted that the arbitrator had properly made the finding that the affairs of the respondent company were conducted in a "Kienyeji" manner by virtue of the fact that the chair of the board was the majority shareholder of the respondent company and therefore the alter ego of the company.

It was the claimant's case that the respondent had no basis in alleging that the share purchase agreement was not valid by virtue of the fact that it was not executed in accordance with Article 41 of the Articles of the Association of the respondent company. Mr. Regeru submitted that the said agreement was properly executed in accordance with the said Article of Association of the respondent company that provided that the agreement could be sealed in the presence of at least one director and of the secretary "*or such other persons as the directors may appoint for the purpose.*" In the circumstances therefore, Floric Nyawira having been designated by the directors to witness the sealing of the instrument of share purchase, it could not be said that the agreement was invalid. Mr. Regeru further submitted that the respondent should not be allowed to use the fact of irregularities committed by the respondent itself to invalidate the agreement.

It was the claimant's further submission that there was no basis upon which the respondent could claim that the shares were not properly and legally allotted to the claimant pursuant to the said share purchase agreement. This is because the claimant had paid for the said shares when the sum of Kshs.200,000/- per month was deducted from his salary. The claimant rhetorically asked the question why the respondent never bothered to refund the amount that was deducted from the claimant's salary if it is of the view that the share purchase agreement was invalid. He urged the court not to disturb the finding reached by the arbitrator in that regard when she found that indeed the respondent company had the intention to sell the shares to the claimant and had in fact put in motion the process which validated the sale of the said shares to the claimant. He submitted that the arbitrator correctly reached the finding that the respondent could not use failures in its internal management procedures to invalidate the agreement.

As regard the alleged legal advice that the arbitrator sought from Mr. Vohra, Mr. Regeru submitted that the arbitrator sought advice from Mr. Vohra was in regard to the companies secretarial practice and not a legal opinion. He reiterated that there was no legal requirement for the arbitrator to seek the opinion of the parties to the arbitration before he sought advice from Mr. Vohra. It was the claimant's case that the arbitrator had acted within her mandate in accordance with the arbitrator's terms of reference. Mr. Regeru was of the view that the advice obtained by the arbitrator was not in the nature of evidence and only related to company secretarial matters. He submitted that it was not therefore correct for the respondent to claim that the arbitrator had breached the rules of natural justice when she sought the advice from Mr. Vohra.

In response to the respondent's assertion that the arbitrator had acted contrary to public policy of Kenya, Mr. Regeru submitted that the respondent had not proved that indeed the public policy of Kenya had been contravened when the arbitrator made her award. It was the claimant's case that the arbitrator had taken into account all the issues that were placed before her for determination by the parties herein. The claimant was of the opinion that the respondent had not satisfied any of the requirements of **Section 35** of the **Arbitration Act** to entitle this court set aside the arbitral award. He urged the court to put in mind the fact that the parties had agreed to have the dispute regarding the

share purchase agreement determined by arbitration. He submitted that the court should be slow to interfere with the arbitrator's award when the parties themselves had clearly made the conscious agreement that any dispute between them regarding the share purchase agreement would be finally determined when the arbitrator made her award. He urged the court to dismiss the respondent's application seeking to set aside the arbitral award and allow the claimant to enforce the said award as the judgment of the court. The claimant further prayed to be awarded costs of both applications.

This court has carefully read the pleadings filed by the parties herein in support of their respective opposing positions. This court has had the benefit of the submissions made by counsel for the respondent and counsel for the claimant. The court has also considered the decided cases cited by the parties herein in support of their clients' respective cases. There are generally two broad issues for determination by this court. The first issue is whether the respondent established a case to entitle this court set aside the arbitrator's award on the grounds set forth in the respondent's application. The second issue for determination is whether the court should grant the claimant's application seeking to enforce the award made in his favour by the arbitrator. This court will first deal with the first issue. Under **Section 10** of the **Arbitration Act 1995**, this court has no jurisdiction to intervene in any matter governed by the said **Act** except in circumstances provided in the **Act**. Under the **Arbitration Act**, the circumstances under which the court can intervene in a matter which has been referred for determination by arbitration is extremely limited. For instance, under **Section 39(1)** of the **Act**, the court can entertain an application to determine any question of law arising in the course of arbitration or hear an appeal made by a party in regard to any question of law arising out of the award if the parties to the arbitration agreement made such agreement. The other instance is under **Section 35(2)** of the **Act** which sets out the instances under which an arbitral award may be set aside. There are other instances when the court (the High Court) may be approached by a party to an arbitration agreement for interim measures of protection pending the hearing and determination of the arbitration. This is provided for under **Section 7** of the **Act**. Under **Section 6** of the **Act**, the court is required to stay proceedings if it is established that there exists an agreement by the parties to the suit to refer the dispute for determination by arbitration. **Sections 6** and **7** of the **Act** refer to instances when the court is called upon to assist the parties to facilitate the determination of the dispute by arbitration pursuant to the arbitration agreement. It is clear from the foregoing that unless a party establish to the satisfaction of the court that his case falls within the parametres that grants this court jurisdiction to intervene in a dispute in regard to which the parties have agreed to refer the dispute for determination by arbitration, this court will have no option but to decline to interfere with arbitral proceedings or the award that emanates from it. That courts should be reluctant to intervene in arbitral proceedings and the award made pursuant to such proceedings was decided by courts as far back as 1967 when Duffus JA observed at page 650 in **Rashid Moledina vs Hoima Ginners [1967] EA 645**:

> *"Generally speaking the courts will be slow to interfere with the award in an arbitration having regard to the fact that the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision, but the courts will do so whenever this becomes necessary in the interests of justice, and will act if it is shown, as it is alleged in this case, that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the law".*

Deverell JA in **Epco Builders Limited vs Adam S. Marjan Arbitrator & Anor CA Civil Appeal No.248 of 2005** *(unreported)* emphasized the need of the courts to encourage alternative dispute resolution mechanism so as to reduce the pressure that has resulted from the ever increasing number of litigants seeking redress through the courts. He deprecated the practice that had emerged in which litigants wishing to delay the hearing and the determination of a dispute by arbitration pursuant to an arbitration agreement resorts to court process. He observed at page 4 of his ruling that:

> *"If it were allowed to become common practice for parties dissatisfied with the procedure adopted by arbitrator(s) to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts."*

In the present application, the agreement that is the subject of the dispute is dated 31st March 2004. This agreement, although its validity has been disputed by the respondent, provided under clause 9 thereof that any dispute regarding the sale of said shares shall be referred for determination by arbitration. The said clause provided that *"the decision of the arbitrator shall be final and conclusive."* Under the principle of separability of the arbitration clause in an agreement, even where the validity of the entire agreement is being challenged by one of the parties to the agreement, the arbitral tribunal will have jurisdiction to determine whether it has jurisdiction to hear and determine whether or not the agreement that forms the basis of the dispute that has been referred to arbitration is valid. This principle is legally provided under **Section 17(1)** of the **Arbitration Act** which provides that:

> *"The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose-*
>
> *(a)an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of*

the contract; and

(b)a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause."

The arbitration agreement did not make a provision for any aggrieved party to appeal against the decision of the arbitrator to the court either on questions of law as envisaged under **Section 39** of the **Arbitration Act** or on questions of fact. The arbitration agreement specifically provided that the decision made by the arbitrator in her award shall be final and conclusive. The only recourse for any party who is aggrieved by the arbitrator's award is to make an appropriate application under **Section 35(2)** of the **Arbitration Act** for the setting aside of the said award.

The respondent has sought to set aside the arbitral award pursuant to the provisions of **Sections 35(2)(a)(ii), 35(2)(a)(v)** and **35(2)(b)(ii)** of the **Arbitration Act. Section 35(2)(a)(ii)** of the **Act** provides that an arbitral award may be set aside if:

> *"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;"*

It was the respondent's case that the agreement, the basis upon which the claimant relied on in seeking to lay claim that he had purchased the respondent's ordinary shares was invalid. According to the respondent, the said agreement was entered into without the authority of the board of directors of the respondent. The respondent further argued that even if the court were to find that the board of directors of the respondent had authorized the sale of the shares, the agreement itself was not executed in accordance with Article 41 of the respondent's Articles of Association. On his part, the claimant was of the view that the issue regarding the validity or otherwise of the agreement had exhaustively been considered by the arbitrator after taking into consideration the evidence that was adduced by the witnesses of the parties to the dispute. According to the claimant, the respondent was in actual fact appealing to this court against the said decision by the arbitrator.

Having evaluated the issue in dispute in regard to whether or not the said agreement was valid, this court is of the considered opinion that the issue is one of fact rather than law. The arbitrator evaluated the evidence that was adduced by the parties herein. She reached the determination that the board of directors of the respondent had approved the sale of its ordinary shares to its employees who included the claimant and the chair of the board of the respondent. This court cannot re-evaluate the evidence adduced before the arbitrator with a view to determining whether or not she reached the correct finding. If this court embarks on such an exercise it would be sitting on appeal against the decision of the arbitrator. As stated earlier in this ruling, the arbitration agreement was specific: it provided that the decision of the arbitrator shall be final and conclusive. It did not anticipate a situation where an aggrieved party would appeal against the said decision of the arbitrator.

In this regard, I am in agreement with the submission made on behalf of the claimant that the respondent was in fact appealing to this court from the decision of the arbitrator under the guise that the arbitrator had failed to consider the case put forward by the respondent that the agreement upon which the claimant based his case was invalid. Even if this court were to reach determination that the issue regarding the validity of the agreement is a question of law rather than a question of fact, under **Section 17** of the **Arbitration Act**, the arbitrator had jurisdiction to consider the issue. The respondent was required to ventilate the issue regarding the validity of the agreement before the arbitrator. This is in fact what the respondent did resulting in the award that was made by the arbitrator. This court lacks jurisdiction in the circumstances to reconsider the question regarding the validity or otherwise the agreement. The respondent took issue with the fact that the arbitrator had failed to consider its contention that the claimant was not a shareholder of the company and therefore could not lodge a claim in such capacity. Again, this court is of the view that the issue is a question of fact and not a question of law. The claimant and the respondent adduced evidence before the arbitrator with a view to establish whether or not the claimant was a shareholder. That issue was exhaustively addressed by the arbitrator in her final award. This court has no jurisdiction to delve into the question under **Section 35(2)(a)(ii)** of the **Arbitration Act**. To do so would be hearing an appeal against the decision of the arbitrator. That ground fails.

The second ground that the respondent sought to set aside the arbitrator's award is predicated on the provisions of **Section 35(2)(a)(v).** That section provides that the arbitral award may be set aside if:

> *"the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless the agreement was in conflict with a provision of this act from which the parties cannot derogate; or failing in such agreement, was not in accordance with this Act;"*

According to the respondent, prior to the hearing of the dispute by the arbitrator the parties have entered into an agreement where in they had set out the arbitrator's terms of reference in regard to the hearing and determining the dispute. The respondent was particularly aggrieved that the arbitrator had sought legal advice from one Mr. Vohra without consulting the parties contrary to clause 12 of the said agreement. The respondent was of the opinion that the arbitrator had considered the legal advice of Mr. Vohra and thereby reached a determination against the respondent without giving the respondent an opportunity to be heard. The claimant was of the view that the advice that the respondent sought was not legal advice but related to certain company secretarial services.

Having evaluated the rival arguments made in this regard, it was clear to the court that the advice sought by the arbitrator from Mr. Vohra

could not be considered as legal advice. The arbitrator took a dim view of the evidence that was adduced by Winnie Jumba, the respondent's witness representing Livingstone Associates, the respondent company's secretaries. She formed the opinion that the respondent company's records which were produced in evidence were prepared months or even years after the fact on the basis of information given by the respondent. She reached the conclusion that the respondent managed its affairs in a "Kienyeji" manner and therefore it could not impeach its own documents for failure to abide by their own internal management rules and regulations. She was of the view that the respondent company was not managed in accordance with the acceptable corporate governance principles. She observed that according to the advice she was given by Mr. Vohra companies, such as the respondent, which were not properly managed in accordance with the requirements of the law, usually sought professional advice after they had run into trouble with regulators or potential purchasers.

Was the advice given to the arbitrator by Mr. Vohra of such significance that it completely prejudiced the respondent's case? I do not think so. Taking into consideration the entirety of the award published by the arbitrator, it was clear to the court that the advice taken by the arbitrator from Mr. Vohra was not a determinant factor in the decision that was finally reached by the arbitrator. The respondent's right to natural justice was not breached by the arbitrator's decision to seek advice from Mr. Vohra. This court holds that the arbitrator was within her mandate when she sought advice from the said Mr. Vohra regarding how companies ought to conduct their secretarial affairs. Again, this court is of the view that the issue regarding whether or not the arbitrator should have sought the advice of Mr. Vohra is a question of fact and not a question of law. Were the arbitrator to completely disregard the advice that she received from Mr. Vohra, it could not change the fact that the arbitrator had reached a determination that the respondent had agreed to sell its ordinary shares to the claimant and the fact that the respondent had paid for the shares in performance of the agreement. It would further not alter the fact that it was the chair of the respondent who gave instructions for the preparation of the agreements for the sale of shares of the respondent company to some of its employees including the chair of the board herself. This court could have considered the issue if the parties had agreed in the arbitration agreement to open the arbitrator's award for challenge before the High Court on appeal as provided under **Section 39** of the **Arbitration Act**. I therefore hold that the respondent failed to establish that the arbitrator acted contrary to the arbitrator's terms of reference to entitle the court set aside the award pursuant to the provisions of **Section 35(2)(a)(v)** of the **Arbitration Act**. That ground similarly fails.

The respondent submitted that the arbitrator's award contravened the public policy of Kenya in that she took into account evidence that she had procured by herself without giving the parties an opportunity to interrogate such evidence. It is the respondent's case that the arbitrator made the award in breach of natural justice when she reached a determination on an issue without involving the parties to the arbitral proceedings. The respondent was of the view that the arbitrator fell in error when she relied on the evidence of a witness (Mr. Vohra) who the respondent did not have opportunity to cross-examine. The claimant was of the contrary view. He was of the opinion that the advice that the arbitrator sought from Mr. Vohra could not be considered as evidence which was required to elicit comments from the parties. The claimant reiterated that the arbitrator had not acted contrary to the public policy of Kenya when she made the award in his favour.

This court is aware of the decision made by Ringera J (as he then was) in **Christ For All Nations vs Apollo Insurance Co. Limited [2002] 2 EA 366** in which he attempted to define what constitutes public policy. I am in agreement with the learned judge that in general an act that is deemed to be contrary to public policy is an act that is contrary to the written Laws of the country and is inimical to the national interest of Kenya and is further, contrary to justice and morality. Can the decision made by the arbitrator to seek advice from Mr. Vohra in regard to an issue that was not germane to the issues in dispute be considered to be contrary to the public policy in Kenya as envisaged under **Section 35(2)(b)(ii)** of the **Arbitration Act**? I do not think so. As earlier stated in this ruling, the advice taken by the arbitrator from Mr. Vohra was within her mandate as the arbitrator. Further, the advice obtained did not significantly influence the decision that the arbitrator eventually made in the award. That ground too fails because it was not established to the required standard of the law.

Taking into consideration the totality of the issues raised by the respondent in its bid to set aside the arbitrator's award, it was clear to the court that the respondent was essentially seeking a second opinion from this court in regard to the award that was made. In law, a second opinion can only be rendered when this court has been given mandate by the parties to hear an appeal emanating from the arbitrator's decision. When parties enter into an arbitration agreement, they have essentially agreed that they will have autonomy in regard to how any dispute arising out of the agreement shall be determined. That autonomy excludes intervention by the court unless under the specific circumstances provided under the **Arbitration Act.** The **Arbitration Act** does not envisage that the court will be clothed with the jurisdiction to review in minute detail the arbitral award with a view to reaching a determination whether or not the award should be set aside. It is the duty of the court in so far as it is possible to facilitate the wishes of the parties who have chosen an alternative dispute resolution mechanism other than through the ordinary court process. In the present case, it was clear that the parties had the intention to have any dispute arising out of the share purchase agreement determined with finality and conclusively by the arbitrator when she rendered her award. As stated earlier in this ruling, the issues raised by the respondent in the application seeking to set aside the arbitrator's award are not of such legal significance as to persuade this court to set aside the arbitral award.

It is clear from the foregoing that the respondent's application dated 18th March 2009 lacks merit and is hereby dismissed with costs to the

claimant. The claimant's application dated 16th March 2009 seeking the leave of the court to enforce the final award made by the arbitrator is hereby allowed. The claimant is granted leave to enforce the final award made by Mrs. Njeri Kariuki, sole arbitrator on 6th February 2009 as judgment of the court. The claimant shall have the costs of the said application.

DATED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2010

L. KIMARU
JUDGE