



Exquisite Services Limited v Mwakuzimu & 4 others (Environment and Land Case 104 of 2021) [2025] KEELC 5818 (KLR) (28 May 2025) (Ruling)

Neutral citation: [2025] KEELC 5818 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE 104 OF 2021
LL NAIKUNI, J
MAY 28, 2025**

BETWEEN

EXQUISITE SERVICES LIMITED PLAINTIFF

AND

MWASHIME ALI MWAKUZIMU 1ST DEFENDANT

SALIMU SAIDI RACHITU 2ND DEFENDANT

WYCLIFFE GAGAI MADAGA 3RD DEFENDANT

OKANGA & CO ADVOCATES 4TH DEFENDANT

**MOGAKA, OMWENGA & MABEYA & COMPANY ADVOCATES 5TH
DEFENDANT**

RULING

I. Introduction

1. The Honourable Court is tasked with the determination of twin applications dated 6th September 2024 and 27th March 2025 respectively both filed by the Exquisite Services Limited - Plaintiff/Applicant herein.
2. The court will deal with both applications simultaneously though separately for clarity sake.

II. The Notice of Motion Application dated 6th September, 2024 by the Plaintiff/Applicant.

3. The application is made under the provisions of Section 35 of the *Arbitration Act*, Sections 1A, 1B, 3A and 3B of the *Civil Procedure Act*, Cap, 21 and Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.



- b. That this Honourable Court be pleased to set aside the arbitral award dated 11th June 2024
 - c. That the costs be provided for.
4. The application was premised on the grounds, testimonial facts and averments made out under the 34 Paragraphed Supporting Affidavit of – Hon. Amb. Chirau Ali Makwere, the director. The affidavit herein was sworn and dated 6th September 2024. The Applicant averred that:
- a. The Plaintiff/Applicant filed the instant suit but it was referred to arbitration as provided for in one of the clauses of the sale agreement dated 1st October 2011.
 - b. The Plaintiff/Applicant formerly appointed Messrs. Swanya & Co. Advocates to come on record on its behalf and which they did through the notice of change of advocate dated 24th May 2023 and which was acknowledged by the arbitrator through an email dated 8th September 2023.
 - c. The Arbitrator then published the award on 11th June 2024 allowing the claim against 1st 2nd and 3rd Defendants, dismissing the claim against the 4th Respondents and completely failed to mention or address the 5th Respondent.
 - d. The Plaintiff/Applicant being dissatisfied with the decisions there was bias on the part of the arbitrator on how the proceedings were handled.
 - e. Before the award was published, the Plaintiff/Applicant filed and served an application dated 4th April, 2024 before the Arbitrator seeking to arrest the ruling and to re – open the case to allow the Plaintiff/Applicant’s Managing Director who was its star witness to testify and to further allow the Plaintiff/Applicant to produce or adduce evidence.
 - f. Prior to the award being published, the Plaintiff/Applicant’s new advocate had further sought for directions, proceedings and records vide a letter dated 5th September 2023 and a similar prayer in the application dated 4th April, 2024. The Arbitrator either ignored to share the proceedings.
 - g. Before the award was made the Plaintiff/Applicant had raised an objection over the consent purportedly signed on its behalf by one of Stephen N. Gikera who was clearly conflicted in the subject matter being a non-executive director of the Plaintiff/Applicant and a partner at the Law firm of Messrs. Gikera & Vadgama Advocates initially on record for the Plaintiff/Applicant.
 - h. The consent which the award was premised on had been signed by Stephen N. Gikera on the part of Gikera & Vadgama Advocates acting on behalf of the Plaintiff/Applicant without any valid instructions from the Plaintiff/Applicant.
 - i. The 3rd Defendant/Respondent who allegedly owned the property jointly never signed the purported consent which was filed at the arbitral tribunal on 14th June 2022.
 - j. The impugned consent was never signed by all the parties to the sale agreement specifically the 3rd Defendant/Respondent yet the arbitrator went ahead to make a decision against the 1st to 3rd Defendants/Respondents basing on the said consent.
 - k. Mr. Stephen N. Gikera purported to give evidence on the subject matter before the Arbitrator without any authorisation from the company’s board of directors or board resolutions which amounted to misrepresentation.



- l. The Arbitral tribunal deliberately either by design or omission ensured that the company's managing director who was expected to give a primary evidence did not get a chance to testify or adduce his evidence and giving him a fair hearing thus demonstrating bias.
- m. Despite having been aware of the above application dated 4th April, 2024, the Arbitrator proceeded to issue a decision/ an award majorly relying on the contents of the impugned consent, ignoring probative evidence in the application.
- n. The Plaintiff/Applicant is also dissatisfied with the decision because there were fraudulent acts on the part of their previous advocate representing the Plaintiff/Applicant probably in collusion with the 4th Defendant/Respondent.
- o. There was evidence presented before the Law Society of Kenya's Advocates Disciplinary Tribunal that showed the 5th Defendant had received a sum of a sum of Kenya Shillings Two Hundred Thousand [Kshs. 200,000/=] withdrawn from and forming part of the purchase price deposit made by the Plaintiff/Applicant.
- p. The above conduct by the Arbitrator amounted to a violation of fundamental rules of natural justice, including the right to be a fair hearing as well as gross violation of Article 159 [3] of *the Constitution* of Kenya and Section 19 of the *Arbitration Act*.
- q. There was a pre – mediated plan hatched by the said Advocate in collusion with the other Defendants to deprive the Plaintiff of the purchase deposit without any future possibility of recovering the same.
- r. The Plaintiff/Applicant maintains that the award never effectually settled the Plaintiffs/Applicants claim which was against the five Defendants and hence the prayer to have the application allowed.
- s. The Plaintiff/Applicant had and continued to suffer financial/economic loss arising from the failed sale transaction constituting the subject matter of this dispute and as such it was in the interest of justice that this application was allowed.

III. The responses by the Respondents

5. The Respondents opposed the Notice of motion application dated 6th September 2024 through four affidavits the first being a 17 paragraphed affidavit sworn by Salimu Saidi Rachitu the 2nd Respondent. It was averred as follows that:-
 - a. They had entered into an agreement for sale of land dated 1st October 2011 with the Plaintiff/Applicant where they were represented by the 4th Respondent firm.
 - b. The agreement was made together with the 2nd and 3rd Respondents though the 3rd Respondent was not known to him and was introduced by the 4th Respondent to him.
 - c. The deponent stated that he was aware the Applicant had made a deposit of a sum of Kenya Shillings Eight Million [Kshs. 8,000,000/-] through the 4th Respondent firm.
 - d. After a year the vendors were unable to give vacant possession of the suit property and thus the Applicant opted to rescind the agreement and filed suit before court for refund. The matter was then referred to arbitration.
 - e. The 4th Respondent advocate then approached the deponent and asked him to sign a consent which he obliged. That he was later informed that the arbitrator had used the consent to make



an award for refund of a sum of Kenya Shillings Eight Million [Kshs. 8, 000, 000/=] to the Applicant.

- f. The deponent states that he signed the consent without fully understanding its details and thus the application to have the same set aside should be allowed as he was not able to repay the sum of Kenya Shillings Eight Million [Kshs. 8, 000, 000/=] as he never received the same.
6. The 1st Respondent's affidavit in response to the application is dated 18th November 2024. The 1st Respondent Mwashime Ali Mwakuzimu reiterated the averments raised by the 2nd Respondent. He averred that he also supported the application as he had not received the alleged payment of the sum of Kenya Shillings Eight Million [Kshs. 8, 000, 000/=] and was in no position to refund the same.
 7. The application was further responded to by a 33 Paragraphed Replying Affidavit sworn by Stephen Njoroge Gikera a director of the Plaintiff/Applicant company and the chairman of the partnership board at Messrs. Gikera & Vadgama Advocates. The same was sworn on 6th November 2024. The deponent averred as follows that: -
 - a. His firm represented Hon Makwere in the present case and HCCC No 171 of 2015 between China Road & Bridge Cooperation and Econite Limited.
 - b. Despite the court making adverse findings against the deponent in the latter suit, he had filed for perjury against Hon Makwere and which case was still pending.
 - c. The deponent stated that he was approached by Hon Makwere sometime in the year 2011 and asked to become a director of the Applicant company which was in the process of acquiring the suit property Kwale/Diani Beach Block/108.
 - d. He took up the directorship and followed closely on the acquisition of the suit property with the 5th Defendant who were representing the applicant by then. That unfortunately the 1st to 3rd defendants who were selling the property failed to complete the sale and as a result the Applicant instructed the deponents firm to seek a refund of the Kshs 8 million that had already been paid as deposit.
 - e. The 4th Defendant was sued for failing to uphold an undertaking not to release the deposit to the 1st to 3rd Defendants.
 - f. In the pendency of the matter the 4th Defendant applied to have the matter referred to arbitration as per the contents of the sale agreement. The 5th Defendant on the other hand applied to have the suit against them dismissed for lack of cause of action.
 - g. Consequently, Hon. Justice Mukunya delivered a ruling referring the matter for arbitration. The deponents firm then wrote a letter to the Law Society of Kenya requesting for an arbitrator and Mr. Joseph Munyithya Advocate was appointed through a letter dated 3rd November 2014.
 - h. The arbitrator later resigned and the same was communicated to the Applicant. That Mr Erick Wafula Nyongesa was then appointed as an arbitrator to the matter. That the progress was always communicated to Hon. Makwere and he was thus aware of all that was transpiring at the arbitration process.
 - i. The matter was scheduled for hearing several times and at one time the 1st and 2nd Defendants admitted the claim and sought to have the property sold so as to make a refund of the deposit. That the matter was discussed and a consent entered into. That several mails were done to Hon Makwere informing him of the same.



- j. Vide an email dated 13th June 2022, the deponent received confirmation from one Ms. Batsigira authorising him to proceed and record the consent which he did. That Hon. Makwere facilitated his appearance before the arbitrator and covered his travel expenses. The matter did proceed.
 - k. The 1st and 2nd Defendants opted not to testify and closed their case. The 3rd and 4th Defendants did not attend the hearing and the arbitrator stated that their involvement would be discussed as a preliminary issue in the final award.
 - l. The deponent maintained that his Law firm handling the matter was transparent and there was open communication with his co-directors Hon. Makwere and Ms. Batsingira. That his reputation should not be tarnished but rather the applicant can simply challenge the award. The court was urged to expunge any paragraphs adversely mentioning the deponent and his firm and to find that he bears no fault.
8. The 4th Defendant responded to the application vide a 10 Paragraphed Replying Affidavit dated 30th September 2024 and sworn by Fredrick E. O. Okanga the proprietor of the 4th Defendant law firm. The deponent stated as follows:-
- a. The award by the arbitrator was proper and in the favour of the Plaintiff/Applicant and further the same should be adopted as a Judgement of the court and the matter to come to a conclusion.
 - b. The Plaintiff/Applicant should proceed to execute the Judgement in its favour in line with the Arbitral award.
 - c. Despite of the award being in favour of the Plaintiff, it was surprising that the Plaintiff was citing bias in the matter.
 - d. The parties to the Arbitration Agreement proceeded to record a consent in the matter and the same was adopted as an arbitral award. The Plaintiff/Applicant was represented at that time by the law firm of Messrs. Gikera & Vadgama Advocates and which proceeded to call witnesses in the Arbitration proceedings which ultimately was in favour of the Plaintiff/Applicant.
 - e. The Plaintiff had not raised any valid reasons why the arbitral award should be set aside and if anything the award was in his favour and whereby they were ably represented. Litigation must come to an end.
 - f. The court was urged to dismiss the application by the Applicant herein.

IV. Supplementary Affidavit by the Plaintiff/Applicant.

9. In response to the averments raised by the Respondents, the Applicant sought leave and filed a 20 Paragraphed Supplementary Affidavit sworn by Hon. Chirau Ali Makwere and dated on 24th January 2025. He averred as follows:-
- a. Stephen Njoroge Gikera was only a non-executive director with no shares in Exquisite Services Limited and was later removed as a director through board resolutions passed on 24th April 2023.
 - b. The said Stephen Njoroge Gikera never filed any appeal against the findings of the court in HCCC No 171 of 2015. His claim that he had filed an application for perjury was a confirmation that all along he had been holding a vendetta against the Deponent herein.



- c. Stephen Njoroge Gikera correctly confirmed at Paragraph 14 that the 4th Defendant/Respondent was sued for failing to uphold a professional undertaking nor to release the Kenya Shillings Eight Million [Kshs. 8, 000, 000/=] to the 1st, 2nd & 3rd Defendants/Respondents.
- d. Despite of Stephen Njoroge Gikera knowing the reasons why the Plaintiff/Applicant had sued the 4th Defendant/Respondent, he still went ahead to concede and/or mislead the Plaintiff/Applicant into conceding the application dated 10th June 2013 by the 4th Defendant/Respondent that was seeking to have the matter referred to arbitration.
- e. The application to refer the matter for Arbitration should not have been allowed as the issue had not ripened for arbitration because the parties [Sellers] to the agreement for sale of the land had no land to sell and all that was remaining was for the funds to be refunded to the Plaintiff/Applicant.
- f. Stephen Njoroge Gikera unprofessionally, deliberately and out of negligence allowed the matter to go to Arbitration knowing that the arbitral proceedings could lead to the exoneration of the 4th Defendant/Respondent from refunding the proceeds of the Plaintiff/Applicant guaranteed by the professional undertaking, particularly if the matter was eventually determined through arbitration as it was the case.
- g. The matter ought not to have gone to arbitration because the 4th & 5th Defendants/Respondents were lawyers who were never parties to the sale agreement.
- h. The email alleged to have come from Ms Rose Batsingira never constituted any valid instructions from the Plaintiff/Applicant as there was no company resolution to support the decision to have the consent dated 14th June 2022 adopted.
- i. Stephen Njoroge Gikera being a lawyer could not proceed to give evidence or represent a company in matters such as this one without authority by the board of directors supported by resolution of the board of directors.
- j. The Plaintiff/Applicant confirms having facilitated Stephen Njoroge Gikera to travel as its lawyer but not to give evidence.
- k. Mr. Gikera had not explained the reason he never summoned the Deponent to testify in the case.
- l. Mr. Gikera was conflicted and went contrary to the provision of the *Evidence Act*, Cap. 80 for appearing as the lawyer for the Plaintiff/Applicant and at the same time tendering evidence as a witness. He never acted in good faith.
- m. The applicant sought that the arbitral award was to be set aside as it was tainted by fraud, conflict of interests and misrepresentations and that the applicant be allowed to take appropriate recourse.

V. Supplementary Affidavit by the 4th Defendant/Respondent

10. In response to the averments raised by the 1st and 2nd Defendants/Respondents. The 4th Defendant filed a supplementary affidavit sworn on 20th January 2025. He averred as follows:-
 - a. He denied the allegation that he had approached the 1st and 2nd Defendants/Respondents to sign the consent.



- b. During the mention of the matter before the court, he had asked the applicants advocate to supply him with the contested consent which had by then been signed by the Plaintiffs then advocate and the two Defendants.
- c. It would be surprising for the said Defendants to sign the consent which they claim they did not understand.
- d. At Paragraphs numbers 13 and 14 of the final award, the intention of the parties to amicably settle the matter was discussed.
- e. The two Replying Affidavits were termed as being falsified.
- f. The deponent maintained the consent was signed without his undue influence to the said parties.

VI. The Notice of Motion application dated 23rd January 2025 by the Plaintiff/Applicant.

- 11. The second application by the Plaintiff is made pursuant to the provisions of Article 159 of *the Constitution* of Kenya 2010, Order 1 Rule 10 [2] of the Civil Procedure Rules 2010 and Sections 1A,1B and 3A of the *Civil Procedure Act*, Cap. 21 and all the enabling provisions of the law.
- 12. The Plaintiff/Applicant sought for the following prayers:-
 - a. Spent.
 - b. That the proposed 5th Defendant be enjoined as a Defendant in this suit
 - c. That this application be heard and/disposed of before the honourable court hears and determines the application dated 6th September 2024
 - d. That the costs of this application be provided for
- 13. The application was supported by an affidavit sworn by Hon Chirau Ali Makwere who averred as follows:-
 - a. When the suit was first instituted the proposed 5th Defendant had been enjoined by as a 5th Defendant.
 - b. The 5th Defendant acted for the Plaintiff/Applicant at that time when it got instructions from the Plaintiff/Applicant to remit a sum of Kenya Shillings Eight Million [Kshs. 8,000,000/-] to the 4th Defendant.
 - c. The instructions were based on a specific professional undertaking that had a clause not to release any of the funds until completion of the sale as provided for in the terms of the sale agreement signed by the parties.
 - d. The Plaintiff/Applicant later learnt that the 5th Defendant had been discharged from the proceedings but it was without the knowledge of the applicant.
 - e. The Applicant maintained that the joinder and participation of the proposed 5th Defendant in this proceedings was necessary because the said party received a total sum of Kenya Shillings Two Hundred Thousand [Kshs. 200,000/-] that formed part of the land purchase deposit which the Plaintiff/Applicant had paid to the 4th Defendants client account.



- f. The proposed 5th Defendant had not denied receiving the sum of Kenya Shillings Two Hundred Thousand [Kshs. 200,000/-] nor given explanation for what reasons the money was paid to them by the 4th Defendant.
- g. The Plaintiff/Applicant was pursuing the recovery of a sum of Kenya Shillings Eight Million [Kshs. 8,000,000/-] paid to the 4th Defendant to be held under professional undertaking but were illegally transferred to other parties including the proposed 5th Defendant.
- h. A complaint was still pending before the Law Society of Kenya Disciplinary tribunal over the 4th Defendants conduct.
- i. It was in the interest of justice that the application be allowed to facilitate effectual determination of issues pertaining to the unprocedural transfer of funds by the 4th Defendant to the proposed 5th Defendant.
- j. From the record, the application was not responded to by the rest of the parties save for the 5th Defendant vide a Replying Affidavit sworn by Peter Omwenga on 25th February 2025.
- k. The 5th defendant had filed an application to be struck off the proceedings and which application was allowed by consent.
- l. The matter was thereafter stayed pending the hearing and determination of the arbitration proceedings.
- m. Having been struck off the proceedings by consent, the issue of being joined in again as parties does not arise.
- n. The 5th Defendant firm had acted as advocates for the applicant and were not parties to the agreement. The allegation that they received a sum of Kenya Shillings Two Hundred Thousand [Kshs. 200,000/=] was denied and termed as a ruse to conflate the issues.
- o. Further that the cause of action against the 5th defendant was time barred and not maintainable. The court was urged to dismiss the application.

VII. Submissions

14. On 27th February 2025 while all the parties were present in Court, they were directed to have the two Notice of Motion applications dated 6th September 2024 and 27th March 2025 respectively be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved by Court accordingly.

A. The Written Submissions by the Plaintiffs/Applicants

15. The Plaintiff's submissions were filed before court by the Law firm of Messrs. Swanya & Company Advocates. The same are dated 19th November 2024. Mr. Naibei and Swanya Ogeto Advocate identified the following as issues for determination;
 - a. Whether this matter ought to have been referred to arbitration in the first place and as such whether it is capable of being effectually resolved by arbitration
 - b. Whether the arbitrator was biased in the manner he handled the proceedings
 - c. Whether there was fraudulent misrepresentations by the Defendants/Respondents



- d. Whether the award should be set aside for reasons that it is based on a consent which was not properly entered into and has since been denounced by the main parties
- e. Whether the counsel for the Plaintiff failed to disclose material facts to the arbitrator.
16. The court was referred to the provisions of Section 35 of the *Arbitration Act* on setting aside arbitral award. The Applicant further made reference to the holding in the case of “National Cereals Produce Board v Erad Suppliers & General Contracts Limited [2014] eKLR and in “Christ of All Nations v Apollo Insurance Company [2002] 2EA 366” on the threshold for setting aside an arbitral award which can only be done if the same was based on fraud, bribery, undue influence or corruption.
17. On the first issue for determination, the Learned Counsel submitted that the arbitral award dealt with a dispute not contemplated by or falling within the terms of the reference to arbitration. That some of the issues addressed by the arbitrator were beyond the scope of the arbitration and as such the decision failed to conclusively address the Plaintiff/Applicants grievances that formed the basis of the suit before this court. It was submitted that the reference of the matter to arbitration was therefore not proper as there were issues raised that could not be effectually resolved by the arbitrator.
18. On whether the arbitrator was biased. The Learned Counsel contended that the arbitrator demonstrated bias in the manner in which he handled the proceedings leading to the delivery of the award. That the arbitrator ignored formal communication request and an application to arrest the ruling made by the Applicant’s advocate. That the application was to allow the applicant managing director to testify. That a request was further made for copies of the directions, proceedings and records through a letter dated 5th September 2023 and in the application dated 4th April 2024.
19. That the arbitrator proceeded to make the award despite the said applications and letters and which action amounted to a violation of fundamental rules of natural justice including the right to be heard. That the arbitrator failed to make a determination over a sum of Kenya Shillings Two Million [Kshs. 2,000,000/-] held by the 4th Defendant and the sum of Kenya Shillings Two Hundred Thousand [Kshs. 200,000/-] paid to the 5th Defendant.
20. On the issue of fraudulent misrepresentation by the Defendants/Respondents. It was averred that the 1st and 2nd Defendants/Respondents had admitted to having signed the consent without knowledge of the contents. That also Mr Stephen Gikera had acted without proper instructions from the applicant. That the 3rd Defendant never signed the consent despite being a party and a joint owner of the suit property. It is also stated that Stephen Gikera failed to disclose that he was a partner at Messrs. Gikera & Vadgama Advocates who were then the Plaintiff/Applicants Advocate and hence hatched a scheme to mislead the arbitrator.
21. The Learned Counsel for the Applicant further submitted on the issue of setting aside the consent award and stated that the consent cannot be perfected due to the 1st and 2nd Defendants assertions that they had signed the consent without knowledge of what the same entailed. It was also submitted that the Plaintiff failed to disclose material facts to the arbitrator that there were pending disputes between him and the other directors which were ongoing in court and which were later decided upon. The applicant maintained that the award ought to be set aside for being invalid.

VIII. The Written Submissions by the Plaintiff the 3rd Director.

22. The submissions were filed by the Law firm of Messrs. Gikera & Vadgama Advocates in opposition to the application dated 6th September 2024. The following issues for determination were identified and discussed; -



- a. Whether the matter ought to have been referred to arbitration
 - b. Whether the arbitrator was biased in the manner he handled the proceedings
 - c. Whether there were fraudulent misrepresentations by the defendants/respondents
 - d. Whether the counsel for the plaintiff failed to disclose material facts to the arbitrator
 - e. Whether the award should be set aside for reasons that it was based on consent which was not properly entered into and has since been denounced by the main parties
23. On the first issue for determination. It was submitted that the matter was first referred to arbitration by the 4th Defendant. The same was informed by the sale agreement which had an arbitration clause. It was submitted that the 4th Defendant's inclusion in the claim never prevented the Plaintiff from pursuing other enforcement measures against the 4th and 5th Defendants for breach of the professional undertaking. That infact the Applicant had initiated disciplinary proceedings against the 4th Defendant at the advocates disciplinary tribunal.
 24. That the Applicant had not further identified any issues addressed by the arbitrator in the award. The court is urged to find that the suit was properly referred to arbitration.
 25. On the allegation of the bias by the arbitrators. It was asserted that the arbitrator exhibited no bias in the conduce of the matter. That the arbitrator provided all parties with an opportunity to present their case and proceed based on the proceedings submitted before him. The Plaintiff/Applicant was given an opportunity to prosecute his claim as the 3rd Director testified on behalf of the Applicant.
 26. Submitting on the alleged fraudulent misrepresentations by the Defendants/Respondents, it was stated that the applicants claim of fraud was unfounded based on the fact that Stephen Gikera was appointed as a director of the company by Hon Makwere. That the 3rd director did not however have any knowledge of how the Applicants met with the vendors and was only asked to step in when the sale stagnated. It was also submitted that the Applicant was all along made aware of how the matter was proceeding and it could not be said that he was not aware of the same.
 27. According to the 3rd Director, the issue of a consent arose when the 1st and 2nd Defendants filed a joint Defence and stated that they were willing to have the claim settled out of court. That the Applicant approved the consent thereafter. The 1st and 2nd Defendants could not therefore feign ignorance of the consent given that they had made an admission in their defence.
 28. On the proceedings in HCCC Case no 117 of 2015. It was submitted that Hon. Makwere had committed perjury by lying in the matter and there were perjury proceedings filed against him which he was found guilty of. It is submitted that the Plaintiff has exhibited being untruthful and the instant proceedings are meant to settle personal scores over what transpired in the perjury proceedings.
 29. On non-disclosure of material facts to the arbitrator. It was submitted that there was no misrepresentation of any facts to the arbitrator as it was earlier disclosed that there was a partnership between Hon. Makwere and Stephen Gikera. Also that the case before the Advocates Disciplinary tribunal was made aware to the arbitrator and so was the dispute in HCCC No 117 of 2015.
 30. On setting aside the arbitral award. It was submitted that the award was not subject to being set aside simply because the key parties had denounced the same. That the parties had voluntarily entered into the consent and the same after being adopted by the arbitrator should be treated as a preliminary award.



31. It was submitted that the Applicant had not laid sufficient ground for invalidation of the contract. Court was referred to the holding in the case of:- “Isaac Kamau Ndirangu v Commercial Bank of Africa [2002] eKLR” where it was held that a consent Judgement could only be set aside on the same grounds that would justify the setting aside a contract for example fraud, mistake or misrepresentation. That the allegations made by the Plaintiff and its two directors were unsubstantial and they had therefore failed to provide sufficient grounds to justify the setting aside of the final arbitral award based on the consent recorded between the Plaintiff and the 1st and 2nd Defendants.

IX. The Written Submissions by the 4th Defendants.

32. The 4th Defendants filed their written submissions dated 20th January 2025 through the Law firm of Messrs. Okanga & Co Advocates. Mr. Okanga Advocate commenced his submissions by stating that it was based majorly on one main issue which was whether the Plaintiff/Applicant had met the threshold of Section 35 of the *Arbitration Act*. On this, the court was referred to grounds 17 and 19 of the application where the Applicant alleged that there was a pre - meditated plan hatched by the 4th Defendant in collusion with other Defendants and one Stephen Gikera to deprive off the Applicant the purchase deposit of the suit property.
33. It was submitted that there was no proof of any plan hatched to defraud the Applicant as the final award was infact in favour of the said Applicant. The court was further referred to the averments made under the Replying Affidavit by Stephen Gikera particularly at paragraphs 25 and 26 where it was averred that Hon. Makwere had given the said party the nod to enter into the consent. Further that the other co-director Rose Batsigira had also vide the email dated 13th June 2022 given the go ahead for recording of the consent.
34. The court was urged to make a finding that no fraud as being alleged by the Plaintiff/Applicant. The court is further referred to the provisions of Section 35 of the *Arbitration Act* on the threshold for setting aside an arbitral award. That the Applicant did not come close to meeting the four grounds set and as such the same could not be allowed.

X. Analysis and Determination

35. Having considered all the pleadings by the Plaintiff/Applicant being the supporting affidavit to the two [2] Notice of Motion applications dated 6th September 2024 and 27th March 2025 respectively, the replies thereto and submissions thereof, the cited authorities the envision of *the Constitution* of Kenya 2010 and the relevant provisions of law.
36. For the Honourable Court to arrive at an informed, fair and reasonable decision, it has framed the following three [3] salient issues for its consideration. These are:-
- a. Whether the Notice of Motion applications dated 6th September, 2024 and 27th March, 2025 by the Plaintiff/Applicant herein has any merit whatsoever.
 - b. Whether the parties should entitled to the reliefs sought.
 - c. Who bears the costs of the applications?

ISSUE No. a]. Whether the Notice of Motion applications dated 6th September, 2024 and 27th March, 2025 by the Plaintiff/Applicant herein has any merit whatsoever.

37. Under this sub heading, the Honourable Court will be examining the main substratum of the matter raised from the filed applications. These are mainly, firstly, whether the Court should set aside the



Arbitral award granted by the Arbitration Tribunal on allegations of the it having been meted by fraud or misrepresentation. Secondly, whether it should grant leave to have a joinder of party in the proceedings.

38. The Law governing the setting aside Arbitral Awards was founded under the provisions of Section 35 of the Act sets out the grounds for setting aside of an award as follows: -

“ 35. An arbitral award may be set aside by the High Court only if—

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

39. In the course of establishing whether a case has been made out for setting aside of the arbitral award, this court is keen on not re-evaluating the evidence that was placed before the arbitrator as the same would amount to taking up the role of an appeal court but to simply confine myself to the threshold



for grant of the orders sought. I am guided by the holding in the case of:- “Geo Chem Middle East v Kenya Bureau of Standards [2020] eKLR”, where the Supreme Court of Kenya quoted with approval Ochieng J’s holding in the High Court that: -

“It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award ... if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal”.

40. Similarly, the laws on joinder of parties is founded on the provision of Order 1 Rules 10 [2] of the Civil Procedure Rules, 2010. The Rules provides as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

41. The Judgement of Justice Njoki Mwangi in the case of:- “Milimani Bankruptcy case of Eng. Austin Salmon Kitololo T/A Kitololo Consultants v Middle East Bank” on joinder of parties stated indepth as follows:-

16. Under this sub – title, the Honourable Court shall examine whether the Applicant should be joined as a party in the suit. It is instructive to note that before a party is enjoined in a matter, the court ought to satisfy itself that the proceedings are alive. That means that the suit must still be pending before the Court. Therefore, the applicant must move the Court during the pendency of the proceedings in that matter. Again, besides the proceedings being pending there should be not bar to them going on, so much so that if there are orders staying the proceedings then the party cannot move the Court since the proceedings are ‘frozen’ until the orders are lifted, vacated or set aside.

17. For the proposition that the proceedings must be pending, this Court relies on the cases of “Florence Nafula Ayodi & 5 others v Jonathan Ayodi Ligure, John Tabalya Mukite & another; Benson Girenge Kidiavai & 67 others [applicants/intended interested parties] [2021] eKLR” and “Elizabeth Nabangala Wekesa v Erick Omwamba & 3 Others; Esther Momanyi Omwamba [applicant] [2021] eKLR”. In the first case, this Court held that in case a party wishes to be enjoined in a matter, the case must be either be at “the nascent or other stages but must be alive.” In the second case, it was held that in case a party moves the Court to be joined as a party, “there is no doubt anymore that if a party wishes to be joined in a matter he or she must move the Court during the pendency of the proceedings in that matter... the main point is that it [suit] is still alive.”

18. Similarly, in the case of:- “Leonard Kimeu Mwanthi v Rukaria M’twerandu M’iringu; Nathaniel Kithinji Ikiugu & 4 others [Intended Interested Parties] [2021] eKLR”, Lady Justice Mbugua J stated, “A party claiming to be enjoined in proceedings must have an interest in the pending litigation...” From the facts of the instant case, this suit has neither been heard nor



finalized. If anything, it is proceeding with applications at the interlocutory stage. Therefore, this stage is appropriate for the application of this nature.

19. It is worth noting that an application for joinder of an interested party may be made even at the appellate stage of the proceedings. The only condition to be met first is that the proceedings are still alive. The second point that the Court should take care of is that the proposed interested party should not use the procedure to institute a fresh suit, particularly if his application is made at the appellate stage.

20. On these two points I am guided by the holdings of the Court of Appeal and Supreme Court of Kenya respectively the following cases. The applicant in “David Kiptugen v Commissioner of Lands, Nairobi & 4 others [2016] eKLR” filed an application before the Court of Appeal to be joined as an interested party to the appeal and for remission of the matter back to the trial court for hearing de novo. The court allowed that application and held;

“We agree with Ms. Kirui that whatever the outcome of the appeal, if the applicant is not joined in this appeal, he will be deprived of an opportunity to be heard on his claim to the ownership of the suit land. That will of course be unconstitutional and against the rules of natural justice.”

21. Second, in the case of “Communications Commission of Kenya & 4 Others v Royal Media Services Limited”, the Supreme Court in declining a similar application for joinder of an interested party held:-

“The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal..

We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause.”

22. The provision of Order 1 Rule 1 of the Civil Procedure Rules, 2010 under which the application is brought provides as hereunder:

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.....

24. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J [as she then was] in the case of “Kingori v Chege & 3 Others [2002] 2 KLR 243” where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.



5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
25. In the case of: “Deported Asians Property Custodian Board v Jaffer Brothers Limited [1999] 1 EA 55” it was held as follows:-

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the Plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, [on an application of a Defendant] to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

26. In the case of:- “Civicon Limited v Kivuwatt Limited and 2 Others [2015] eKLR” the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a Defendant in a suit based on the general principles set out in Order I rule 10 [2] bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

27. In this case, the intended interested party was seeking leave to be joined to be able to participate in the proceedings being that he formally acted for the Plaintiff in this suit and subsequently filed an Advocate/Client Bill of Costs in MSA No 329 of 2011 and which was taxed at a sum of Kenya Shillings Nine Million One Ninety Nine Thousand Eight Sixty Eight Hundred [Kshs. 9,199,868/-] on 7th October 2011 as per attached order of the court marked as “DMM - 1” annexed herein. Upon various failed attempts to execute against the Plaintiff his firm filed bankruptcy proceedings at the High Court commercial and Tax, Insolvency cause No. E023



of 2023 subsequently the court issued a bankruptcy order on 10th November 2023 attach in the affidavit and marked as “DMM - 2” and the Plaintiff herein was Adjudged Bankrupt and hence has no capacity to prosecute this suit.

28. This Court relies on the case of “Martin Kirima Baithambu v Jeremiah Miriti [2017] eKLR”, where the court pronounced itself as hereunder:

“The pragmatic reality has been for courts to add parties in a suit based on guarantee if it is desirable to add such party so that the court can resolve all the matters in controversy effectually and completely. Aptly here would be to invoke the procedure provided under Order 1 Rule 15 of the Civil Procedure Rules. I say these things for the sake of jurisprudence.”

29. Accordingly, based on the foregoing reasoning, I strongly find great merit in the application for joinder. Thus, it must be allowed.

42. At this juncture, it is imperative to note that the Consent entered by parties herein before the Arbitration Tribunal has been vigorously attacked on the ground that it was obtained through fraud or misrepresentation of facts. Clearly, these allegations have to be proved. Tus, they have urged the Court to set aside the Award by the Arbitration. The Honourable Court has extensively deliberated on this legal aspect and hence, it will not belabor the point nor re – invent the wheel. In the very early and initial stages of establishing the Jurisprudence, the Court of Appeal sitting in Kisumu in the now famous case of: “Flora N. Wasike v Destimo Wamboko [1988] KLR” the Court of Appeal held thus:-

“It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in Hirani v Kassam [1952] 19 EACA 131, at 134, as follows:

“The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments and Orders [7th edn], vol 1, P 124, as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

43. In another case of: “Kenya Commercial Bank Limited v Specialised Engineering Co. Ltd [1982] KLR 485”, Harris J correctly held inter alia, that –

- “1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation



by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

44. Additionally, in the case of:- “Hirani v Kassam [1952] 19 EACA 131” the Court of Appeal held;

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

Finally, I also wish to cite the Court of Appeal in the case of “Brooke Bond Liebig Limited v Mallya [1975] EA 266 at 269” Law Ag P said:

“A court cannot interfere with a Consent Judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

45. The provision of Order 25 Rule 5[1] of the Civil Procedure Rules, 2010 which deals with the Doctrine of Consents [read compromise of suits] provides as follows:-

“Where it is proved to the satisfaction of the Court and the Court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any subject matter of the suit, the Court shall on the application of any party order that such agreement, compromise of satisfaction be recorded and enter Judgment in accordance therewith.”

46. The adoption by Courts of Consents entered into by litigating parties is done in keeping with the spirit of the provision of Article 159[2][c] of *the Constitution* of Kenya, 2010 and Sections 20 [1] and [2] of the Environment and *Land Act*, No. 19 of 2011 which exhorts Courts to encourage all forms of Alternative Dispute Resolution [ADR] and/or Alternative Judicial System [AJS].

47. Now the Honourable Court wishes to endeavour on addressing all the issues that have been raised by the parties herein which include the allegations of bias on the part of the arbitrator, non-disclosure of material facts by Mr. Stephen Gikeria and the issue of fraud and fraudulent misrepresentation. In doing so, it will be discussed whether or not the threshold for orders sought has been met.

48. It is the Applicant’s case that the award made by the arbitrator be set aside as the same is unlawful and marred by fraud. In order to give context into what is being contested, the court will give a brief history of the suit herein.

49. From the pleadings, it can be deduced that the Applicant entered into an agreement for sale of property with the 1st to 3rd Defendant/Respondents herein. The same was for purchase of land parcel no Kwale/ Diani Beach Block/108 at an agreed consideration of a sum of Kenya Shillings Twenty Six Million One Thirty Four Thousand One Nineteen Hundred [Kshs. 26,134,119/=]. The agreement is dated 1st October 2011. A down payment/deposit of a sum of Kenya Shillings Eight Million [Kshs. 8,000,000/-]



was made to the vendors through the 4th Defendant Advocate. A further sum of Kenya Shillings One Million One Thirty Four Thousand One Nineteen Hundred [Kshs. 1,134,119/-] was made to the County Government of Kwale for clearance of accrued land rates over the property.

50. That later, the vendors failed to deliver vacant possession and transfer title to the Applicant. The Applicant then filed a suit being Mombasa HCCC No 106 of 2013 but the high court then referred the matter for arbitration. The claimant prayed for the following orders:-
- a. An order for refund of a sum of Kenya Shillings Eight Million [Kshs. 8,000,000/-] being monies paid by the claimant as deposit towards the sale transaction
 - b. A refund of sum of Kenya Shillings One Million One Thirty Four Thousand One Nineteen Hundred [Kshs. 1,134,119/-] paid to Kwale county government as outstanding property rates for the suit property
 - c. General damages for breach of contract in lieu of or in addition a refund of the said deposit
 - d. The costs of this claim
 - e. Interest on [a][b][c] above the court rates
 - f. Any other or further relief as this honourable court may deem just and fit
51. On 14th June 2022 the parties agreed on compromising the suit through a consent. The same was recorded in the following terms:-
- a. That the 1st and 2nd Defendant/Respondents admit that they are liable to refund the sum of Kenya Shillings Eight Million [Kshs. 8,000,000/-] to the Claimant being deposit of the purchase price they received from the Claimant towards the sale/purchase of the property known as Kwale/Diani Beach Block/108.
 - b. The following outstanding issues to proceed for hearing and determination and determination before the arbitrator;
 - i. Refund of the land rates of sum of Kenya Shillings One Million One Thirty Four Thousand One Nineteen Hundred [Kshs. 1,134,119/-] paid to the County Government of Kwale.
 - ii. General damages for breach of contract.
 - iii. Costs of the claim.
 - iv. Interest on [i][iii] and [iii] above at court rates.
52. Subsequently, the arbitrator in his final findings made the award to the Applicant in the following terms:-
- a. The 1st 2nd and 3rd Defendants/Respondents to refund to the claimant a sum of Kenya Shillings Eight Million [Kshs. 8,000,000/-] paid and received from the Claimant as part of the deposit of the purchase price for the plot Kwale/Diani Beach Block/108.
 - b. The 1st 2nd and 3rd Defendants/Respondents to refund the Claimant a sum of sum of Kenya Shillings One Million One Thirty Four Thousand One Nineteen Hundred [Kshs. 1,134,119/-] paid by the Claimant to the County Government of Kwale towards the discharge of the land rates that had accrued over the plot Kwale/Diani Beach Block/108



- c. The monies to be refunded to the claimant under [a] and [b] above shall accrue simple interest at the rate of 12% per annum from the date of filing of the claim on the 16th May 2022 until payment thereof in full.
 - d. The 1st, 2nd and 3rd Defendants/Respondents shall bear costs of the reference being a sum of Kenya Shillings Four Twenty Nine Thousand Four Sixty Hundred [Kshs. 429,460.00/-]. Any portion of this sum which may have been paid by the claimant shall be refunded by the Respondents upon service of this award on the Respondents and will accrue simple interest from the said date of service of the award at the rate of 12% per annum until payment in full.
 - e. The Respondents shall meet the Claimant's reasonable costs of and incidental to the arbitration proceedings to be agreed upon the Claimant and the 1st, 2nd and 3rd Respondents within thirty [30] days of the date of service of this award upon the Respondents, otherwise the costs to be taxed. The amount of this costs so agreed upon or taxed to attract simple interest thereon from the said date of service of the award at rate of 12% per annum until payment in full
 - f. The claim as against the 4th Respondent was hereby dismissed with no orders as to costs.
53. The record bears the fact that at the time of hearing the Applicant was represented by a co-director of the company Stephen Gikera. It is noted that a fall out occurred sometime later between the said Mr. Gikera and the other directors. However, from the evidence tendered by way of affidavit by Mr. Gikera, the other two directors were well aware of the arbitration proceedings and cannot state otherwise. Indeed, evidence has been tendered of the email correspondence between the said parties.
54. The Applicant alleges that they were not given an avenue to be heard at the time of arbitration which fact I happen to disagree with. From the record in the final award by the arbitrator, the parties were informed of the arbitrator's acceptance to determine the dispute between them as per the letter dated 28th February 2019. The parties were present before the arbitrator on 22nd March 2019 in a meeting where they agreed on the format of pleadings and the manner in which the hearing would take place.
55. At paragraph 13 of the award, it is indicated that the matter did come up severally for pre hearing meetings and it was then that the parties requested to have time to engage with each other for purposes of reaching an amicable settlement. The same informed the recording of the consent on 14th June 2022.
56. The above chronology of events indicates a substantive period of time from when the matter was placed before the arbitrator and when the same was eventually settled. It cannot be said that throughout this period the Applicants other director namely Hon. Chirau Ali Makwere and Ms. Batsingira were unaware of the matter. if anything, one of the co-directors was present all through the proceedings and more so was representing them.
57. The Law governing the setting aside Arbitral Awards was founded under the provisions of Section 35 of the Act sets out the grounds for setting aside of an award as follows: -
- “ 35. An arbitral award may be set aside by the High Court only if—
- [a] the party making the application furnishes proof—
 - [i] that a party to the arbitration agreement was under some incapacity; or



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

58. In the course of establishing whether a case has been made out for setting aside of the arbitral award, this court is keen on not re-evaluating the evidence that was placed before the arbitrator as the same would amount to taking up the role of an appeal court but to simply confine myself to the threshold for grant of the orders sought. I am guided by the holding in the case of:- “Geo Chem Middle East v Kenya Bureau of Standards [2020] eKLR”, where the Supreme Court of Kenya quoted with approval Ochieng J’s holding in the High Court that: -

“It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award ... if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal”.



59. Just as supposition that is not the case, it has been said time and again that in as much a party has appointed counsel to act on their behalf in a matter, it is also imperative of them to be proactive in following up on the progress of the same. I wish to refer to the case of:- “Tana & Athi Rivers Development Authority v Jeremiah Kimogho Mwakio & 3 Others [2015] eKLR” where it was held as follows:-

“As stated in the case of Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR that “it is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

60. It is trite that parties ought to be given an opportunity to be heard and ventilate their respective cases, but in the event that the avenue for this has been created and the same is not utilised, the parties cannot again turn and blame the court for that. I am convinced that the applicant was given the opportunity to ventilate its case and cannot allege otherwise.

61. Now, was there any bias on the part of the arbitrator as alleged? Black’s Law Dictionary 8th Edition defines bias as: -

“inclination, prejudice judicial bias. A Judge’s bias towards one or more of the parties to a case over which the Judge presides. judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge’s bias usually must be personal or based on some extra judicial reasons”

62. The court in the case of:- “Ernest & Young LLP v Capital Markets Authority & Another [2017] eKLR and Alnashir Popat & 8 Others V Capital Market Authority [2016] eKLR” the test of bias was defined as: -

“Is there a real possibility that a reasonable person properly informed and viewing the circumstances realistically and practically could conclude that the decision maker might well be prone to bias.”

63. The arbitrator has outlined his reasons for the findings made. The consent was entered into by the parties and out of their own volition. The arbitrator had no interest as he was not a party to the transaction. I have noted that the 3rd Defendant never entered appearance of took part in the proceedings but the arbitrator insisted on having the said party informed of the matter as evidenced by the advertisement in the daily nation newspaper of 9th February 2021. The final orders were in favour of the Applicant as against the 1st to 3rd Defendants who admitted to having received funds in terms of deposit for the suit property and part payment. They were asked to refund the same together with interest. The aspect of bias and any favourism has not been clearly spelt out by the applicant herein. Perhaps the same could be on the discharge of the 5th defendant as a party and the fact that no orders were made as against the 4th defendant? The court will shortly discuss the same as it introduces the issue of fraud and misrepresentation as alleged by the Applicant.

64. The advocates on record and who received part of the sum had been served with complainants before the Advocates Disciplinary Tribunal. The affidavit of Mr. Stephen Gikera speaks to this. It is noted that the Applicant is keen on having the award by the Arbitrator set aside and for the court to make a determination of certain issues which include alleged fraudulent acts by the advocate on record for the Applicant and the co-director.



65. Fraud has been defined in Blacks Laws Dictionary as; “Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.” Further, Black’s Law Dictionary Ninth Edition at Page 731 also defines ‘fraud’ as; “knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
66. In the case of “Belmont Finance Corporation Limited v Williams Furniture Ltd” Buckley L.J said:-
“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”
67. The Applicant alleges that the former co-director Stephen Gikeria acted fraudulently in misrepresenting them before the arbitrator without disclosing his position in the company and further without proper instructions from them. Further that the 4th Defendant misappropriated some of the funds by not disclosing certain payments made to the 5th Defendant and those that were retained by Advocate Mwaboza.
68. It is trite that the burden of proof of an allegation of fraud is on the person alleging. In the case of “Ndolo v Ndolo [2008] 1KLR [G &F] 742” the court stated that:-
“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
69. The issues of fraud and the conduct of Mr. Stephen Gikeria and the 4th Defendant advocate in my opinion fall under professional misconduct. As observed by the arbitrator and which issue I am also in agreement with, the court is not the right forum to address the said issues. It has already been made known to the court that the issues had been raised before the Advocates Disciplinary Tribunal. The Disciplinary Tribunal [hereinafter referred to as ‘the Tribunal’] is established under Part XI [Sections 55 to 80] of the *Advocates Act*.
70. One of the main functions of the Tribunal is to deal with complaints against Advocates. Such complaints may be lodged by or on behalf of any person or by the Commission or by the Council of the Law Society of Kenya. The procedure in dealing with the complaints is provided for under Sections 58, 59, 60, 60A and 61 of the *Advocates Act*. It is further enriched under the Advocates [Disciplinary Committee] Rules, 1990.
71. Under the provision of Section 58[5] and [6] of the *Advocates Act*, proceedings before the Tribunal are akin to legal proceedings. The said section provides as follows: -[5]All proceedings before the Tribunal shall be deemed for the purposes of Chapter XI of the Penal Code [Cap. 63] to be judicial proceedings and for the purposes of the *Evidence Act* [Cap. 80] to be legal proceedings.



72. The mandate to determine whether an issue amounts to professional misconduct lays with the tribunal. In the case of:- “Republic v Advocates Disciplinary Committee Interested Party Daniel Mutisya Ngala Ex - Parte Danstan Omari Mogaka [2015] eKLR”, Korir J said as follows:-
- “The onus of determining whether an act amounts to professional misconduct belongs to the Disciplinary Tribunal. It would amount to usurpation of that mandate were the court to decide what amounts to professional misconduct”.
73. The above provisions of the law and case law affirm the position that the conduct of counsels can only be discussed by the tribunal and since a complaint has already been lodged, the court will not interfere with the same. any complaint with regard to the conduct of counsels should thus be referred to the tribunal for determination.
74. Further, on the issue of the consent.The Honourable Court wishes to address the two affidavits by the 1st and 2nd Defendants/Respondents who have pleaded ignorance of the contents of the consent. I will point out that the said parties did not dispute the allegations against them and in fact the defence on record contained admissions to the transaction. It is alarming how the tune has now changed to that of having been coerced into signing the consent given that they had initially admitted to having failed to honour their obligation in the contract.
75. If the consent is to be set aside and the matter heard by the court, will the same absolve the 1st and 2nd Respondents off their obligation to remit the funds received? I highly doubt the same. To me, the fact that the matter was first before court where a defence was made admitting the contents of the plaint and also before the arbitrator where the consent was recorded which has now turned to denial of the contents of the consent points out to a ploy to abuse the court process.
76. The Court of Appeal in the case of: “Muchanga Investments Limited v Safaris Unlimited [Africa] Limited & 2 others Civil Appeal No. 25 of 2002 [2009] eKLR 229”, in dealing with the principle of abuse of Court process stated as follows: -The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona-fides and frivolous, vexatious or oppressive.
77. Mrima J in the case of:- “Bore v Spire Bank Limited & another [Civil Case 8 of 2020] [2024] KEHC 1034 [KLR]” [8 February 2024] [Ruling] opined as follows on abuse of the court process; Abuse of the Court process is a settled legal principle applicable on two fronts. First, from a public interest perspective, duplication of proceedings is a waste of precious Court time and resources. That is in addition to the risk of inconsistent findings which threaten to bring the administration of justice into disrepute. Second, from a private interest perspective, it is highly vexatious and oppressive to the opposite parties not only in terms of time and costs, but also in that the “dry-run” of the claim in the prior proceedings affords the Plaintiff an opportunity to refine its case and work around any defence, evidence or explanation that the opposite party in the subsequent action put forward.
78. The 1st and 2nd Defendnats/Respondents cannot take the court round in circles when it comes to the settlement of the claim against them by the tactics they are now trying to employ. The aspect of having been coerced into signing the consent is clearly an afterthought and the court feels the need to protect itself from this kind of abuse of its mandate and time. I am guided by the holding in the case



of: “Stephen Somek Takweny & Anor v David Mbuthia Githare & 2 Others Nairobi [Milimani HCC No. 363 of 2009]” where it was held as follows:

“.....The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process, it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”

79. The court opines that based on the discussions held above, it is not persuaded that the Applicant has meet the requirements for setting aside the arbitral award.
80. On the prayer to have the 5th Defendant re-joined in the proceedings, the same in my opinion amounts to an exercise in futility as it will serve no purpose the court having rendered itself as above.

ISSUE No. c]. Who is to bear the costs of the applications

81. It is now well established that the issue of Coasts is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 [1] of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh v Tarchalan Singh” eKLR [2014]” and Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited, eKLR [2014]”.
82. However, given the circumstances of this suit I order that each party bears its own costs.

Conclusion & Finding

83. Consequently, upon causing an indepth anaylsis to the framed issues herein, the Honourable Court on the principles of Preponderance of Probabilities and the balance of convenience arrives at the following conclusion.
 - a. That the Notice of Motion applications dated 6th September 2024 and 27th March 2025 be and hereby found to lack merit and hence dismissed accordingly.
 - b. That each party to bear its own costs.
84. It Is Ordered Accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 28TH DAY OF MAY 2025

HON. MR. JUSTICE L.L NAIKUNI,



ENVIRONMENT & LAND COURT

Ruling delivered in the presence of:

Mr. Daniel Disii, the Court Assistant.

Mr. Naibei & Mr. Swanya Ogeto Advocates for the Plaintiff/Applicant.

M/s. Opondo for Mr. Steve Gikeria – the 1st Director.

