REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 1041 OF 2004

DON-WOODS COMPANY LTD.……..….PLAINTIFF/APPLICANT

VERSUS

KENYA PIPELINE COMPANY LTD. ….....…… DEFENDANT/RESPONDENT

RULING

A. PRIVATE PARTY-GOVERNMENT-OWNED COMPANY CONTRACT; REVOCATION IN NAME OF GOVERNMENT: INTERLOCUTORY APPLICATION, PRAYERS AND DEPOSITIONS

(a) For the Plaintiff/Applicant

Within the framework of a suit dated and filed on 4th October, 2004 the plaintiff filed Chamber Summons of even date. The application was made under sections 3A and 63 of the Civil Procedure Act (Cap. 21), and Orders XXXIX (rules 2, 3 and 9) and XLV of the Civil Procedure Rules.
The applicant was seeking Orders as follows:
(a) that, an interim injunction do issue pending hearing inter partes;
(b) that, an injunction do issue against the defendant by itself, its servants, agents or otherwise howsoever, restraining them from removing, dismantling or in any other way whatsoever interfering with the plaintiff's plant, machinery, equipment, building materials, personnel at the project site, or in any other way whatsoever interfering with the project site pending the hearing and determination of the suit;
(c) that, an order be issued referring the dispute between the parties forthwith to arbitration, as provided in clause 36 of the agreement between the parties dated 19th October, 2000, and in terms of ss.6 and 7 of the Arbitration Act, 1995.
(d) that, costs of the application be provided for.
The plaintiff's application is premised on the following grounds:
(i) that, the defendant has purportedly terminated the contract between itself and the plaintiff;
(ii) that, the defendant has substantially performed its part in the contract, and has at all times been ready to continue with the remaining obligations;
(iii) that, the defendant has not issued any notice of termination of the contract between the parties;
(iv) that, the plaintiff will suffer irreparable injury that is not compensable by an award of damages;
(v) that, preserving the status quo by way of injunction pending reference to arbitration will be in the interests of justice;
(vi) that, the plaintiff has an arguable and compelling case in the main suit.
The evidentiary basis of the application is set out in the supporting affidavit by *Paul Mutisya Muli*, the General Manager of the plaintiff company, sworn and filed on the same date with the Chamber Summons herein. The deponent avers, in summary, as follows.
The plaintiff and the defendant had entered into a contract on 19th October, 2000. By this contract the defendant commissioned the plaintiff to undertake the construction of the defendant's proposed headquarters (hereinafter referred to as "the project") in the Industrial Area, Nairobi. (The contract is

exhibited and marked “PMM1”). Execution of the said contract had been preceded by the invitation of bids, and out of six bids the plaintiff’s was the lowest. Thereafter the contract price was further negotiated; and the price of Kshs.573,022,382/00 was mutually agreed. On 30th November, 2001 a further modification took place, with a variation deed executed by the plaintiff, the defendant, the project architect and the project quantity surveyor. In this variation the contract price was adjusted from Kshs.573,022,382/00 to Kshs.914,529,148/45. (The variation documents are annexed to the affidavit as “PMM 2 (i), (ii), (iii)”).

On the basis of the said agreement, the plaintiff took possession of the project site on 8th May, 2000 and construction work began, and by 25th February, 2003 the plaintiff had completed most of the construction work including: (i) the entire office block (save for the interior finishes and the roof); (ii) one parking area (completed and handed over); (iii) two parking areas (at the finishing stage); (iv) land-scaping (not yet complete). It is deponed that as at 25th February, 2003 as much as 74% of the agreed works had been completed. Certificates of completion for the works done and for payment had been issued by the project architects, M/s. Mutiso Menezes International, and there was an outstanding payment of Kshs.61,568,782/65.

The defendant, by a letter dated 6th March, 2003 and addressed to the project architects (copied to the plaintiff), informed the architects that they (defendant) had been directed by the Government to “freeze the project”. The defendant directed the architects to implement those directions with immediate effect. And complying with the defendant’s instructions, the project architects wrote to the plaintiff directing the plaintiff “to suspend the works by the end of working hours” on 18th March, 2003 until further instructions. On the following day, by a letter dated 18th March, 2003 and addressed to the architects, the plaintiff protested the suspension of the works. In this protest the plaintiff cited its contractual rights, and specifically noted: (i) that the suspension of work was in contravention of the terms of the contract; (ii) that the plaintiff, even as it accepted the suspension of works, would not waive its rights under the contract; (iii) that the suspension of works would result in major expenses and losses which must go to the defendant’s account.

The “freeze” on works necessitated the commencement of demobilisation by the plaintiff, who also advised sub-contractors to demobilize. On 19th March, 2003 a clerk of works report was prepared, detailing the words accomplished and outstanding as at that date; the construction materials; labour; machine and equipment on site. On 19th March, 2003 a meeting took place between the project architects and all parties concerned, in relation to the suspension of works at the project. At this meeting the plaintiff brought certain points to the attention of the project architects: (i) the plaintiff had contractual commitments involving payments to suppliers of materials; (ii) the expected long rains would damage some of the works already done, particularly the roof which had not yet been covered. It is deponed that there had been no dispute between the parties, save that there was an outstanding demand by the plaintiff for Kshs.61,568,782/=. It is averred that the suspension of works was in breach of the contract between the parties, and that it has resulted in damages and losses to the plaintiff. Between 18th March, 2003 and 24th September, 2004 several meetings have been held between the plaintiff and the defendant, “with a view to developing a formula on how the plaintiff would resume its works…and on how to address the issue of damages which have accrued.” It is averred that the plaintiff has, at all times, been ready to negotiate and compromise on outstanding issues, but the defendant has always
been reluctant, and this prompted the plaintiff to issue notice of termination under the contract (26th October, 2003 and 15th November, 2003).

On 24th September, 2004 the defendant purported to terminate the contract between itself and the plaintiff; the defendant directed that the plaintiff do vacate the project site with immediate effect, and remove its equipment, accessories and personnel forthwith. The deponent avers that the said instruction to the plaintiff to vacate the site is injurious, highhanded, and inflicts loss and damage upon the plaintiff. It is deponed that under clause 25 of the contract document, there exists an elaborate procedure for terminating the contract at the instance of the defendant. The purpose of that procedure is to protect the site, along with the equipment and material obtaining there. It is also the object of such procedure to preserve the rights and claims of the parties flowing from the termination. The preservation also helps to safeguard works completed but not yet certified. It is deposed that the defendant has ignored the laid-down procedures and has placed the project site in the hands of security personnel, who are unqualified persons. The deponent avers that the plant, machinery, building materials and hired equipment on site are now exposed to the risk of being vandalised or disposed of. It is averred that a substantial part of the works accomplished, has not yet been certified, or valued for payment. It is deponed that in these

circumstances, it is only right that there be a proper handing-over, with valuation of works done, current state of the site assessed, and the site preserved. The plaintiff apprehends that if the project site is not preserved, it will suffer irreparable loss and damage.

(b) For the Defendant/Respondent

To the applicant's supporting affidavit of 4th October, 2005 the defendant's company secretary, Mrs. **Mary Kiptui,** swore a replying affidavit on 22nd October, 2004. The deponent disputes the averment made for the plaintiff, that there was a variation deed to the contract, raising the amount payable from Kshs.573,022,382/= to Kshs.914,525,148/45; she avers that the purported variation was done fraudulently, irregularly and illegally between the defendant's former Managing Director and employees of the plaintiff company. She depones that the proposed variation deed of 30th November, 2001 was a new contract, entirely different from the one entered into on 19th October, 2000 between the plaintiff and the defendant; and "the purported variation was done without either the sanction of the board of the defendant or the project architect and was not tendered for…." The deponent avers that the defendant's then Managing Director, well after the contract date, 19th October, 2000, on 21st July, 2001 acted contrary to the terms of the existing contract and, without the authority of the defendant's board, purported to make another independent contract by making a new offer to the plaintiff which the plaintiff accepted. It is deponed that "the plaintiff knowing very well that Mr. Cheruiyot [the said former Managing Director of the defendant] and those acting with him had no authority to issue such instructions, nevertheless endorsed the same and purported to alter and vary the existing contract by making an additional sum of Kshs.341,506,766 creating a new contract with new terms completely different from the one of 19th October, 2000 ipso facto rescinding the old contract of 19th October, 2000."

The deponent further avers that the plaintiff was paid by the defendant a total of Kshs.228,253,596 on 6th March, 2001 and 18th December, 2001 respectively, for work which was not done. It is deponed that as at 18th March, 2003 when the works were suspended, the total sum which had been paid to the plaintiff by the defendant company amounted to Kshs.669,226,163, but the project was far from completion and the plaintiff was claiming more money for work done.

The deponent avers that the said demand of further payment by the defendant did not please the Government who is a principal shareholder of the defendant company; and so the Government "instructed the defendant board to suspend the project and carry out an inspection to ascertain whether what has been paid for tallies with the work done on the ground." It is averred that a committee was set up to conduct that verification, and the findings of that committee, and of an independent consultant, confirmed the Government's fears that there were irregularities; that the project was incomplete; that works were overpriced; that there were other malpractices which "rendered the entire project a mockery."

It is deponed that the defendant's Managing Director, on 20th March, 2003 wrote to the plaintiff company explaining the reasons for the Government directive of 18th March, 2003. By the said letter of 20th March, 2003 the Managing Director asked the plaintiff "to immediately return to the site", but the plaintiff did not do so. The deponent avers that the plaintiff "never resumed work on the site and instead, on 21st October, 2003 it wrote to us intimating that it will indeed terminate the contract…"

The defendant's Managing Director wrote to the plaintiff on 24th September, 2004 advising the plaintiff to seek help from the defendant for demobilising the site and vacating in accordance with the contract of 19th October, 2000. The said Managing Director also instructed the project architects to give formal notice of termination to the plaintiff – and the architects did so on 29th September, 2004.

(c) Depositions for the Plaintiff in Rejoinder

Paul Mutisya Muli swore an affidavit in rejoinder to the defendant's replying affidavit dated 28th October, 2004. He avers that the depositions so far made will confirm that various disputes have existed between the plaintiff, the defendants, and the project architects. He depones that such disputes had been anticipated at the time of making the contract, and it had been provided in Clause 36 of the contract that when they occur, they would be referred to arbitration. It is averred that the plaintiff has not waived its rights to arbitration. The deponent avers that the variation to the original contract was effected pursuant to the provisions of clause II of the contract document and it was approved by the defendant's board, with communication to this effect being made to the project architects and quantity surveyors (letter by defendant's Managing Director dated 12th July, 2001). It is deposed that the deed of variation was arrived at after due consultation within the defendant's board, and with the project architects and quantity

surveyors - and due communication was made to the plaintiff by binding order from the project architect, in accordance with the terms of the agreement of 19th October, 2000 (architect's letter dated 16th November, 2001).
The deponent avers that the advance payment made to the plaintiff had been mutually agreed between the parties, and a schedule of recovery was prepared which has been implemented at all material times. The plaintiff had provided security for the advance payment as was required. It is deponed that the defendant is the one who has been unable to give clear instructions to the plaintiff to resume work, and it is not true for the defendant to state that it had asked the plaintiff to resume work on the project but the plaintiff refused. It is averred that the defendant had unilaterally, and in breach of the contract between the parties, suspended the contract on 20th March, 2003. The implementation period of the contract was to lapse on 30th June, 2003. It was deponed that as a result of the suspension of the contract, the plaintiff has suffered and continues to suffer loss, and it was possible to place a value todate
of such loss at the figure of Kshs.700,000,000/=.
The deponent avers that issues raised by the defendant, such as —
(i) whether the contract was terminated by the plaintiff or the defendant;
(ii) whether the purported termination of the contract was effected or 24th or 29th September, 2004;
(iii) whether the deed of variation is a separate agreement, or a confirmation of the agreement dated 19th October, 2000;
(iv) whether the plaintiff is entitled to raise claims under the deed of variation or not;
(v) whether the contract dated 19th October, 2000 has lapsed or not — properly belong to arbitration as the path to a solution, as provided for under the
agreement.

B. WHO IS IN BREACH OF CONTRACT? IS THIS A MATTER FOR

ARBITRATION? — SUBMISSIONS ON LAW AND EVIDENCE
Hearing of the application began on 4th November, 2004 when learned counsel, Mr. Wagara represented the plaintiff/applicant, while learned counsel, Mr. Njuguna and Mr. Kabue, represented the defendant/respondent

(a) For Plaintiff/Applicant

How was the contract terminated? Lawfully?
Learned counsel, Mr. Wagara, began by setting out the issues for determination:
(i) whether an injunction would issue where damages will be an adequateremedy;
(ii) whether the plaintiff has brought itself within the ambit of the provisionsof ss.6 and 7 of the Arbitration Act, 1995;
(iii) whether the plaintiff's gravamen comprises matters which under thecontract, should be referred to arbitration;
(iv) whether the plaintiff has waived its rights to refer the dispute toarbitration.
The plaintiff was seeking injunctive relief; and an order referring the dispute toarbitration; as well as costs; and any other relief seen fit by the Court.Under the agreement of 19th October, 2000 the parties had contracted for theconstruction by the plaintiff of a five-storey building, to serve as the defendant'sheadquarters. The defendant was the first to execute the contract, this being witnessed byMary Kiptui the defendant's company secretary. The plaintiff then executed, this beingwitnessed by Alan Simu, the defendant's architect. The role of the architect, learned
counsel submitted, was crucial in the design and performance of the plaintiff's obligations under the contract.
The architect's role was to ensure due performance of the plaintiff's contractual obligations, as defined in conditions expressly spelt out. It was thus stated in the agreement:

"For the consideration hereinafter mentioned the contactor [plaintiff] will upon and subject to the conditions annexed hereto carry out and complete the works shown upon the contract drawings…"

One of those conditions was thus expressed:

"2. (1) The contractor [plaintiff] shall…forthwith comply with all instructions issued to him by the Architect in regard to any matter in respect of which the Architect is expressly empowered by these conditions to issue instructions."

The role of the architect in seeing to the proper conduct of the works was linked, under condition No. 10, to that of "clerk of works". That clause provides:

"10(1) The employer shall be entitled to appoint a clerk of works, whose primary duty shall be to act as inspector on behalf of the employer under the direction of the architect…:"
Mr. Wagara noted from the contract of 19th October, 2000 that variation of its terms was within the contemplation of the parties; it was provided for in the conditions, at clause 11:

"11(1) The architect may issue instructions requiring a variation and he may sanction in writing any variation made by the contractor otherwise than pursuant to an instruction of the architect. No variation required by the architect or subsequently sanctioned by him shall vitiate this contract…

(4) All variations required by the architect or subsequently sanctioned by him in writing and all work executed by the contractor for which provisional sums are included in the contract bills (other than work for which a tender made under clause 27(g) of these conditions has been accepted) shall be measured and valued by the quantity surveyor who shall give to the contractor an opportunity of being present at the time of such measurement…"

Under clause 23 of the conditions, provision was made for extension of time for the completion of works by the plaintiff. This clause provides:

"Upon it becoming reasonably apparent that the progress of the works is delayed, the contractor shall forthwith give written notice of the cause of the delay to the architect, and if in the opinion of the architect the completion of the works is likely to be or has been delayed beyond the Date for Practical Completion stated in the appendix…then the architect shall so soon as he is able to estimate the length of the delay beyond the date or time…make in writing a fair and reasonable extension of time for completion of the works."

Learned counsel submitted that the scope for the employer to determine the contractor's operations was defined in the conditions set out as part of the contract. The relevant provisions are set out in clause 25 which (in part) reads:

"25 (1) If the contractor shall make default in any one or more of the following aspects, that is to say:

(a) if he without reasonable cause wholly suspends the carrying out of the works before completion thereof, or

(b) if he fails to proceed regularly and diligently with the works, or

(c) if he refuses or persistently neglects to comply with a written notice form the architect requiring him to remove defective work or improper materials or goods… then the architect may give him a notice… and if the contractor either shall continue such default for fourteen days after receipt of such notice… then the employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition…forthwith determine the employment of the contractor under this contract, provided that such notices shall not be given unreasonably or vexatiously."

Learned counsel submitted that the defendant's letter determining the contract, of 24th September, 2004 was not in accordance with the governing terms of the contract, for at least one reason – it made no reference to the role of the project architect. The said letter, signed
by the Managing Director of the defendant company, thus reads:

"We advise having been instructed by the Government to immediately TERMINATE the above

CONTRACT which we HEREBY DO and to further instruct your company to make immediate arrangements to demobilise and remove forthwith all the construction equipment on site, accessories and personnel.

"By copy of this letter, we are requesting our Chief Security Officer, Administration Manager and Engineering Manager to assist your company in expediting this Government directive."

It is the above-quoted letter that precipitated suit, as well as the instant application which was made under certificate of urgency. It is stated in the certificate, filed by counsel for the plaintiff on 4th October, 2004 that "*the defendant herein has purported to terminate a contract between itself and the plaintiff and demanded that the plaintiff makes immediate arrangements to demolish and remove forthwith all construction equipment, accessories and personnel on site*."

Mr. Wagara stated that it would have been impracticable for the plaintiff to comply with the demand made by the defendant; and it became necessary to move the Court to give interlocutory relief. The plaintiff was concerned to preserve the site, pending reference to arbitration. In the plaintiff's perception there was an imminent danger, turning around disputes that ought to be resolved through the forum of arbitration. The project architects wrote a termination letter to the plaintiff, dated 29th September, 2004 in the following terms:

"Client's letter to yourselves of 24th September, 2004 ref ES/SC/660 refers.

"Your employment on this contract between yourselves and M/s Kenya Pipeline Co. Ltd. for construction of the proposed Kenya Pipeline Company Limited Headquarters Building is hereby determined with effect from the date of this letter.

"The client feels that your continued engagement is contrary to Public Policy and Ethics and is not sustainable due to the ongoing litigation involving Datalogix Company Limited whereby Mr. D.K. Mwaura is a major shareholder. Mr. D.K. Mwaura is also the principal shareholder of M/s. Don-Woods Company Limited.

"All materials on site should not be removed. Materials stored in your go-downs…belong to the client…

"The employments of sub-contractors are also hereby determined.

"Please get in touch with the project architects, M/s. Mutiso Menezes International, to agree on a timetable for joint inspections and valuations of works done and materials of the works on and off site.

"After the inspections the project architects will advise you what to remove and not remove from the site and when to hand over the site to the client."

The letter was signed by Mr. Alan Simu for M/s. Mutiso Menezes International, Architectural, Planning and Interior Design Consultants. Learned counsel noted the conflicting dates of the two letters of termination – theone from the defendant dated 24th September, 2004 and that from the architects dated 29th September, 2004 and yet both were determining the plaintiff's employment "forthwith." From such conflicts of intent, the plaintiff had considered that the proper forum of resolution was before an arbitrator. There were, counsel submitted, substantive issues in the dispute which required arbitration. Mr. Wagara made reference to a document annexed to the supporting affidavit, a confidential document from the defendant, captioned "Minutes of the Olali Committee Meeting on KPC Headquarters Project which was Held on the 28th September, 2004 at 11.30 a.m. at the Head Office of the Company." But learned counsel for the defendant, Mr. Njuguna, raised the objection that introducing the minutes would be contrary to Order XVIII rule 3 of the Civil Procedure Rules because the deponent could not prove their content. Mr. Wagara's response was that the test, in admitting those minutes, would be relevance. He submitted that the minutes were relevant and their admission would assist the Court. On this matter I ruled as follows:

"It is not controverted that the relevant series of meetings had in the past been attended by the deponent, even though he happened not to be at that particular meeting.

"It is thus quite clear to me that there is absolutely nothing sacrosanct about the series of minutes such as the said committee would have [recorded] over time; and some of them will show that the deponent was in attendance.

"I have not been told that the impugned minutes were in any way a forgery.

"I hold, therefore, firstly, that those minutes are relevant to enable this Court to see the present issues in the correct light; and secondly, that the deponent is a pertinent and appropriate person to attach the said minutes to his depositions."

Mr. Wagara made reference to the said minutes, at Min.1/2004, second paragraph, which reads:

"A letter had already been addressed to M/s. Don-woods by [the defendant] on 24th September, 2004. The Board at its meeting of 27th September, 2004 resolved that the Olali Committee be convened to formalise the termination taking cognisance of contractual obligations under the contract and to put 'the defendant' on a safe landing ground in the event of arbitration."

Learned counsel considered the above-quoted passage in the said minutes to imply that the defendant's letter of 24th September, 2004 terminating the contract had been irregularly issued; and so a technical committee had now been called to regularise the position. The regularisation is expected, besides, to strengthen the defendant's position during arbitration. It is precisely this object of regularisation of an irregular letter of the defendant, Mr. Wagara submitted, and in my view, with justification, that the project architects wrote their letter of 29th September, 2004 the content of which has earlier been set out. Learned counsel observed, I believe correctly, that just as the said minutes indicated, the defendant was well aware of the arbitration procedure and indeed acknowledged the amenability of matters in dispute to arbitration procedures.

Learned counsel returned to the declamation of the defendant and its project architect: termination of the contract was with immediate effect. Counsel asked: "What was then to happen? This is a building contract, not a contract for delivery of milk or sugar." He noted that this kind of contract entailed certain burdensome, running courses of action: "There is mobilization; materials brought on site; equipment brought on site; the contractor would already have constructed something; there are amounts owing; there are suppliers; there are sub-contractors; how are these to be taken care of?" Counsel submitted that termination of a contract such as the one herein, is injurious, and exposes the plaintiff to lots of damages; and this was the justification for the plaintiff to move the Court seeking interim relief, to preserve the status quo. Mr. Wagara submitted that the Arbitration Act, 1995, ss.6 and 7 gave the Court a special jurisdiction to refer issues to arbitration, and to this position there were only two exceptions: s.6(1)(a) – where the arbitration clause was void; s.6(1)(b) – whether there does exist a dispute, in respect of the matter agreed to be referred to arbitration. Learned counsel submitted that the Court does have jurisdiction, under s.6 of the Arbitration Act, to refer the matter to arbitration. He further submitted that such a position was by no means compromised by the fact of the plaintiff having filed proceedings in Court: for it is not incompatible with the arbitration agreement that either party should move the Court for an interim measure of protection. Indeed, s.7(2) of the Act makes express reference to injunctive relief.

Is it possible to grant injunction where damages would be a remedy?

Mr. Wagara submitted that the position taken by the defendant, as reflected in the replying affidavit, that orders of injunction cannot be made where damages would provide a remedy, was misconceived. The defendant's position, which is in general consistent with the Court of Appeal decision in Giella v. Cassman Brown [1973] E.A. 358, is not true in all situations. Counsel submitted that s.7 of the Arbitration Act vested in the Court the mandate to grant injunctions for preservatory purposes; and he further urged that s.7 of that Act must take precedence over decided cases. Counsel relied on the High Court decision in Indigo EPZ Ltd. v. Eastern and Southern African Trade and Development Bank [2002]

1 KLR 810, in which Mbaluto, J had held (p.810):

"In agreements where parties have agreed to refer disputes to arbitration the position is that the jurisdiction to deal with substantive disputes and differences is given to the arbitrator and the Courts retain residual jurisdiction to deal with peripheral matters and to see that any disputes or differences are dealt with in the manner agreed between the parties…."

On the specific point whether the relief of injunction can be sought by the plaintiff herein, learned counsel relied on the Court of Appeal decision in Tononoka Steels Ltd. v. The Eastern and Southern Africa Trade and Development Bank, Civil Appeal No. 255 of 1998. In this case, it was held that the Court could grant a temporary injunction, even in relation to matters of a specific, pecuniary nature. In the words of Kwach, J.A.:

"The Kenyan Courts must retain the power to look at the securities and instruments and be in a position to tell the PTA Bank, in an appropriate case, that while the dispute is being referred to London for arbitration and final determination, it cannot realise its security in the meantime."

Learned counsel also relied on the High Court's decision in Lucy Njoki Waithaka v. Industrial and Commercial Development Corporation, Civil Case No. 321 of 2001, to demonstrate that injunctions will issue even where damages would give compensation to party. In that case Ringera, J (as he then was) stated the law as follows:

"As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal [in Giella v. Cassman Brown] couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy. By using the word 'normally' the Court was recognising that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted. I think some of the considerations to be borne in mind are the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the applicant, this may move a Court of equity to say: 'money is not everything at all times and in all circumstances, and don't you think can violate another citizen's rights only at the pain of damages'…"

For good measure, learned counsel remarked that it was an express provision of Order XXXIX, rule 2 that in a suit, whether or not compensation is claimed, an injunction may issue where breach of contract is alleged. Counsel urged that it was in all respects
proper, in the instant case, to seek an injunction.

The question of arbitration

Learned counsel affirmed that under the terms of the contact, the parties had agreed that disputes in certain matters be referred to arbitration. He noted the content of clause 36 of the conditions in the agreement; the same provides:

"36. (1) Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor … as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereafter or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled…) or the rights and liabilities of the parties under clauses 25, 26, 33 or 34 of these conditions, then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties…"

By the terms of the condition aforementioned, learned counsel submitted, there was an a automatic reference to arbitration the moment a dispute arose. Termination by the employer was provided for under Clause 36(2) of the conditions in he agreement; and hence, counsel submitted, this was a matter for reference to arbitration. Mr. Wagara submitted that by s.6(1)(a) of the Arbitration Act, 1995 the Court's jurisdiction to refer the matter to arbitration would be fettered only if the agreement was null and void; or was inoperative; or was incapable of being performed. He submitted that the agreement had been properly executed, and had been recognised by both parties as being active throughout the relationship – otherwise the defendant's letter of termination could not have been written. Neither would the architect's letter of purported termination have been written if the agreement was inoperative. Had the agreement been null and void, the Olali Committee which met on 28th September, 2004 could not possibly have required the employer and the architect to properly terminate the relationship. Counsel submitted that since the contract was always capable of being performed, the Court did indeed have jurisdiction to refer the dispute to arbitration. Learned counsel submitted that s.7 of the Arbitration Act did give the Court jurisdiction to entertain peripheral issues – and one of these was injunction to preserve the site pending reference to arbitration. There was need to so preserve, because there were on the site constructions put in place by the contractor, and they were not yet certified, not yet paid for. The site, therefore, should be preserved, so that the parties have an opportunity to appear there and to conduct assessments. There was equipment and material on site, some requiring a prolonged process of dismantling; these could not be terminated forthwith, and so they must be preserved. Was the contract void as claimed in the replying affidavit? Counsel was concerned with the averment in the relying affidavit, that there had been a variation to the contract of 19th October, 2000 which changed the nature of that contract and terminated it. I was myself concerned about that element in the replying affidavit, for the reason that it was a rather ambitious argument on a point of law, which in my view should not have been made part of a factual deposition. It was really a matter for counsel to take up and argue in Court, on behalf of the defendant. But learned counsel for the plaintiff had the additional point, that under clause 11 in the conditions in the agreement, the right to vary the terms of the contract had been provided for; and such variation could be required by the architect, or could subsequently be approved by the architect; and such a variation would not vitiate the contract. This meant that a variation could be quite properly effected within the terms of the contract.

As a matter of fact, there were variations effected by the project architect. One of these took place on 17th December, 2002 and was duly signed by the quantity surveyor, the architect and the employer (defendant). This item showed the contractual claim for additional works as Kshs.103,493,14/55. There had also been a variation earlier, similarly signed and authorised, on 30th November, 2001. Counsel submitted that in the case of these variations it was not the contractor making the variation; rather, it was the employer (the defendant). The defendant's Managing Director had written to the project architect on 12th

July, 2001 as follows:

"RE: PROPOSED HEADQUARTERS BUILDING AT NAIROBI TERMINAL FOR KENYA PIPELINE COMPANY LIMITED – APPROVAL FOR REDESIGN OF SUB-STRUCTURE AND ADDITONAL 2No.FLOORS.

"Reference is made to your letter Ref. 2129 (A4ta)/AS/VM dated 10th July, 2001 on the above.

"Please note that the above work was approved by our Board as follows….

"From the aforesaid you should ensure that:

(a) A bill of quantities for the redesigned sub-structure and superstructure, additional 2No. Floors, carpark, staff welfare facilities and executive canteen using the contractor's tendered rates in the current contract is prepared urgently…"

Counsel noted that, firstly, the plaintiff had tendered its rates as required; and secondly the defendant's board had duly approved the variations to the contract and there were agreed, revised contract payments. Counsel's point here, that the defendant's affidavit evidence lacks colour of truth, is unanswerable, I believe. On the evidence thus analysed, Mr. Wagara submitted that there clearly was a dispute, and on matters agreed to be reserved to arbitration; the contract was operative; it was not null and void; it was capable of being performed. Learned counsel cited in support of his submission the apt decision of the Court of Appeal in Aikman v. Muchoki [1984] KLR 353. This case sets our important principles regulating interlocutory injunctions, and holds (p.354):

"6. The judge was wrong in his observation that because liability was in dispute, granting an injunction would be unfair for being based on a contingent liability yet to be ascertained. Interlocutory injunctions can be granted where liability has not been ascertained.

"7 (obiter) To allow and protect the respondent's unlawful acts would render totally valueless the concept of sanctity of contract, security of mortgages, debts, charges by sweeping the [dust] under the carpet, and then leaving the field free for insurgents to play havoc by perpetrating illegal infringements."

Another important principle, which in my view has to be borne in mind in the instant matter, was also set out in that case. This is in the words of Potter, J.A. (p.360):
"I have had the advantage of reading in draft the judgement of Madan, J.A. with which I fully agree. I would only add the observation that, *in the field of the civil law, it is of the utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of the common law courts to do so, and if this tradition is departed from, the nation will suffer."*
Mr. Wagara submitted, and quite meritoriously, I believe, that the defendant was acting in breach of an agreement it had entered into, and that this betokened a lack of respect for the law. From this position learned counsel went on to urge that the plaintiff had clear probabilities of success in the main suit; because the plaintiff had carried out constructions in accordance with the contract, and had thus perfected its side of the contract; and yet the plaintiff was now being asked to leave the project site "forthwith". The plaintiff has equipment on site. How does the plaintiff assess the value of its works? How does the plaintiff preserve so many things of value on the ground? Stock must be taken. Liabilities must be ascertained.
Learned counsel urged that the conduct of the defendant had by no means been above reproach; and that on this account the balance of convenience would tilt in favour of the plaintiff. This balance of convenience, counsel urged, could not possibly tilt in favour of a defendant who did not even put in place a reliable mechanism to facilitate the plaintiff's vacating of the project site.

Is any financial accounting required of the plaintiff?
At paragraph (vi) of the replying affidavit it is thus averred:
"THAT once again and for reasons which not even the project architect could discern, the plaintiff was paid by the defendant a total of Kshs.228,253,596 on 6th March, 2001 and 18th December, 2001 respectively for work which was not done and for a sum which the plaintiff is yet to account for to-date."
Such a claim, counsel for the plaintiff submitted, was not pertinent to the issues in dispute in the instant proceedings and indeed, it was not even mentioned in the Minutes of the Olali Committee Meeting which took place at the defendant's headquarters on 28th September, 2004. Counsel submitted that as there was no explanation of the basis of the said sum of Kshs.228,253,596 this would be purely a claim for the purpose of confusing issues. Learned counsel submitted that the replying affidavit carried major contradictions. It carried allegations such as: that variations to contract had no approval from the defendant's board; that the variation was fraudulent and void - whereas the evidence on record showed that the variation not only emanated from board decisions, it also had the approval of the architect.

(b) For the Defendant/Respondent
Learned counsel, Mr. Njuguna, entered upon his task by submitting, quite properly in my view, that the decision of the Court would "revolve around [the question] whether the contract exhibited by both parties was valid and capable of enforcement." Mr. Njuguna contended that the contract, which was "supposed to have been performed by 12th May, 2002" had already expired by the time in respect of which the plaintiff alleges that breach did take place. Counsel contended that when, on 24th September, 2004 the defendant's Managing Director wrote to the plaintiff terminating the contract, "the contract had already expired." On that foundation counsel cited Order XXXIX, rule 2 of the Civil Procedure Rules, urging that this rule required that there be a contact in existence capable of being breached, for a party to seek injunctive relief. This line of argument was founded on a decision of the Court of Appeal, Nabro Properties Ltd. v. Sky Structures Ltd and Others, Civil Appeal No. 175 of 1999. In that case, which was in respect of the sale of land, it was held that a fundamental term of a subsequent agreement between the parties was

"entirely inconsistent with the terms of the old agreement" and so it amounted to a rescission of the old contract. I would observe, however, that the validity of the point of law in Nabro Properties is by itself incapable of
establishing the defendant's case herein, as it must be viewed in the lights of the facts obtaining. In the plaintiff's further affidavit of 28th October, 2004 it is stated that the defendant's breach of the contract had taken the form of unilateral suspension thereof on 20th March, 2003; and it is deposed as well that the contract was to lapse on 30th June, 2003 (para.12). Mr. Njuguna submitted that the plaintiff had, therefore, admitted that the contract was no longer in existence when it is alleged to have been breached. Counsel urged: "Even if that is the due date, by the time the contentious letter was written there was no contract in existence capable of being enforced or protected by injunction." Counsel submitted that the contract had already lapsed by the time it is clamed to have been breached by the defendant, but for good measure, goes further to place responsibility for termination at the plaintiff's doors. Mr. Njuguna submitted that it is the plaintiff itself who had, on 18th March, 2003 suspended the works. The basis of the defendant's claim, however, appears dubious, in the light of the correspondence on record. The plaintiff had on 21st October, 2003 written to the defendant's Managing Director quoting the project architect's letter of 17th March, 2003: "We therefore, on behalf of the client, M/s. Kenya Pipeline Company Ltd., hereby instruct you to suspend the works by end
of working hours tomorrow (18/3/2003) until further instructions." The plaintiff had written to the project architect on 18th March, 2003 complying with the architect's instructions but "without prejudice to our rights under the contract and [at] common law." On 15th November the defendant had written to the plaintiff in these terms: "We await…your formal termination letter to enable us to conclude the above contract…" I think it cannot be said the initiative for termination of the contract was coming from the plaintiff; it is a fact that the plaintiff was responding to the defendant's demands. But the defendant's perception is different; learned counsel submits:

"After the expiry of 14 days the plaintiff terminated the contract. [The plaintiff] can no longer say the contact of 19th October, 2000 is about to be illegally terminated."

Quite clearly, the defendant was striving to shut out all possibilities of being fixed with contractual obligations. Learned counsel maintained that the effect of the variation to the contract, of 17th December, 2002 – which, as I have noted already was duly signed by the defendant's quantity surveyor, its architect, and the defendant itself – was to rescind the contract. While admitting that the project architect had authority under the contract to sanction variations, he impugned the manner in which the variations were arrive at. It was not, however, apparent whether in the defendant's evidence or in its advocate's submission,
that the plaintiff had enjoyed any overwhelming control or influence over the defendant which had been misapplied, so as to subject the defendant to any duress or undue influence at the time of making the variations to the contract. Counsel for the defendant contended that the variation to the original contract amounted to a new contract, and by that fact rescinded the existing contract. This, clearly, was a bold claim which, if made casually without cogent evidence and supporting legal principle, would carry hardly any colour of validity. In my view, there was not sufficiently strong evidence to support the claim, as judged from the content of the replying affidavit. However, learned counsel moved on courageously to cite supporting authority for his client's case. He cited Halsbury's Laws of England, 4th ed., Vol. 9 para.570:

"Since a contract required by law to be evidenced in writing may be rescinded by a written or oral agreement it becomes important to distinguish between variation and rescission. If, on its proper construction, the new agreement rescinds the original contract the latter is brought to an end even though the new agreement is unenforceable. If, on the other hand, the new agreement is only a variation, it can only take effect if not in writing, as a waiver or by way of estoppel. Whether the parties intended to rescind or vary is to be determined in the light of all the circumstances of the case; but the parties will be presumed to have intended to rescind the old contract and to have substituted a new one wherever the new agreement is inconsistent with the original contract to an extent which goes to the very root of it."

Counsel cited another passage on variation of contacts, from Halsbury's Laws of England, 3rd ed., Vol.8:

"Where a variation which is inconsistent with the terms of the contract is made by consent, this amounts to a new agreement which supersedes the original contract."

In attempting to apply these well-recognised principles of law to the instant matter, learned counsel contended that the "variation" to the original contract herein, did carry the requisites of a new agreement: whereas the old contract had a time-frame, this was not the case with the new one; and consequently the two agreements were inconsistent. Counsel urged:

"The variation altered the old contract and created a new contract. The new contract cannot be the basis of the suit." Counsel went on to argue that under clause 11 of the contract, any variation was to originate from the architect. He did not, however, show any convincing evidence that the variation to the contract herein was the handiwork of the plaintiff. He did, however, make a proposition which I think is not tenable; that "the basis of variation must be the architect and not the owner." This cannot be right; for it must be assumed that the architect receives general instruction from his employer (the defendant); in the nature of things, it cannot be otherwise! Mr. Njuguna contended that the applicant had shown no contractual provision for the merits of the dispute herein, to go before an arbitrator. He submitted that the plaintiff could not invoke clause 36 in the conditions forming part of the contract. But as I have noted earlier, clause 36(1) of those conditions did provide for arbitration as a virtually automatic recourse, where there were disputes "between the employer or the architect on his behalf and the contractor…"In my view, counsel's reluctant to appreciate the clear purpose of this arbitration clause is puzzling. He appear to hypothesise his submission on the mere assumption that the contract between the parties no longer exists. He states: "The applicant must show a contractual provision laying the basis for an arbitration clause…. It is trite law that once a contract expires by effluxion of time, a party cannot rely upon it. I do not know what the arbitrator will be doing." The contention that there is no basis for invoking the arbitrator's jurisdiction, because the contract is no more, in my view proceeds from a fallacy, because an important legal inference is being drawn on the foundation of a mere conjecture – that the original contract had simply vanished for being consumed by a variation which is not a true variation, but an inconsistent, new contract. This sanguine line of submission, apparently, could not be avoided by counsel, since he had already filed a defence and counterclaim in which he asserted that the original contract between the parties simply did not exist any more. Such a stand clearly denied the defendant's advocate a chance to address his mind to the merits of the call for arbitration in this matter. He proposed:

"The arbitrator cannot deal with the issue of legality. He can only determine matters to do with a contract that is alive. This matter cannot be referred to arbitration… There must be an agreement which provides for arbitration. The agreement has lapsed."

Mr. Njuguna challenged the arbitration option on yet another ground: this path of dispute settlement was only available before a statement of defence was filed; and at that stage, the party seeking recourse to arbitration must apply to the Court for stay of proceedings. Learned counsel submitted that the applicant had not brought himself within the ambit of s.6 of the Arbitration Act, 1995; and, he urged, the right to refer the matter to arbitration had been extinguished. What is the legal basis for such propositions? Learned counsel sought to rely on the Court of Appeal decision, Kisumuwalla Oil Industries Ltd v. Pan Asiatic Commodities PTE Ltd. & Another Civil Appeal No. 100 of 1995. Bosire, J.A. in that case remarked:

"In view of the reasons I have endeavoured to state above, and in light of the clear provisions of section 6 of [the] Arbitration Act, unless a defendant waives his right to rely on such a clause, he would be obliged to apply for a stay of proceedings."
Justice Pall in that case stated the law as follows:

"The parties can of course expressly agree to ignore or disregard the arbitration clause. They may also do so by conduct. Once the parties have submitted to the jurisdiction of the Court they cannot blow hot and cold and subsequently without consent of each other rely upon the condition precedent in the arbitration clause."

On the basis of the foregoing passages, learned counsel urged that, since a defence and counterclaim have been filed, it was no longer possible for the Court to open the doors to arbitration. In counsel's words: "The Court now has become seised of the dispute, and it is for the Court to decide the matter." He relied on the Court of Appeal decision, Corporate Insurance Co. v. Loise Wanjiru Wachira, Civil Appeal No. 151 of 1995 in which it was held:

"While we agree with the proposition that a Scott v. Avery arbitration clause can provide a defence to a claim we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence, the appellant lost its right to rely on the clause."

Counsel submitted that the procedure of arbitration can only be invoked where stay has been sought. He further argued that the issues canvassed in the instant matter are about validity of contract, and as such, these are for judicial resolution and not for arbitration. Learned counsel submitted that it was not possible, under s.6 of the Arbitration Act, to have the matter referred to arbitration once a party has filed a defence. It was urged that the Court had no jurisdiction to make such reference. The clear purpose in this argument, it appears to me, was to validate a possible move by the defendant to seek judgement against the plaintiff – in particular because the defendant had a counterclaim to which no response had been filed. Counsel urged that the only reason the defendant had not sought judgement was that it had undertaken at the beginning not to seek it. It was further contended that the Court could not refer the matter to arbitration by virtue of Order XLV – because the parties had not reached agreement that such reference be made.

Mr. Njuguna submitted that there would be no basis for granting the plaintiff's prayer for an injunction, because there was no reason to seek to preserve the project site.

That site, it was contended, belongs to the defendant, and besides, it had been averred at para.11 of Paul Mutisya Muli's supporting affidavit that "the plaintiff commenced demobilization .. and advised sub-contractors to do likewise"; and in para. 12 thereof that

"on the 19th March, 2003 a clerk of works report was prepared detailing the works accomplished and outstanding as at that date, the construction materials, labour, machine and equipment on site." Learned counsel submitted that the only matter in respect of the project site that remained outstanding was paperwork and the calculation of accounting figures. In counsel's words: "A party cannot be injuncted against taking over his site merely because there is a dispute." He urged that it was the defendant rather than the plaintiff who stood to lose; and the defendant would lose if it had no access to its site and thus could not engage other contractors. Learned counsel submitted that at the time the works were suspended, there was no contract in existence which would create any right to arbitration. He contended that such a right could only inhere in the original contract, but that contract had ceased to exist. He disputed the plaintiff's position that the original contract had gone through a variation; in his view the alleged variation was invalid. He contended that a valid variation could only emanate from the architect, not the quantity surveyor who, he maintained, was the originator of the material variation. He argued again that what had been achieved by the variation was a "total overhaul of the contract". For good measure, counsel urged that "the purported

variations were illegal." He then contended that "if business for which an arbitrator could be appointed is tainted with illegality, then the Court cannot act." To consolidate such bold assertions, counsel invoked case law. He cited the Court of Appeal decision in Heptulla v. Noormohamed [1984] KLR 580 at p.581: "No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality." He contended that the variation to the contract was illegal and "the applicant was a party to the illegality; so he cannot come to seek equity."

The basis of Mr. Njuguna's submissions is para.2 (viii) of the replying affidavit of the defendant's company secretary, Mrs. Mary Kiptui, dated 22nd October, 2004. The deponent avers:

"THAT due to this colossal amount of money having been spent and irregularly so, the Government as a principal shareholder of the defendant company instructed the defendant board to suspend the project and carry out an inspection to ascertain whether what has been paid for tallies with the work done on the ground and a committee and independent consultant so appointed confirmed the Government's fears of irregularities, incomplete project, overpriced works and a multiplicity of other malpractices done by the

plaintiff herein rendering the entire project a mockery."

The said report, which clearly is not conceived within the terms of the original contract between the plaintiff and the defendant, is dated 2nd May, 2003 and comes from a private firm by the name Quantech Consultancy – Quantity Surveyors & Building Economists. These consultants challenge the contractual arrangements which bound in law the two parties; they say, for instance: "the contract rates in the bills of quantities were 2.68 times higher than current construction rates." This private consultant's document is the basis, quite clearly, upon which counsel for the defendant founded his claims of illegality, the basis upon which Mr. Njuguna relied on a passage in Mistry Amar Singh v. Kulubya
[1968] E.A. 408 at p. 414, quoted in the Heptulla case (at p.586):

"Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense and expresses clear and well-recognised legal principle, which is not [confined] to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him."

Learned counsel avowed the content of the private consultancy report to be true and submitted that on that account, the variations to the contract were illegal and the contract was unenforceable; and hence it served as no basis whereupon the Court could refer the dispute to arbitration. Mr. Njuguna contended that since the said consultancy report impugning the contract had been an annexure to the replying affidavit, by dint of the fact that the plaintiff did not "deny it" — presumably through a counter-report — it followed that the report's content was true and was admitted as such by the plaintiff. So the alleged illegality was entirely true, and this Court must condemn and refuse the plaintiff's claims for interlocutory relief. In counsel's words: "The report represents the situation on the ground."

Learned counsel ascribed merits to the private consultant's report because it was "made by an independent committee." He did not, however, say how the independent committee was agreed upon, how its independence was guaranteed, but most important, how this committee came to be a material player in the process of private contract between the plaintiff and the defendant. These are significant considerations; for unless they are clarified, then there is only a feeble foundation to the main contentions made for the defendant such as "The report of an independent committee shows that there were irregularities committed with the connivance of the applicants;" "The applicant should not benefit from its own complicity in irregularities"; "Even if there was a contract, injunction should not be granted on that ground, for it would protect an illegality"; etc. Learned counsel further strengthened that line of argument by citing the Court of Appeal decision in The Owners of the Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Limited, Civil Appeal No. 50 of 1989, in which it was clearly stated that in ex parte proceedings (which have at first granted certain prayers of the plaintiff) there should be full and frank disclosure to the Court of facts known to the applicant, and failure to make such disclosure may result in the discharge of any order made. Mr. Njuguna submitted that the plaintiff, at the time of moving the Court by application, had not disclosed material facts. But what are those facts not disclosed? That the contract had ceased to have effect due to effluxion of time; that it is the plaintiff who had terminated the contract before coming to Court; that a payment had been made to the pontiff which was, in the words of learned counsel, "not sanctioned by contract"; that a payment had been made which "was not sanctioned by the architect"; that there was a report by an
independent consultant which queried payments made to the plaintiff; etc. Although learned counsel closes his list of matters-not-disclosed with the remark, "Certain fundamental facts were withheld", it is my assessment that the matters in reference are not really facts capable of being disclosed as established reality; what is in contemplation are extremely controversial positions which are the very basis of the joinder of issues in the main suit herein and in the instant application. Such matter, I think, cannot correctly be referred to as facts for disclosure within the framework of depositions made under Order XVIII of the
Civil Procedure Rules, which relates to the making of affidavits. On this basis I would not accept

counsel's contention that the alleged non-disclosure "disentitles the applicant from enjoying the fruits of the [Court's] orders."
Learned counsel submitted that the applicant had not demonstrated a prima facie case with a probability of success, and therefore should not be granted an injunction. He submitted that if any injury to the plaintiff would be held to have occurred, then this could be remedied by an award of damages, which the defendant has the capacity to pay – and the same would provide adequate compensation. Counsel further submitted that the plaintiff's prayer for an injunction should be refused, because the balance of convenience lay on the defendant's side: because the site sought to be preserved was the property of the defendant, and the defendant was able to give recompense in damages; because the clerk of works report had been prepared, and so the position of the plaintiff at the project site was now already ascertained; because the defendant had already "sunk in more than 500 billion Kenya Shillings, and so it was not faire to deny the defendant the opportunity to finalise the project, just because where was a dispute."
(c) The Plaintiff's Rejoinder

Learned counsel, Mr. Wagara, submitted that there was a misapprehension on the defendant's side, on the design and purpose of ss.6 and 7 of the Arbitration Act, 1995. What is required under these provisions, it was submitted, was to determine whether the arbitration agreement is null and void; or inoperative; or incapable of being performed; whether there is a dispute on the matters agreed between the parties to be referred to arbitration; whether a prima facie case has been established on those questions, and if yes, then the proceedings are to be referred to arbitration. That counsel for the defendant had not addressed the foregoing points, preferring to claim that the contract was tainted with illegality, in the submission of counsel for the plaintiff, was remiss in terms of the identification of the material legal questions. For there had indeed been a valid variation in the original contract, bringing into being a new contract binding as between the parties. Learned counsel submitted that there was no evidentiary basis for the claims of illegality in the varied contract: no particulars of ill motives on the part of the plaintiff, in the making of variations to the contract, had been set out in the replying affidavit. By the Evidence Act (Cap.80), a party who alleges a fact situation must prove the same (ss.107, 109). The defendant, counsel submitted, had not complied with this requirement of the law. Mr. Wagara disputed the propriety of the reliance, in relation to the allegations of illegality in the contract, which counsel for the defendant had sought to place upon the statement of defence dated 19th October, 2004. The said pleadings, counsel submitted, had no relevance; the reason being that the documents of pleadings were
concerned only with the merits of the case which are to be resolved at a different level.
The arbitration procedure Learned counsel submitted that the initiative for arbitration under s.6 of the Arbitration Act, 1995 is designed for defendants in the first place, in a situation in which the plaintiff has commenced judicial proceedings, and done so in violation of an arbitration agreement. In this case, the plaintiff has moved the Court so that the Court may determine the issues in dispute. If the defendant is still desirous of enforcing the arbitration agreement in the contract, then the law requires the defendant not to go beyond the stage of entering appearance, but after this stage to apply to the Court for a reference to arbitration. Should the defendant proceed to file a defence, he will have compromised his plea for a reference to arbitration – and so he will be left only with the judicial process as his recourse. In the instant case, the plaintiff filed plaint, and then promptly under the umbrella of the plaint, filed an application for reference to arbitration. The defendant rejects the arbitration option and expresses preference for the judicial process; indeed, they not only file a defence but also file a counterclaim. By filing the counterclaim, the defendant has taken the position of a plaintiff, with the real plaintiff now appearing as the defendant; and in accordance with the terms of s.6 of the Arbitration Act, the real plaintiff has to-date not filed a reply to counterclaim, but has instead filed the instant application praying for reference to arbitration. With these submissions, learned counsel was taking the position that the plaintiff had pursued the legal and the prudent course of moving the Court to refer the dispute between the parties to arbitration, there being a contractual arbitration clause. Learned counsel placed further reliance on the Court of Appeal decision in Kisumuwalla Oil Industries Ltd. v. Pan Asiatic Commodities PTE Limited & Another, Civil Appeal No. 100 of the 1995. The Court there held (Bosire, J.A.):

"…in the light of the clear provisions of section 6 of [the] Arbitration Act, unless a defendant waives his right to rely on [the contractual arbitration] clause, he would be obliged to apply for a stay of proceedings."
Counsel also relied on another Court of Appeal decision, Corporate Insurance Company v. Loise Wanjiru

Wachira, Civil Appeal No. 151 of 1995. The learned Judges of Appeal, in that case, stated the fundamental principle underlying s.6 of the Arbitration Act as connected with established practice in English Law; and a relevant passage in Mustill's and Boyd's
The Law and Practice of Commercial Arbitration in England, 2nd ed. was quoted:

"A Scott v. Avery [contractual arbitration] clause performs two different functions. Firstly, it creates an obligation to arbitrate: and as such, it gives the defendant in a High Court action the right for a stay of the proceedings. Second, it creates a condition precedent to the plaintiff's right of action; and as such, it gives the defendant a substantive defence to the claim. A defendant sued in breach of a Scott v. Avery provision thus has a choice of remedies. In law he is entitled to bide his time and rely on the Scott v. Avery point at the trial. But the court does not approve of this procedure, because it wastes the costs of the action. The right course is for him to apply for a stay."
Counsel noted that in both the Kisumuwalla and the Corporate Insurance Company cases the plaintiff had filed suit without any regard to the contractual arbitration clause; and in each case the defendant had compromised his right of reference, just by proceeding to file a statement of defence. The plaintiff in this instance does not want to fall into that trap, in view of the counterclaim filed by the defendant.
The claim of illegality in the contract One reason given by counsel for the defendant for alleged illegality in the variations to the contract, is that they were not approved by the defendant's board of directors. Counsel for the plaintiff submitted that it was trite law that a party dealing with a corporation was perfectly entitled to presume that the corporation had complied with its internal procedures, for an outsider has no way of knowing how the corporation conducted its internal affairs. A corporation could not, thus, be heard to plead its internal irregularities as reason to defeat the rightful claims of outsiders who had dealt with it. Counsel noted from the evidence in the further affidavit of Paul Mutisya Muli dated 28th October, 2004 that a letter by the Managing Director of the defendant company to the project architect, dated 12th July, 2001 had unambiguously stated that the variations were "approved by the Board." This letter, counsel submitted, had not been shown to have been a forgery; and the company secretary of the defendant who swore a replying affidavit on 22nd October, 2004 had not exhibited any board minutes stating that the board meeting said to have approved the contract-variation, had not in fact, taken place. Learned counsel added, for good measure, that the law of arbitration did not require variations to contract such as the one in question, to be placed before a board before they could have validity.
Mr. Wagara also contested the contention by counsel for the defendant, that the contract-variation was illegal because it was not the project architect who approved it. The meaning of the architect's approval, learned counsel remarked, was endorsement by signature; the idea of variation could come from the client itself, or indeed from any responsible person. It was submitted that since the variations were silent on the issue of variation, it followed that the contract was self-preserving on the issue of variation; and besides, it was an express term of the original agreement that it was not vitiated by a subsequent variation (clause 11(1) of the conditions in the contract). Variation? Or new contract?
Learned counsel was in agreement with the principle in the Court of Appeal decision in Nabro Properties Ltd. v. Sky Structures Ltd. & Others, Civil Appeal No. 175 of 1999, which is thus stated (Owuor, J.A.): "Going by the observation of the learned author of Chitty on Contract, 27th ed., Vol.1 (paragraphs 022-023), the appellant herein chose to be bound by the new assignment thereby executing he same. This in my view amounted to a rescission of the old contract as this fundamental term was entirely inconsistent with the term of the old agreement." Mr. Wagara, however, submitted that such a situation did not characterise the contract under consideration here; the variation here was "not inconsistent with the spirit of the original contract, the fundamental terms of which had remained intact."
Counsel submitted that the evidence tendered by the defendant hardly showed a belief that, truly, the said variations to the original contract had rescinded the same. The
replying affidavit, at paragraphs 2(iii), 2(iv), 2(v) and 2(xvii) showed that sometimes the defendant thought the contract had been varied, and at other times thought it had been rescinded. Such a contradictory stand, it was submitted, offended the requirement of Order VI, rule 13(1)(c) of the Civil Procedure Rules. On the claim that the contract had lapsed through effluxion of time, learned counsel submitted that even a lapsed contract would not take away a party's cause of action which was limited by the Limitation of Actions Act (Cap.22) at six years. Within that time period either party would have been entitled to seek enforcement of the contractual arbitration clause.
Counsel submitted that the original contract between the parties had not lapsed. It had been extended. The

further affidavit of Paul Mutisya Muli dated 28th October, 2004 carries the project architect's letter of extension of 14th November, 2002 which (in part) reads:

"Your letter of 27th May, 2002 item 1 refers to project variation of 60% as a basis for your request of 60 weeks…

"The Consultants have used your original progress chart submitted in September, 2000 as a basis for working out the 7 months' extension warded for additional works and commences on 11th May, 2002 upto 11th Dec., 2002. The 7 months has been awarded under clause 23(a)."
Counsel stated that there was a further extension of the contract to 15th June, 2003, but before that date, the defendant suspended works on 17th March, 2003 – at which date the extended contract was still running. A relevant document in this regard is a letter attached to the supporting affidavit being from the defendant's Managing Director to the defendant, and dated 15th November, 2003. The letter says: "We await…your formal termination letter to enable us [to] conclude the above contract as per clause 26 without prejudice to the rights of either party." It can only be concluded from that letter that the defendant honestly believed, as at 15th November, 2003 that the original contract of 19th October, 2000 was still in force: which would contradict what is deposed in the defendant's company secretary's replying affidavit of 22nd October, 2004 and what is repeatedly asserted by counsel for the defendant, that the contract had lapsed and so it could not confer upon the plaintiff rights to have the dispute referred to arbitration! Is there a prima facie case warranting grant of relief? Counsel for the plaintiff contested the contention made for the defendant, that no prima facie case had been made for the reliefs sought. Mr. Wagara submitted that all the plaintiff was required to prove were: that there was a valid, existing contract providing for arbitration; that the contract project was substantially accomplished; that a dispute had arisen between the parties. Only in those spheres was it necessary to establish the existence of a prima facie case. Learned counsel also contested the contention that it is not a fit case for grant of injunction because clerk of works had been effected and so there was nothing to protect at the project site: for the said assessment was, in effect, the handiwork of the defendant alone – yet there was a dispute between the parties. Counsel relied on the authority of Emmanuel Odhiambo & Another v. Egerton University, HCCC No. 894 of 2002 and submitted that under s.6(2) of the Arbitration Act,
arbitration proceedings can take effect even when a matter is still pending before the Court;
and on this basis there would be no need for an endless injunction in favour of the plaintiff.
This submission is consistent with the Courts position (Hewett, J) in Express Dairies Ltd. v. Tetra Pak Limited & Another, HCCC No. 1691 of 2000. The relevant passage may be set out here:

"As regards the third Agreement, it seems fair and equitable to me that if I grant a temporary injunction to prevent sale of the plant comprised therein it should be strictly limited in time and if within that time the matter is not referred to the ICC and the initial deposit for fees paid, then the injunction should be lifted.

"I accordingly grant a temporary injunction to restrain Tetrapak from repossessing, removing, selling or dealing with the equipment and machinery comprised in the third Agreement dated 5th March, 1998 for a period of 60 days from today within which time the dispute must be referred to the I.C.C. and the initial deposit of fees paid by the plaintiff failing which the injunction will be discharged."

Learned counsel in his further submissions placed reliance in this Court's decision (Mwera, J) in Tropical Food Products International v. The Eastern and Southern African Trade & Development Bank & Another, HCCC No. 1534 of 2001, which contains the following relevant passage:

"This Court's understanding of section 6 [of the Arbitration Act, 1995] is that a party who desires to go to arbitration in an appropriate case may apply at any time not later than the time:
(i) it enters appearance; or
(ii) files any proceedings; or
(iii) takes any other step, and the Court shall grant such an application unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or unless the Court finds that in fact there is no dispute between the parties with regard to the matters agreed to be referred to arbitration.
This provision of [the] law says at subsection (2) that it
does not matter that an application has been brought under [subsection] (1) and a suit is pending before

the Court – arbitral proceedings can still be brought and an award made."

C. FURTHER ANALYSIS, AND ORDERS

In my consideration of the application and prayers, the evidence, the documentation, and the submissions of counsel on law and evidence, certain scenarios have emerged which I consider to be a reliable fact-foundation, for arriving at certain findings and making appropriate orders. These scenarios may be set out in point form -

(i) A contract was entered into between the defendant and the plaintiff, on 19th October, 2000 for the construction and completion of the defendant's proposed headquarters building and associated external works.

(ii) The construction was to be on the basis of drawings and bills of quantities duly approved, and the conditions forming part of the contract provided a central role for the defendant's project architect who was also empowered to make or approve variations to that original contract.

(iii) On 6th March, 2003 the defendant wrote to its project architect as follows: "We are in receipt of Government instructions to freeze the project and hereby issue instructions to you to implement the same immediately." The project architect responded by writing to the plaintiff on 17th March, 2003 as follows: "We therefore, on behalf of the Client, M/s. Kenya Pipeline Company Limited, hereby instruct you to suspend the works by end of working hours tomorrow (18/03/2003) until further instructions." From this record which is undisputed, I take it as a fact that suspension of the works was the act not of the plaintiff, but of the defendant and the defendant's architect.

(iv) The plaintiff upon being directed to suspend the works, immediately, on 18th March, 2003 protested that instruction and cautioned the defendant about existing contractual obligations, the defendants rights emanating therefrom, and the hardships of demobilization now occasioned by the suspension directive.

(v) When the defendant suspended the construction works as aforesaid, the operative extension of completion period was still running and was scheduled to end on 30th June, 2003.

(vi) Notwithstanding that the defendant, as recounted above, had already suspended the works through its architect's letter of 17th March, 2003 the defendant itself, now through tis Managing Director, wrote to the plaintiff on 15th November, 2003 in these terms: "We await your formal termination as per clause 26 [of the contract]". This letter took direct charge of the management of the contractual relationship between the parties, by avoiding any mention of the role of the project architect; and in this way it stated the obvious: the architect was merely the servant of the defendant. Secondly this letter shows that the defendant was directing the plaintiff to abandon the contractual relationship, and in my understanding this amounted to the defendant taking the crucial step of putting an end to the contract. The defendant's Managing Director moreover informed the plaintiff, in the same letter, that he had detailed the defendant's Chief Security Officer to ensure the plaintiff's exit and to take charge and control of the project site.

(vii) Any doubts about the fact that the defendant terminated a contract which it clearly perceived to exist, is found in the Managing Director's further direct letter to the defendant, dated 24th September, 2004: "We advise having been instructed by the Government to immediately TERMINATE the above CONTRACT which we HEREBY DO and to further instruct your company to make immediate arrangements to demobilize and remove forthwith all the construction equipment on site, accessories and personnel." This letter evidences a measure of confusion in the defendant's understanding of management procedures under the contract for the construction of its new headquarters by the plaintiff. For on 29th September, 2004 the project architect similarly wrote to the defendant claiming to terminate the same contract, which letter now went even further and proclaimed that it was terminating he said contract on grounds of "public policy and ethics."

(viii) It is a common averment in the defendant's evidence and in its counsel's submissions, that the said contract, which was clearly seen by successive Managing Directors of the defendant as valid and in force continuously, at least up to 24th September, 2004 was illegal, null and void. This shows notable contradictions: to the plaintiff, the contract was always entirely valid and indeed was for most of the time operational; for the defendant and its top management, too, the contract carried legal force – at least until they terminated it in September, 2004. But to the defendant's company secretary (deponent of the replying affidavit) and the defendant's advocate,there was never any contract, because it had lapsed in March, 2003 and because it was an illegal contract. It is claimed in these proceedings that the contract was, in the eyes of the Government and a committee called the Olali

Committee which the Government had
set up, also illegal, irregular and void. The Government is not a party in these proceedings, and neither did any of its officers make depositions in support of the defendant's claims.
(ix) The plaintiff's position is that the contract between the parties, dated 19th October, 2000 did not remain the same. It had been anticipated from the very beginning that variations would become necessary; and it was provided in clause 11(1) of the conditions in the contract that –

"The Architect may issue instructions requiring a variation and he may sanction in writing any variation made by the Contractor otherwise than pursuant to an instruction of the Architect. No variation required by the Architect or subsequently sanctioned by him shall vitiate this Contract."
(x) The defendant produced no evidence of even a single variation to the contract of 19th October, 2000 which was not duly authorised by the project architect. It follows that no credible evidence was placed before the Court which showed a variation to the contract secured through fraud, irregularity or illegality as repeatedly alleged by the defendant in these proceedings. I therefore find as a fact that the original contract was indeed varied, and that the variations effected had the authority of the defendant and the defendant's architect, and consequently the variations were not tainted by fraud, irregularity or illegality.
(xi) Although the defendant, who clearly acknowledges that the contract of 19th October, 2000 was varied, has contended that the variation of 30th November, 2001 brought about a new contract which rescinded the original one, this has not, in my finding, been proved at all. The defendant has shown no new contract entered into on 30th November, 2001 that in any way differed from the structure, design and character of the contract entered into on 19th October, 2000.
(xii) That the original contract of 19th October, 2000 remained valid is evident from the fact that the defendant's committee known as the Olali Committee, said to be independent and avowedly appointed at the instance of the Government, at its meeting of 28th September, 2004 advised the employer (defendant) to properly terminate the contract entered into with the plaintiff on 19th October, 2000. Besides, how could the defendant's Managing Director terminate the said contract by his letter of 24th September, 2004 if no such contract existed.
(xiii) No evidence was placed before the Court which could show any duress, or undue influence emanating from the plaintiff which would
have led the defendant to enter into contract with the plaintiff on 19th October, 2000 and thereafter to effect variations to that original version of the contract. Therefore I must conclude that the said contract as well as its subsequent variations, were consensually executed by both parties within the recognised principle of freedom of contract.
(xiv) Since the contract between the parties was, as I have held, a valid contract in every respect, its conditions, including the one providing for arbitration of matters in dispute, were no less valid; and clause 36(1) of those conditions did provide for arbitration: "Provided always that in case any dispute or difference shall arise…then such dispute or different shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties…"
(xv) Since section 6 of the Arbitration Act, 1995 specifically secures the defendant's right to prefer arbitration to the judicial process, the fact that the defendant herein has, I believe, deliberately spurned the arbitral solution, indicates strongly that the defendant had taken a position of reluctance in complying with the terms of the contract.
(xvi) By contrast, the plaintiff who is committed to the path of arbitration, has shown a clear sense of fidelity to the contract. Thus in compliance with procedure and practice, the plaintiff, rather than file a defence to the defendant's counterclaim, has moved the Court to refer the dispute to arbitration.
(xvii) Although the path of arbitration is provided for in the contract, and is clearly open to the parties by virtue of s.6 of the Arbitration, Act, 1995 the defendant rejects arbitration, and claims that the arbitral recourse is an emanation of a contract that is illegal and void. Since I have already found and held that the contract between the parties was valid in every respect, I must also now hold that the defendant's reason for desisting from arbitration is an invalid one.
(xviii) The defendant's unexplained rejection of arbitration is evident in its refusal to acknowledge that if it attempted to seek judgement on its counterclaim it would probably fail – because the plaintiff has already moved the Court to refer the dispute to arbitration; counsel for the defendant has claimed that there has been no move to secure judgement on the counterclaim only because of some generous undertaking which the defendant has chosen to make!
(xix) The defendant impeaches its own Managing Director as an illconducted employee who facilitated

what is perceived as an illegal or fraudulent or irregular contract; the defendant claims its board did not authorise variations to the contract; the defendant claims the consensually made contract entailed overpricing in favour of the defendant; the defendant claims that the making of the contract was attended with malpractices “rendering the entire project a mockery.” No basis for these claims, however, is placed before the Court that carries any legal force, as measured against the doctrines attached to the law of contract. Hardly any cogent evidence is brought into Court which would compromise the motions of contract which had brought the parties together in a binding legal relationship. The foregoing factual scenarios lead me, with a clear perception, to find and hold that the defendant has not brought before the Court any credible material such as would
lessen the weight of the contractual obligations resting upon the parties. This perception is further confirmed by the following analysis of certain relevant legal issues. By blaming its own management personnel and its internal failings of procedure, then relying on these to dispute the legality of the contract, the defendant falls into a
misconception, in point of law. The Kenya Pipeline Company Limited (the defendant) must be taken to be a full-fledged body corporate, with its own in-house arrangements for good management; and to outsiders such as the plaintiff, the only relevant consideration is that the defendant has its common seal, can sue and be sued, has the capacity to own, utilise, lease,
mortgage or dispose of property. That is all. The position was long ago settled in the English case, The Royal British Bank v. Turquand (1856) 6 E. & B. 327. To quote the operative principle of law, as set out by Jervis, CJ (p.332):
“We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties
dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made completely by a resolution they would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.”
Thus, whether or not the defendant’s Managing Director should not have communicated with the plaintiff as he did, is, for purposes of the law, irrelevant. Whether or
not he had first convened the defendant’s board, before committing his company in contract, was irrelevant. Counsel for the defendant contended that the variations made to the original contract of 19th October, 2000 had rescinded the contract. From the facts already considered above, that does not appear to be so. In Halsbury’s Laws of England, 4th ed., Vol.9 (para.570) the relevant principle is thus stated:

“Whether the parties intended to rescind or vary is to be determined in the light of all the circumstances of the case…” It is quite clear to me that the facts on record have not shown that the parties had any intention to rescind the original version of the contract, dated 19th October, 2000. It is on the basis of there being a contract, that the plaintiff has opted for arbitration as the recourse for solving the dispute between the parties. And quite the reverse, it is on the supposition that there exists no contact, that the defendant has declined arbitration. On the basis of the evidence and the submissions I have held that there was a valid contract governing the relationships between the parties. It is clear that the defendant has done everything to have the contract declared void: the defendant has claimed internal irregularities within itself to taint the contract with illegality; the defendant has invoked the name of Government, and to invoke Government’s obligations of public stewardship to impugn the private interests embodied in the contract; the defendant has even presented itself as the exemplary custodian of ethics asserting itself to chasten a rather slick contractant. But there can be no objective basis for such a claim, and much less, a commitment to legality. A critical object of legality is the preservation of accrued private
rights. And a vital right which must always, so far as possible, be protected by law is the
right of private contract; for it lies at the very core of economic initiatives which facilitate
the quality and integrity of human life. An aspect of such civil law rights was well expressed by Potter, J.A. in Aikman v. Muchoki [1984] KLR 353 (at p.360):

“…in the field of civil law it is of the utmost importance that the Courts uphold the rights of parties to commercial transaction. It is the firm tradition of the common law courts to do so, and if this tradition isdeparted from, the nation will suffer.” Quite clearly the plaintiff has shown a well grounded claim in law, which if prosecuted through trial, would have a high probability of success. As for the defendant, not

only has it signally failed to show the makings of a cogent case, but it has frequently contradicted itself, as well as shown want of bona fides in its commitment to the contract of 19th October, 2000 as properly varied. The defendant appears to have taken leave of its juristic design and functioning, claming in vague terms that Government instructed it to terminate its contract with the plaintiff; the defendant has employed unilateral and capricious arrangements to prove weaknesses in the performance of the plaintiff's contractual role; the defendant has attempted by faulty methods to create the impression that it is the plaintiff who had terminated the contact; the defendant has treated with contempt the most basic aspects of contractual obligation. And the defendant has exposed the plaintiff to major losses that flow from the fact that a building contract entails continuous chains of activity; involves large-scale mobilization of plant, equipment and machinery; involves sub-contracts and serious third-party interests; entails secondary contracts for
goods and supplies; involve mobilization and site occupation and management. When the plaintiff asks how such things and processes are to be reorganised and accounted for upon termination of contract, the defendant ripostes that there is no reason to protect the project site which in any case is the defendant's property. In the words of counsel for the defendant: "A party cannot be injuncted against taking over his site merely because there is a dispute."
This, in my view, is the classic case for the grant of injunctive relief. I would notaccept the submission of counsel for the defendant that the damage which the plaintiff
would suffer is very well calculable and can be recompensed in damages, so that injunction is not necessary.
I will make orders as follows:

1. That, an injunction be and is hereby issued against the defendant by itself, its servants, agents or otherwise howsoever, restraining them from removing, dismantling or in any other way whatsoever interfering with the plaintiff's plant, machinery, equipment, building materials or personnel at the project site, or in any other manner whatsoever interfering with the project site pending the hearing and determination of the suit.

2. That, an order be and is hereby issued referring the parties forthwith to arbitration, as provided in clause 36 of the Contract Agreement between the parties dated 19th October, 2000 and in terms of sections 6 and 7 of the Arbitration Act, 1995.
3. The defendant shall bear the plaintiff's costs in this application in any event.

Orders accordingly.

DATED and DELIVERED at Nairobi this 7th October, 2005.

J. B. OJWANG
JUDGE

Coram: Ojwang, J.
Court clerk: Mwangi
For the Plaintiff/Applicant: Mr. Wagara, instructed by M/s Wagara, Koyyoko & Co. Advocates
For the Defendant/Respondent: Mr. Njuguna, instructed by M/s. Kangethe & Advocates.