



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO. 102 OF 1995**

**VISHVA BUILDERS LTD.....PLAINTIFF**

**VERSUS**

**J. K. KOSKEI..... DEFENDANT**

**RULING**

This matter has a long history and in order to understand the proceedings it is better to set out the relevant history of the matter. On 19th July 1985 the plaintiff Vishva Builders Limited filed this case against the defendant Mr. J. K. Koskei. The nature of the claim is set out in paragraph 3 of the plaint which states that the plaintiffs claim against the defendant is for the recovery of the sum of Ksh. 1,935,987/- with interest thereon from 14.3.1995 at the prevailing bank rates at the time of payment being balance sums due from and payable by the defendant to the plaintiff in respect of construction work done by the plaintiff on the defendants plot No. 6/190 Eldoret at the defendant's own request and instance full particulars whereof are well known to the defendant as a final account prepared by the Architects has been availed to the defendant by the plaintiff, that despite demand made and notice of intention to sue having been tendered the amount remains unpaid. In consequence thereof the plaintiff prayed for Ksh. 1,935, 987.00 interest thereon at prevailing bank rates on the date of payment with effect from 14.3.1995, costs of the suit and interest at court rates.

The defendant filed a defence on 29th August 1995 and the key averments in the same are that he denies the contents of paragraph 3, 4 and 5 of the plaint and put the plaintiff on strict proof thereof, that if the plaintiff ever did construction work as alleged then he was paid the whole amount as agreed thereof save wherein expressly admitted the defendant denies each and every allegation of fact contained in the plaint as if the same were herein stated and traversed seriatim. On that account the defendant prayed that the plaintiffs case be dismissed with costs.

On 27th September 1995 the plaintiffs Counsel filed an application dated 11.9.1995 under Order VI rule 13 (1) of the Civil Procedure Rules seeking an order that the defence filed herein be struck out on the grounds that it is scandalous, frivolous or vexatious, it discloses no reasonable defence, it may prejudice or delay the fair trial of this case, it is an abuse of the process of the court, that judgement be entered for. The plaintiff as sought in the plaint and that costs be provided for, the application was supported by a supporting affidavit and oral submissions in court. The defendant/respondent opposed the application and the same was heard on merit. The court made the following findings

1. The court found as a fact that there was a building contract entered between them.
2. That the plaintiff built a hotel which was handed over to the defendant which was operational as

at that time and the dispute was over the final payment whereby the plaintiff was saying that the same was applicable as per clause 30 of the contract and the defendant cannot question it while the defendant alleged that he had paid the entire or whole amount as per the contract and he does not know how the figure demanded arose.

3. The court found that the contract document executed by both parties had been exhibited and the court perused the same and found that clause 36 of the said contract document provided for arbitration in the event of any dispute arising there from. It was also noted that neither party had deponed that that procedure had been exhausted before the plaintiff came to court. The court held in its ruling of 15th February 1996 that for that reason the parties could not proceed in court and the suit as well as the applications were not properly before court and made an order that parties should comply with clause 36 before proceeding in court. On that account the application was refused with costs to the respondent.

It is noted that this court did not make an order striking out the pleadings, neither did it make a formal order referring the matter for arbitration on any formal terms. It merely directed the parties to comply with the arbitration clause in clause 36 of the contract.

On 3rd February 1998 the plaintiff came back to court under section 36 (1) and (2) of the Arbitration Act 1995 Order 45 rule 17 (1a) (2) and 3 of the Civil Procedure Rules dated 14th day of October 1997 seeking orders that the award made by M/s Diang'a in arbitration of the dispute herein be deemed duly filed and adopted by the court, that judgement be entered for the plaintiffs against the defendant in the award and that costs be provided for. The application was supported by an annexed affidavit to which the award dated 15th September 1997 was annexed. The defendant filed an application in opposition to that application and the same was heard inter parties and the court gave a ruling to that effect dated 30.6.1998 was delivered. The findings of the court were to the effect that

1. In this courts ruling of 1.2.1996 the court made an order that the parties should comply with clause 36 of the contract before proceeding in court.
2. It was noted that apparently since the court was not requested to strike out the suit as being premature it was not struck out and still exists.
3. It was also noted that there are no formal orders staying the proceedings pending arbitration but the parties went for arbitration and the court was informed that arbitration was done and an award had been filed which the court was being called upon to have it deemed to be filed.
4. That according to the contract document the award is final and it cannot be challenged here in court.
5. That the court had perused the file and found that no award had been filed and infact only a copy of it had been annexed to the affidavit.
6. That the correct procedure to be followed by the applicant should be to make an application to this court seeking an order that the order of 1.2.1996 be deemed to have stayed the proceedings herein pending arbitration and that since an award has been made this court do give leave to the arbitrator to file the award in these proceedings instead of filing a separate action as that would be a duplication of suits and that after such filing of the award herein the same be adopted as a judgement of this court.
7. That it is only after the above prayers have been granted that an award could be filed herein to enable the parties proceed according to law and for the reasons given the application was refused with costs to the respondent and the applicants counsel was advised to proceed as advised above. That application was dismissed with costs to the respondent.

On 27th July 1998 the plaintiff applicant filed an application by way of chamber summons dated 20th day

of July 1998 under section 36 (1) and (2) and section 6 (1) Arbitration Act 1995 seeking orders that following the ruling of this court of 1.2.1996 the proceedings herein be deemed to have been stayed pending arbitration, that this honourable court be pleased to grant leave to have the arbitration award made by Mr. S. Diaga entered, filed and adopted by this court, that leave having been granted this honourable court be pleased to enter judgement for the plaintiff as per the said award. That application was supported by grounds in the body of the application, supporting affidavit, annexures and oral submissions in court.

For purposes of the record the terms of the award which was being sought to be adopted as a judgement of the court are as follows:-

1. The respondent shall pay the claimant a sum of Ksh. 1,935,987.00 within 28 days from the date this award is taken up in full and final settlement of all matters referred to me herein.
2. The respondent shall pay the cost of the reference to be taxed on a party to party basis which if not agreed is to be taxed in the High Court.
3. My fees and expenses which I hereby tax and settle at Ksh. 286,184.00 inclusive of Ksh. 25,000.00 deposit paid by the claimant shall be paid by the respondent provided that if the claimant has paid or shall pay amounts meant to be paid by the respondent, he shall within 28 days of this award being taken up be reimbursed by the respondent.
4. If the moneys directed to be paid in this award are not paid within 28 days of this award being taken up then the same moneys shall attract interest at the rate of 24% per annum for the period they shall remain unpaid.

It was made and published by the Arbitrator on the 15th day of September 1997 and it was signed by Stephen O. Diang'a sole arbitrator.

That application was opposed by the defendant vide their undated grounds of opposition filed on 3rd February 1999 and a replying affidavit sworn by the defendant on 8.2.1999 and filed the same date. That application was argued on merit inter parties on 18.3.1999 and a ruling to that effect delivered by this court on 4.10.1999.

This courts findings were as follows

1. That it was evidently clear that there is no dispute that the basis of the matters herein is a building contract.
2. There was no denial that the work was done and completed by the plaintiff and what is in dispute is the amount payable and how the same can be recovered.
3. That the plaintiff filed the suit in court and the defendant entered appearance and filed a defence.
4. The court did not decline jurisdiction in total because all that the court said was that the objection was genuine and that the parties had come to court prematurely in view of an arbitration clause in the agreement and the court made an order that parties should comply with that clause before coming to court.
5. That the defendant did not apply to have the proceedings struck out and the court cannot be blamed for not striking out the pleadings as it was not asked to do so.

The parties left the proceedings pending in court and they are still pending.

6. That the parties went to arbitration and the arbitration award was still pending in court.

7. That the suit was filed on 19.7.1995 during the existence of the old Arbitration Act as the new Arbitration Act was published on 18th August 1995 and commenced on 27.2.1996.

8. That the old law having been repealed this court cannot turn to it for guidance. It has just to turn to the new Act for a solution under clause 36 of the agreement the appointment can either be made by the chairman or vice chairman of the East African Institute of Architects who will when appropriate delegate those duties to the chairman or vice chairman of the local National Society of Architects. Clause 36 (4) just says that the award of such arbitrator shall be final and binding on the parties. It does not provide for enforcement of the resultant award. That is the reason why the plaintiff after the award had been given had to look for means of enforcing it.

9. Annexure P.G 3 to the plaintiff's further affidavit contains the appointment letter of the arbitrator which was done by the chairman Architectural Association of Kenya. In it he has not stated, quoted that he has been delegated powers by the East African body. The court was of the view that if the appointment had been challenged then the source of the authority would have been given.

10. That it was deponed that the arbitrator came to the hotel and interviewed the defendant but he defendant did not participate in the proceedings.

11. That since the appointment letter was copied to him and the arbitrator came and interviewed him he should have taken appropriate steps to object to that appointment. There is no formal objection to that appointment and this is not the right forum for that as the defendant is simply replying to the plaintiff's request but he has not himself filed a substantive application challenging the award. For this reason the court is of the view that the appointment of the arbitrator was proper. There is a valid award and the only question to be determined is how this can be enforced. As noted earlier it is the new Act to operate. Order 45 of the Civil Procedure Rules does not apply as the matter was not referred by the court.

Section 6 of the Arbitration Act states clearly that a party has to apply to court to stay the proceedings and notwithstanding the existence of the court proceedings on arbitration award may be made. Section 6 states clearly that the court has to be requested to stay the proceedings and allow parties to proceed to arbitration. Herein the court was not asked to stay the proceedings but objection was raised to it and the court upheld it.

12. That the stay order is important and that is why the court advised the applicant to apply for a deeming order. Section 6 does not say once it is disclosed that the parties should have gone to arbitration the pleadings become null and void. All that the court is required to do is to set in motion the arbitration proceedings which the court did herein.

13. Section 13 and 14 provide for procedure for challenging an arbitration which procedure was not invoked herein and in the absence of that the defendant cannot challenge the appointment in the grounds of opposition and replying the affidavit.

14. Section 24 allows parties to file their claim and defence and section 26 (c) allows the arbitrator to proceed and determine the matter where one party fails to turn up.

15. Section 35 of the Act makes provision for the setting aside of an arbitral award which provision has not been resorted to by the defendant.

16. Section 36 gives a party a right to apply to the High Court for enforcement of an award.

17. Section 37 deals with circumstances under which an award may be refused and these are not the grounds being relied upon by the defendant.

On the basis of the foregoing points the court made a finding that the applicant had not breached

any of the provisions of the Arbitration Act. That the plaintiff came to court and on being told of the existence of the Arbitration Clause referred the parties to arbitration and since it was not asked to stay the proceedings impliedly stayed them but made no formal order to that effect. That the applicant seeks an order to have them deemed to have been stayed which followed advice from the court in a ruling which was delivered but which had not been upset or appealed against and as long as it stands the applicant is entitled to invoke it.

18. That it is on record that the appointment of the arbitrator had not been challenged, the High Court had not been asked not to enforce the award in accordance with the rules and as submitted by the applicants lawyer it is not denied that work was done and that the defendant was obligated to pay. On that account the court found that the application was properly before court and the reliefs being sought were proper and allowed. Prayer (a), (b), (C) of the application dated 20.7.1998.

Following that ruling the defendant filed a notice of appeal dated 5.10.1999 lodged with the Deputy Registrar High Court of Kenya Eldoret.

A formal order was drawn and issued by the Deputy Registrar on 17th November 1999.

A decree was drawn and issued the same day. The terms of the decree are as follows

1. The award made by Mr. Stephen O Diang's award is hereby adopted by the court.
2. (i) The sum of Ksh. 1,935,987.00 to be paid within 28 days from the date of the award in full and final settlement of all matters referred to the arbitrator. (ii) The defendant shall pay costs of the reference to be taxed on a party to party basis which if not agreed is to be taxed by the High Court. (iii) The Arbitrator's fees and expenses taxed at Ksh. 286,184.00 inclusive of Ksh. 25,000/- deposit paid by the plaintiff shall be paid by the defendant. (iv) If the moneys directed to be paid in this award are not paid within 28 days of this award being taken up then the same money shall attract interest at the rate of 24% per annum for the period they shall remain unpaid.

On 5th January 2000 the defendant filed an application dated the same date under Section 3A of the Civil Procedure Act Order 50 rule 1 and Order 41 rule 4 of the Civil Procedure Rules seeking orders that there be a stay of execution and/or sale pending an appeal to the Court of Appeal and that costs be provided for. The application was supported by grounds in the body of the application, supporting affidavit, annexures and oral submissions in court. The application was opposed by grounds set out in the replying affidavit sworn on 5.1.2000 and filed on 12.1.2000 as well as grounds of opposition filed on the same day of 12.1.2000. On 20th day of January 2000 a ruling was given by the court and the salient features of that ruling is that the court had come to the conclusion that the applicant had not made out a case for stay and so the court could not deprive a decree holder the fruits of its judgment without good cause, on that account the application was dismissed with costs to the plaintiff/respondent.

Apparently the defendant who had filed notice of appeal to the Court of Appeal moved to the Court of Appeal. This is confirmed by a letter written by the Deputy Registrar Court of Appeal dated 17.4.2000 addressed to the Deputy Registrar High Court of Kenya P. O. Box 141 Eldoret. The contents are as follows "Civil Application No. NAI 77 of 2000 ELD HCCC NO. 102 of 1995 JASON K. KOSKEI VERSUS VISHRA BUILDERS LIMITED.

Thank you for your letter Ref. NO. ELD/HCCC NO. 102/95 dated 14th April 2000. The original High Court record is returned to you as requested. Please return the same to this court as soon as possible as we have already invited the parties to fix a hearing date for the above application. Signed T. S. Luvuga Deputy Registrar. C/c Kirui & Company Advocates, Cooperative Bank Building P. O. Box 7506 Eldoret, Kalya & Company Advocates Sakong House P. O. Box 235

Eldoret.

A perusal of the record shows that another notice of appeal to the Court of Appeal was filed on 28th June 2000.

On 19th April the defendant filed an application by way of chamber summons under Order 21 rule 25 of the Civil Procedure Rules seeking an order that the execution proceedings and all consequential orders in the present suit be stayed pending the hearing and determination of Eldoret High Court Civil Case No. 98 of 2000. The application was supported by grounds in the body of the application, supporting affidavit, annexures and oral submissions in court. The application was opposed by the plaintiff on the basis of the papers filed by them. Ruling to that effect was given by this court dated 4th September 2000. The findings of the court in that ruling were that 1. That it was clear that the plaintiff has a decree in his favour arising from arbitration proceedings.

2. It is also clear that the defendant applicant's previous application for stay have been refused.

3. He has come yet again to seek stay of proceedings pending the hearing and finalization of the suit which he has filed.

4. That the reading of order 21 rule 25 envisages a situation where as at the time the decree is passed there is already a suit in existence in the same court in name of the person against whom the decree has been passed. That the rule envisages a situation where parties have sued each other in an opposite capacity and for one reason or another the two suits could not be consolidated and heard together and then one is heard and finalized earlier than the other. It does not apply to a situation where only one suit was in existence and at the execution stage is when a new suit is filed and then the decree sought to be stayed pending the hearing and finalization of the new suit.

5. That the circumstance of this case do not cover the relief being sought by the defendant applicant and on that account dismissed that application with costs to the plaintiff/respondent.

Meanwhile the defendants application to the Court of Appeal for extension of time to serve notice of appeal and to lodge record of appeal out of time from a ruling and order of the High Court of Kenya at Eldoret (Lady Justice Nambuye dated 4.10.1999). The ruling is brief and the contents are as follows. "This is a reference under rule 54 (1) (b) of the Rules of this court from the decision of a single judge of this court given on 23 rd June 2000 whereby he extended the time for the filing of notice of appeal and the record of appeal.

*Mr. Gicheru in arguing the reference drew our attention to six circumstances of delay extending to long periods. There has been no explanation for the delay. That notwithstanding the Learned single judge of appeal did not advert to those delays of that there was no explanation for the delay which was ex facie inordinate. This in our view clearly violate the exercise of his discretion and with respect we are compelled to interfere. Having extended the time for the filing of notice of appeal and the record he proceeded to deem the filing of these having been in time. We find this difficult to follow.*

In the result the reference is allowed with costs and the order of the single judge is set aside and the application made for extension is dismissed with costs.

***Dated and delivered at Nakuru this 29 th day of September 2000***

***Signed.***

***J. E. GICHERU***

***JUDGE OF APPEAL***

***A.A. LAKHA***

***JUDGE OF APPEAL***

***M. KEIWA***

***JUDGE OF APPEAL***

*A further perusal of the record shows that an appeal had been filed at Nakuru Court of Appeal Registry Civil Appeal No. 32 of 2000 between Jasson K. Koskei as the appellant and Vishva Builders Limited as the respondent being an appeal from a ruling and order of the High Court of Kenya at Eldoret by Lady Justice Nambuye dated 4th October 1999 in HCCC 102 of 1995. The order made was that “with the consent of the advocates for the parties the appeal is struck out with costs.*

***Dated at Nakuru this 28 th day of September 2001.***

***J. E. GICHERU***

***JUDGE OF APPEAL***

***A. A. LAKHA***

***JUDGE OF AP PEAL***

***E. OWUOR***

***JUDGE OF APPEAL”***

On the 10.5.2001 the defendant through his counsel filed an application dated 4th May 2001 filed on 17th May 2001. although the parties have referred to it as the application dated 10.5.2001 it is the certificate of urgency in respect of it which is dated 10.5.2001 and filed on 5.6.2001. For purpose of the record the application is by way of notice of motion under section 2, 3, 3A, 38, 42, 43, 80, 99 of the Civil Procedure Act, Order III rule 7, 9A, Order 20 rule 3 order 21 rule 32, 33, 34, 35, Order 44 rule 1 and 2 Civil Procedure Rules, section 72 Interpretation and General Provisions Act, Cap 2, Section 6 and 9 Arbitration Act number 4 of 1995, Companies Act Cap 486 and all other enabling provisions of the law. It contained 13 reliefs. Those relevant to this application are relief number 7, 8, 9, 10, 11, 12 and 13 which are to the effect that the court be pleased to visit and clarify its order made on 15th February 1996, that the court be pleased to review its orders made in its ruling dated 26th May 1998 delivered on 30th June 1998 and set it aside, that the court be pleased to review its orders made in its ruling dated 29th July 1999 delivered on 4th October 1999 and set it aside, that the court be pleased to find that no valid arbitration has been conducted and no competent award is available for courts adoption, that the court do find that there is want of jurisdiction as to its dealing with the matter that the court do give any direction and or issue any other or further orders in its discretion and that costs be provided for.

The defendant filed a preliminary objection against that application filed on 5.6.2001 dated 4th June 2001 whose main grounds are that the application is incompetent, improperly before the court and the defendants new counsel is in conflict of interest the provision on review are not available to the applicant, that the court does not have jurisdiction to hear the entire application. In view of the clear provision of section 80 of the Civil Procedure Act, prayer 4, 5 and 6 set out in the application are Res judicata and have been overtaken by events, that orders of 15.2.1996 and 30.6.1998 were made in favour of the applicant and no prayer for review can lie against the order, the order is in any event clear and does not need interpretation, that the application is a gross abuse of the court process.

The salient points raised by the defence counsel in support of the preliminary objection are as follows:-

1. Part A of Section 80 of the Civil Procedure Act permits a party to seek review when he has not

preferred an appeal.

That annexures NO1 to the defence further affidavit shows that appeal No. 32/2000 was filed in the Court of Appeal by the defendant on 24.2.2000 against the plaintiff respondent which is further evidenced by annexure 2 which are 2 receipts one for filing fees and another for security for costs. Further support from correspondences from the Deputy Registrar Court of Appeal are dated 26.10.2000 advising counsels of both parties that appeal No. 32/2000 has been filed and they should refer to it as such while another one dated 12.2.2001 informing counsel of the defendant to choose either to proceed with the application filed or withdraw the same (filed in the appeal file). It is the plaintiffs counsels view that the foregoing facts and the authority cited goes to show that an appeal was preferred which was still pending as at the time of trial and it matters not whether the said appeal is competent or not and what matters is that the same has been filed and it remains so until withdrawn by both parties or procedurally struck out.

2. That there was evidence that there were applications pending before the Court of Appeal as at the time of trial evidenced by annexure 4 to the plaintiffs counsels further affidavit which talked of Court of Appeal No. 240/00, Court of Appeal 32/2000. There is also annexure 7 whereby the plaintiff had filed an application dated 28.8.200 seeking to strike out appeal No. 32/2000 because it was incompetent which application was still pending as at the time of trial.

3. That the authorities relied on by them show that where an appeal has been struck out for incompetence an appeal is deemed to have been filed and in such circumstances a party who has moved to the Court of Appeal and failed has no chance of going back to the lower court to file an application for review. If he desires to seek review then he has to file an application for review before he prefers an appeal. In the circumstances of this case it is on record that an appeal was filed on 24.2.2000 while the application for review was filed on 17.5.2001.

4. A party who is aggrieved by a ruling or a judgment has a right to make an election either to prefer an appeal or seek review and once an appeal is filed review merges in it and a party who loses on an appeal the fact of its incompetence notwithstanding cannot turn back and apply for review.

Relating that to the circumstances of this case counsel for the plaintiff submitted that the defendant/applicant cannot be allowed to follow both processes at the same time whereby he has preferred an appeal its competence or incompetence notwithstanding and so he cannot embark on a parallel process of review, they submit it is too late to seek review in this matter and their stand is that that is an abuse of the law more so when the defendant has admitted in paragraph 4 (1) of the defendants further affidavit that an appeal exists and he has offered to have the same withdrawn by consent.

5. That it has been contended that the alleged appeal is a shell since the extension of time granted for filing and validating it made by one judge was recalled by a full bench in a reference. It is their stand that whether or not the full bench recalled the extension of time or not that does not erase the fact that an appeal has been preferred and that recalling cannot give jurisdiction to hear review as the effect of recalling the time to extend is that it rendered the notice and appeal incompetent.

6. They reiterate their stand that once an appeal has been filed then the jurisdiction for review is taken away and it matters not that the order or judgement sought to be appealed against is invalid or not or that the intended appellant has given an undertaking not to prosecute the said appeal. It remains an appeal until struck out. They also reiterate that where a party prefers an appeal or opts for review that party has to consolidate all his grounds and argue them together and he has no option to select which ones to take on appeal and which ones to leave for review as he is allowed to elect and choose only one option and argue all points in that venue.

They also reiterate that even where there is proof that the appeal or appeals have been struck out there is no jurisdiction to seek review on the same facts forming the basis of the struck out appeal. A party has to face the risks of the consequences of choosing either option where appeal is chosen

and the record is struck out the party concerned has to go back to the court of appeal and seek leave to file a proper record and when an extension of time is refused by a bench of three judges the aggrieved party has to refer the matter to a full bench of the Court of Appeal which can allow or refuse a party the right of appeal and where a refusal order is made that becomes the end of the matter

7. They maintain that the entire application is an abuse of the due process of the law because:-

(i) By the time counsel for the defendant/applicant filed that application he was aware of the existence of the appeal pending in the Court of appeal and also the pending application before the Court of appeal.

(ii) Counsel of the applicant wants this court to rule on matters which to his knowledge are still pending before the Court of Appeal.

(iii) Even if it can be taken that the appeal is a shell to the knowledge of the counsel that is a matter to be ruled upon by a full bench of the Court of Appeal and not this court which is a High Court.

(iv) Vesting jurisdiction in the High Court on the wake of a pending application in the Court of Appeal will mean predetermining the matter still pending before the Court of appeal.

(v) All the legal authorities cited by the defence counsel do not oust the legal position that you cannot seek review where a party has elected to file an appeal.

(vi) The authorities cited by the defence are distinguishable because they deal with issues other than those dealing with review and appeal namely that a preliminary objection cannot be raised where the facts are disputed where an order has been given it has to be extracted before it can be enforced.

(vii) the Arbitration Act does not provide for review of orders emanating from that legislation and review is not one of them.

In response to those submissions counsel for the defendant stressed the following points

1. That appeal No. 32/2000 is just an empty shell. It is not an appeal and it cannot afford them a platform on which they can air their grievances as to the competence of the decree issued herein, and it is only in the court which made the grieving decree that they can express their grievances, on that basis they appeal to the courts conscience that the sole reason for parties coming to court is to seek justice and this court should look at the merits of the matter and render justice to the parties over and above technicalities.

2. Counsel concedes that the defendant indeed approached the plaintiff to have the empty shell of an appeal to be withdrawn with an offer to pay costs which offer was turned down and the sole reason for turning down the offer is simply to use that as a shield to inhibit the court from having access to the substantial issue in the matter.

3. They do not agree that issues they have brought out in the application are before the Court of Appeal as that appeal only exists in name and should circumstances arise where the appeal is to be argued then they give their professional undertaking not to argue it.

4. That it is not true that the pending appeal belongs to the Court of appeal as litigation belongs to the parties and are free to direct their grievances to the correct forum and to them this is the only correct forum where they can ventilate their grievances and the court is urged not to be shy to consider the substantial nature of the application.

5. They contend that an appeal is constituted when the same is filed in time and where a party is out of time then it cannot be said that one has filed an appeal when that which has been filed is capable

of being argued but where what has been filed can never be argued then there is no appeal. In the circumstances of this case the appeal was not constituted as it is admitted that notice to appeal was not filed within 14 days nor was it served within the stipulated time of 14 days.

6. There is no doubt that the defendant availed himself of the provision of rule 81 of the appellate Jurisdiction Act when he applied for extension of time to file the notice and record out of time which was turned down and they contend that an appeal where no time has been extended for its filing cannot be termed an appeal and they contend that there is no valid appeal pending and this court is asked to deem the defendant/applicant to have come before this court with no appeal pending as parties cannot be heard on it and what the court should pay attention to should be a question of substance.

7. That the correct position in law is that the only cure for an incompetent appeal is to have it struck out and not withdraw.

8. That an application for review can only be shut out where it can be shown that a process was set in motion whereby an appeal capable of being heard can be shown to exist.

9. Where preference of an appeal has been made out of time or when time for preferring the same has lapsed it is not a reference at all. It can only be termed a wishful reference.

10. The counsel is in agreement that where a party has proceeded with the process of review upto the end he cannot come back to court and start the process of an appeal but their position is distinguishable as their argument is that there is no appeal and they should be allowed to proceed with the process of review as they will have no purport to proceed with the appeal.

11. That if a decision is made on appeal before a decision is made on review then jurisdiction is taken away. Herein no decision has been made on appeal No. 32/2000 and so the jurisdiction on review has not been taken away as the correct position regarding that appeal is that it had not been admitted as at the time of argument, it would not be admitted, it could never be admitted or be heard and so the issue of hearing and determining appeal No. 32/2000 would never arise as it is a shell as time for its validation has never been extended and it will never be extended.

12. The issue of parallel process does not arise as there is no valid process of appeal. All that there is is a valid process of review and so an issue of making an election as to which process to follow does not arise. They have made an election that the proper process to be followed herein is the process of review.

13. They have not delayed in the bringing of the application for review and they maintain that the grounds advanced for review are meritorious as neither the appeal which is a shell or the application for review has been entertained on merit.

14. It is not right for the plaintiffs in these objection proceedings to argue that there is no valid appeal before the court of appeal thus preventing them from proceeding to argue that appeal on merit and then at the same time come and argue in this court that there is no right of review and close them out of the review process as well.

15. Turning to the merits of review counsel submitted that (i) The ruling sought to be reviewed has two dates and the court of appeal has held that any judgement or ruling which has two dates is invalid and it cannot be enforced and so the ruling sought to be reviewed is a nullity and that being a nullity it renders the appeal process fatally defective and that being the case then a decree should not have issued herein in the first instance. That error can only be corrected on review for the court to show which is the correct date when the ruling was dated so that the process of appeal can proceed.

(ii) They contend that if this court were to uphold the preliminary objection then it would in essence

be taking away a party's right of appeal as in declining to review the two dates it will be shutting out the defendant from the doors of justice as they submit that an act of putting two dates in the ruling by this court is an act of excess jurisdiction. To them it will not be proper for this court to put two dates in a ruling and close the door of appeal for a party and then turn round and say that it cannot review. This court has to bear responsibility for its actions and face the situation as it is.

(iii) An application for review was filed on 15.11.2000 and ruled on 5.3.2001 by which time the shell appeal No. 32/2000 was in existence and yet the plaintiffs never raised the issue of jurisdiction and there is no justification for raising it now. Having failed to raise it at that time then they are deemed to have waived their right to raise it now and if upheld then the court will be setting up a new standard of gross prejudice to the defendant.

(iv) The defendant has come to this court following the courts advise in the ruling of 5.3.2001 that if the ruling with two (2) dates is a nullity then a party should move the court to have it declared a nullity and that is what the defendant is trying to do in he application being objected to. Having been advised to do so this court cannot turn round and tell the same defendant that it is declining the jurisdiction to review.

(v) illegality can also be traced to the ruling of 26.5.1998 delivered on 30.6.1998 which also had two dates in which the court declined adoption in realizing that the proceedings were improper and advised the plaintiff to come with an application to have the proceedings deemed to have been stayed. The plaintiff followed that advise and that is what gave birth to the ruling of two dates which the defendant purported to appeal against but cannot now appeal against. He too defendant has also come for review on the advise of the court in its ruling of 5.3.2001 and he should be treated the same way and listened to as the plaintiff acted on the advise of the court and was listened to by the same court and given the grieving orders.

(vi) Even if this court were to take it that the defendant made an election to proceed on appeal as opposed to seeking review but has now come to this court for review he cannot be penalized for that and denied audience chance as there are instances when the plaintiff made an election on one mode of execution and when it failed they came back to proceed on another mode of execution and they were accommodated and so in fairness the defendant though elected to proceed on appeal incompetently has elected to proceed with review and he should also be given equal treatment and accommodation by this court.

(vii) It is on record that the plaintiff came to court by way of plaint filed on 18.7.1995 to which a defence was filed. By that action the plaintiff made an election to go by way of court process and that left no room for an election to go by way of arbitration process and yet when they came back to court with an arbitration award the court allowed them to enjoy the fruits of an arbitral process. They submit that as per the provision of section 6 of Act No. 5 of 1995 once the pleadings were filled in court the right to go to arbitration was forfeited and the doors closed to both parties and this court should never have allowed the parties to take up that process and this is an error. The plaintiff having elected the court process this court should have closed him out and refused to allow him to seek the adoption of the award. This court is urged not to punish the defendant alone and allow the plaintiff to enjoy the process of irregular actions.

(viii) Their application is not limited to the issue of review only as they have raised the issue of jurisdiction in the past and have also challenged the process of execution in its entirety. The question of jurisdiction is also central and the proper place to raise the issue of jurisdiction is the court whose jurisdiction is being challenged.

It is necessary for this court to determine whether it had jurisdiction or not so that ends of justice are met. They stress that in cases such as this one where rules of natural justice have been breached on the part of the defendant this same court has to defy rules to ensure that ends of justice are met. Their stand is that there are breaches of the rules of natural justice to their client because there are grieving orders which were made without jurisdiction and have worked grave prejudice to their

client and in view of these breaches the court has to defy the rules of procedure and open an avenue for their client to address his grievances and restore his rights in the interests of justice. On that basis the court is urged not to uphold the preliminary objection because in doing so it would be advancing the process of nullity.

(ix) It is their stand that the position in law is that an item not properly brought to court cannot be allowed and any process followed to allow such an item is a nullity. Further that it is trite law that a party cannot be given what he has not pleaded for. Herein the issue of arbitration was not pleaded and that should not have been entertained by the court. It was therefore wrong for the court to refer anything to arbitration notwithstanding that their client mentioned the issue of arbitration in his affidavit as that was not an application. It is on record that what was pleaded was an amount of Ksh. 1.9 million which is not what was given in the decree whose effect is that the arbitration award be adopted. Failure of the decree to refer to 1.9 million confirms their stand on the irregularity of the entire proceedings herein. There was no application made argued and ruled on that parties do go to arbitration and so when this court made an order that parties go to arbitration it did so in breach of the rules of natural justice.

(x) They also contend that it was in error for this court to backdate its order that the proceedings be deemed to have been stayed which error can only be rectified upon review.

(xi) Since there was no proper leave sought and granted for parties to go to arbitration they submit that in the circumstances the defendant had no business going to the arbitrator and the arbitrator had no business arbitrating over the matter. It therefore follows that all the arbitral processes undertaken in this matter before leave is granted is a nullity. All these arises from the fact that the court did not address its mind properly on clause 36 of the contract agreement. Had the court done so it would have rejected that arbitral award even if no party had objected to the same.

(xii) Their stand is also to the effect that the court failed to appreciate the fact that when parties come before court they submit themselves to the jurisdiction of the court and it is they themselves who could have divested themselves of that process and opted to go to arbitration. This should not have come as a direction from the court. It is their stand that as at the time the plaintiff went to the arbitrator the suit was still alive in court as the same had not been stayed. That being the case it was not possible for the arbitrator to arbitrate on a matter which is still alive in court. Of the two parties the one who was in contempt of the proceedings was the plaintiff who did so by going to arbitration and seeking the adoption of the award. But the defendant who respected the pending proceedings has ended up to be the party punished.

(xiii) Even if it can be taken that arbitration proceedings were properly resorted to there is nothing to show that the defendant had notice of the same as to when and where they were to take place and so he cannot be faulted for not attending the same as nobody has deponed that the defendant had such notice. It therefore follows that the resultant award should have been rejected under section 37 of the Act as the defendant had no notice of those proceedings.

(xiv) The award itself is also faulty on the face of it as it has no reasoning on the ace of it and neither does it state where the arbitration proceedings took place, the defendant was not served with a copy of the said award and their view is that the same should not have been adopted.

On the basis of the foregoing numerous points the defence counsel urged the court to dismiss the preliminary objection and allow them to proceed with their application.

In reply counsel for the plaintiff objector reiterated his earlier points and stressed the following points

1. That interpretation of the Court of Appeal rules as to when an appeal and notice of appeal are properly and validly lodged can only be done in the right forum which is the Court of Appeal itself. They maintain that the law is clear as to when an appeal and notice of appeal are validly filed and that happens when the record is lodged and paid for and security for costs paid. Once that position

has been established it is only a full bench of the Court of Appeal and no amount of argument can go round that.

2. They have established by way of authorities cited that an application for review can never lie when an appeal has been presented. If an application for review is filed earlier and then an appeal is filed later and heard and a decision is taken on the matter then that application can never be revisited again. In the circumstances of this case the application for review is coming 1½ years after an appeal had been lodged. 3. That all the authorities cited by them in support of the preliminary objection are all relevant, they stand and none is distinguished and they have not been ousted.

4. As regards complaint on double dating they submit that that issue cannot be revisited in an application for review when the same ruling is subject of an appeal which is still pending and that issue can be revisited in the pending appeal in any case such a defect is not totally fatal as there is provision for amendment.

5. They are not estopped from raising the points they have raised at the time the application for review of the committal order was made which gave birth to the ruling of 5.3.2001 because those proceedings were dealing basically with the application for committal proceedings and not a challenge to the ruling giving rise to the issuance of the decree. It is further their argument that estoppel cannot apply where there are clear provision of the law such as section 80 of the Civil Procedure Act and clear authorities on the subject.

6. The prime consideration here is that there are two processes of law set in motion which the law cannot allow to continue and it matters not that one is termed an empty shell.

7. It is ironical for the defence counsel to complain that rules were not complied with when arriving at the ruling complained of and then at the same time state that this court should defy rules of procedure in favour of the defendant which this court cannot do in view of the clear provision of section 80 of the Civil Procedure Act and the authorities cited. 8. That a perusal of section 10 and 35 (1) of the arbitration Act shows that the only mode of procedure provided for upsetting an arbitration award is an application for setting it aside and there is no provision for review.

Turning to the authorities relied upon by the plaintiff's Counsel in support of their preliminary objection the court has gone over them and observes that they set out the following principles. In the **CASE OF KISYA INVESTMENT LTD. VERSUS ATTORNEY GENERAL AND R.C. ODUPOY NAIROBI C.A 31 OF 1995** it is stated at page 2 line 26 from the bottom it is stated that "the principle and the only ground of appeal urged before us was that the first defendant having filed a notice of appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. Line 12 from the bottom it is stated that "review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred the court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition an appeal is filed by any party. An appeal may be filed after an application for review but once the appeal is heard the review cannot be proceeded with. A review application is incompetent after appeal is preferred, heard and determined.

In the case of **WILLIAM KARANI AND 47 OTHERS VERSUS MICHAEL WAMALWA KIJANA AND 2 OTHERS NAKURU CA 43 AND 153 OF 1986** at page 2 of the judgement of H.G. Platt JA paragraph 3 it is stated "Both section 80 and order XLIV commence by explaining the fundamental nature of review. [It is to be a means of airing gross or obvious errors when an appeal is allowed by the Act from a decree or order but no appeal has been preferred and secondly in cases where no appeal is allowed at all. The broad division then is between the appeal procedure as the general method of airing errors, with its scope to deal with errors or evidential fact or law or mixed fact or law and the review procedure to cure a narrower compass of defect, which cannot be allowed to stand injustice, simply because there is no appeal. From the nature of section 80 and order 44 both procedures cannot be adopted at once. Hence supposing that an appeal is allowed by the Act but has not been preferred, review may be taken, if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by a review must

merge in the appeal. It would not be possible for example to pray for review because there was error on the face of the record, on the grounds that the court had no jurisdiction to pass the decree or order complained of and then by an appeal complain of misdirection on the evidence. That would be an absurd use of the appeal process because if the court had no jurisdiction the misdirection on the evidence would of course be unimportant. The proper approach would be to put all the complaints into one appeal.”

In the case of **RICHARD SAIDI VERSUS SEMBI MOTORS KISUMU CA 9 OF 1991** in the judgement of the court at page 3 the last paragraph it is stated “Order 44 of the Civil Procedure Rules should be amended to prevent abuses of the type we have encountered in this case. This is not the only one. The right to apply for review should be limited to a party who has no right of appeal or a party who has a right of appeal but who has decided not to exercise it” **The case of MARGARET MAKHANGU JOHN VERSUS DAVID JOHN KIBWANA (Executor) MOMBASA CA NO. 84 OF 1995** where the gist of the holding is that an incompetent appeal can only be struck out. It cannot be withdrawn. See also the case of the **OFFICIAL RECEIVER INTER PHOTO STUDIO LTD. VERSUS KODAK (KENYA) LTD NAIROBI CA 88 OF 1995.**

The case of **MOTEL SCHWELTZER VERSUS THOMAS EDWARD CUNNINGHAM AND MARIUS LEON ESTENNE (1955) VOL.22 EACA 252** where holding No. 3 states that “an appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees are paid and security lodged as provided in rule 53 of the fore said rules.”

The defence counsel also filed authorities which dealt with the entire aspects of the application being objected to and the court will set them out for purposes of the record.

The case of **MWANGI MBOUHO AND 8 OTHERS VERSUS MACHARIA WAITUMU AND 10 OTHERS NAIROBI CA 223 OF 1993 (NAIROBI 100/93 UR)** where Order 20 rule 7 of the Civil Procedure Rules was not complied with. The court held at line 10 from the top that the court will not allow any party to flout the rules of procedures.”

The case of **PROVINCIAL INSURANCE COMPANY EAST AFRICA LTD VERSUS MORDEKAI MWANGA NANDWA KISUMU CA NO. 179 OF 1995** where the court reaffirmed the decision in Mwangi Mbothu and 8 others versus Gachira waitumu and 10 others Nairobi Court of Appeal 223/1997 that the court will not allow any party to flout the rules of procedure.

The case of **JOHN K. MALEMBI VERUSS CHARLES O. MUCHUNGO AND 2 OTHERS, TRUFOSSA CHEREDI MUDEMBEI AND ATTORNEY GENERAL NAKURU CA NO. 53 OF 1999** arising from a decision by self where the holding of the court is that “The ruling the subject matter of the appeal before the court bears two distinct and separate dates. It was dated 15th October 1998. It was pronounced on 4th November 1998. This omission to date and sign the ruling in open court as the case may be at the time of pronouncing it clearly breaches the mandatory provisions of order 20 rule 3. Consequently the ruling is a nullity. It must follow therefore that the appeal is fatally defective. We order that it be struck out. We make no order as to costs.”

The case of **MRS RAHAB WANJIRU EVANS VERSUS ESSO KENYA LIMITED NAKURU CA 13 OF 1995** where at page 3 of the judgement the last paragraph it is stated that “We have no doubt that where a matter is fixed for mention as it was in this case, the Learned Judge had no business determining on that date the substantive issues in the matter. He can only do so if the parties so agree and of course after having complied with the elementary procedure of hearing what submissions counsel may wish to make”

The case of **FLORICULTURE INTERNATION LTD. VERSUS CENTRAL KENYA LTD. AND 3 OTHERS NAIROBI CA 121 OF 1995** which reaffirmed the decision in the case of **MRS RAHAB WANJIRU EVANS VS. ESSO KENYA LTD.**

CA 13 OF 1995 that where a matter is for mention no substantive issue should be decided. 2. that the proceedings were riddled with jurisdiction and irregularities from the start.

The case of **SHARDAR MOHAMMED VERSUS CHARAN SINGH NAND SINGH AND ANOTHER (1959) EA 793** where it was held inter alia that section 80 of the Civil Procedure ordinance confers on unfettered right to apply for review in circumstances specified and on unfettered discretion in the court to make such order as it thinks fit.

The case of **TRANSNATIONAL BANK LTD. VERSUS DHABA LIMITED NAIROBI MILIMANI COMMERCIAL HIGH COURT CIVIL CASE NO. 2703 OF 1996** where at page 5 of the ruling it is stated that “Order 44 rule 1 allows the court to review a decree or an order on any other sufficient reason. Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled to ex debito justitiae to have set aside. So far as the procedure for hearing it set aside is concerned it seems to me that the court in its inherent jurisdiction can set aside its own order and that an appeal for the orders is not necessary” Legal Notice No. 394 set the date for commencement of the Arbitration Act No. 4 of 1995 to be 2nd day of January 1996. The case of **CRAIG VERSUS KANSEEN (1943) AER 108** where it was held inter alia that an order which is a nullity is something which the person affected by it is entitled to have set aside ex debito justitiae. The court in its inherent jurisdiction can set aside its own order and an appeal is not necessary.

The case of **CHIEF KOFI FORFIE VERSUS BARIMA KWA BENA SEFANI (1958) AER 287** whose gist of the ruling was that a court has jurisdiction to set aside its own order and secondly that the question on procedures was that the judge attributed the authority to do the thing he did to a source from which it did not flow.

The case of **SOLOLO OUTLETS AND OTHERS VS. N.S.S.F. AND OTHERS NRB HCCC NO. 914 OF 1994** where at page 25 line 13 from the bottom it is stated that being a substantial matter as opposed to procedural the issue of non obtaining of leave prior to the action when the requirement is mandatory makes that action invalid. Failing to obey such a requirement makes the suit not valid.

The case of **COVELL MATHEWS AND PARTNERS VERSUS FRENCH WOOLS LTD. (1978) 2 ALLER 800** where it was held inter alia that the court had no inherent jurisdiction to backdate an order discontinuing proceedings and on the true construction of RSC order 21 rules 3 it had no power to do so under that rule. The case of **HEZHO YING VERSUS QIUWENREH MBS HCCC NO. 128 OF 1994** where the holding is that issue of lack of jurisdiction can be raised at any stage of the proceedings even on appeal

2. That even consents of the parties cannot confer jurisdiction on the court.

3. That jurisdiction is so basic and fundamental to the litigation process that the same cannot be conferred by the silence of the courts.

The case of the owners of the **MOTOR VESSEL “LILIANS” VERSUS CALTEX OIL (KENYA) LTD.** where in the judgement of Nyarangi Judge of Appeal as he then was where at page 13 paragraph 2 the word jurisdiction is analyzed as “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statutes, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgement is given. That a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who failed to question the jurisdiction of a court may not be heard to raise the

issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done the court should hear and dispose of that issue without further ado.”

The case of **MR. CHARLES C. SANDE VERSU KENYA CO-OPERATIVE CREAMERIES LTD. MSA CA 154 OF 1992** where at page 15 of the judgement it is stated at line 7 from the top “cases must be decided on the issues on the record and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue in which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take on such a cause.”

Line 21 from the bottom of page 15 it is stated that “the rules of procedure are designed to formulate the issues which the court has to determine and to give fair notice thereof to the parties. Were it not that the judge has seen fit to determine a number of issues which were never raised in the originating summons I should not have thought it necessary to state that a judge has no power to determine an issue which is not before him. If authority were needed for that proposition ..... It is for this reason that the court will freely grant application for amendment if they are made at the proper time do not create injustice and do not change the suit upto one of a substantially different character.” The case of **KENINDIA ASSURANCE COMPANY LTD. VERSUS JAMES OTIENDE (1989) 2 KAR 162** where it was held inter alia that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court did not and could not apply where the issue sought to be raised de novo on appeal went to jurisdiction.

**The case of NAIROBI CITY COUNCIL VERSUS THABITI ENTERPRISES LTD NAIROBI CA 264 OF 1996.** in the judgement of Lakha Judge of appeal observed that the argument on appeal was that the respondent made an obvious and fundamental departure from the original course of action with related relief for general damages without any amendments of the pleadings and considering the unpleaded issue of the ascertainment of the value of the suit land encroached upon by the appellant. This is true but was the Learned Judge in error in doing so? The appellant acquiesced into the unpleaded issue being argued and it was left for a decision to the superior court ..... at line 2 from the bottom on page 2 it is stated “This is a dispute of a civil nature between parties, it is not litigation belonging to the court or a judge personally. This is so firmly established in our law that a judge is not allowed in a civil dispute even to call a witness whom he thinks may throw some truth on the facts. He must rest content with the witnesses by the parties..... so also it is for pleadings, it is not for the judge to take it on himself lest by so doing he appears to favour one side or the other.” In the same case as per the judgement of AKIWUMI JA as he then was at page 8 paragraph 2 it is stated “the glaring inconsistency apparent in the decree in ordering the City Council to pay Thabiti 80,000,000.00 being the value of the suit land when not only was this not claimed in the very same decree but which very same decree had also at the same time, testified to the fact that Thabiti claim was for a permanent injunction restraining the City Council from putting up any structures on the suit land and further that the City Council should be ordered to remove from it all the things that it had erected there on and general damages for trespass, is there plain for all to see. The omission in the decree of any reference to the fact that Thabiti claim for the injunction and the removal of the erections with respect to the suit land, had been granted, makes the decree suspect to say the least. By the same token it would be appropriate to dispense with the amendment of Thabiti’s pleadings or to amend it to include the determination of the purchase value of the suit land when judgement had already been given to Thabiti granting the injunction and removal orders already referred to on the grounds as claimed in its plaint that Thabiti was the owner of the suit land which it was not selling and had rather sued the City Council for the infringement of its ownership of the suit land through the act of trespass by the City Council thereon. .... at line 13 from the bottom on page 9 it is stated “As I have already observed there was an error apparent on the face of the record which can be seen by one who runs and reads, an obvious and patent mistake. This error on the face of the record is not what can be described as an incorrect exposition of the law, a failure to apply the appropriate law, an omission to raise and discuss appropriate legal issues or the taking of an erroneous view of the law on a debatable point all of which would make me take a different view of the matter “ at page 10 of the judgement an error is apparent on the face of the record if “It can be said of an error that it is apparent on the face of the record when it is obvious and self evident and does not require an elaborate argument to be established. In my view this is the case here and the fact that the City Council acquiesced in the

*procedure adopted by the Learned Judge makes no difference. The Learned Judge had indeed seen the error but proceeded to perpetuate it well knowing that whether the pleadings of Thabiti were amended or not his judgement would conflict with the existing order made by Bosire Judge ..... moreover strange results would follow if a judge were free to determine issues not properly before him”*

At page 11 of the judgement line 11 from the bottom it is stated “by his ruling of 26 th November 1996 refused to grant the review sought in the following main ground that since both parties had acquiesced in his determination of the compensation to be paid to Thabiti on the basis that the suit land would be acquired by the City Council though not pleaded, he saw nothing wrong in the determination of the compensation involved and even if he had followed the wrong procedure this did not constitute an error which was apparent on the face of the record so as to constitute a sufficient ground for reviewing his earlier judgement.”

At page 12 of the said judgement at the top it is noted that the appellant had appealed to the Court of Appeal citing 10 grounds of appeal which could be summarized as “that the Learned Judge erred in holding that his determination of the compensation payable to Thabiti for the alleged proprietor of the suit land by the City Council when this had not been pleaded though acquiesced in by the parties amounted to an error apparent on the face of the record and that under the circumstances the Learned Judge also lacked jurisdiction to determine the compensation payable” at line 15 from the bottom it is stated “it will be recalled that I had stated that it was my view that no matter whether the parties had agreed to the Learned Judge determining the purchase price of or compensation payable for the suit land which had not been sold and no matter whether the City Council had made part payment of the assessed compensation surrounding that determination and the obvious incongruous indeed, contradictory nature of the judgement of the learned judge having regard to the prior ruling of Bosire Judge in the same suit was such that the learned judge should have granted review sought”

At line 1 from the bottom on the same page 12 it is stated ‘This is whether the learned judge had any jurisdiction to determine the compensation value of the suit land without the pleadings in the suit having been amended to make this an issue in the suit notwithstanding the apparent acquiescence of the parties to this procedure.’ At page 16 line 2 from the bottom it is stated” If as it is true that in its foregoing observation this court was also concerned with the lack of pleadings of special damages which invariably can be said to flow naturally from the same facts that support the claim for general damages then a fortiori the foregoing observation will apply with greater force to the averments involved in this appeal where unlike the issue of special damages the determination of the compensation value of the suit land does not flow naturally and is a completely different issue from any of the averments contained in the plaint of Thabiti that related only to trespass ..... At page 18 line 1 from the bottom “ any other sufficient reason need not be analogous with the other grounds set out in order 44 (1) of the Civil Procedure Rules as such a restriction would clog the unfettered right given to a court to review its decision under Section 80 of the Civil Procedure Act from which Order 44 (1) aforesaid derives its being. In my view the wrongful assumption of jurisdiction by the learned judge to determined the value of the suit land amounts to any other sufficient reason that justifies the grant of an application for review.

As per the judgement of Tunoi Judge of appeal in the same case at page 8 of the judgement paragraph 3 it is stated “*it would appear that those glaring errors arose singularly due to the manner in which the prayer was prosecuted and in the process the learned judge was unfortunately misled to award a prayer which was not contained in the plaint. These errors which were apparent on record and the fact that no nexus existed between the ruling and subsequent judgement were sufficient reasons to warrant the learned judge to review his judgement. Errors apparent on the face of the record need not as the learned judge held be those that can physically be pointed out without any argument”* ..... line 4 from the bottom it is stated “ It is difficult to resist the submission that prosecution of general damages for trespass as if it was a compulsory acquisition obscured the issue which was for determination before the learned judge.

Jurisdiction to award compensation was a condition precedent to the proceedings by the learned judge. In the circumstances the learned judge acted wrongly and in excess of jurisdiction proceedings with the determination of compensation without ascertaining that he had jurisdiction to do so. I would think also

that the justice of the matter required that the judgment be reviewed for the record to be put right” lines 7 from bottom on page 9 it is stated “ *it is now settled law that the only way to raise issues for determination by the court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them, In this instance compensation was never pleaded and should not have been tried. The court was obligated to dismiss that relief*”

In the case of **BHAG BHARI VERSUS MEHED KHAN (1965) EA**

Where it was held inter alia that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited on these grounds the trial judge should have refused to deal with issues raised at the hearing apart from the question of furnishing accounts

There was no issue as to entitlement and therefore no occasion for the money to be paid into court consequently paragraph (d) was inappropriate.

At page 104 paragraph H it is stated “the rules of procedure are designed to formulate the issues which the court has to determine and to give fair notice thereof to the parties.

Were it not that the judge has seen fit to determine a number of issues which were never raised in the originating summons I should not have thought it necessary to state that a judge has no power to determine an issue which is not before him.

The case of **JOAB HENRY ONYANGO OMINO VERSUS LALJI MEGHJI PATEL AND COMPANY LTD. NAIROBI CA 119 OF 1997** where at page 5 of the judgment paragraph 2 it is stated “ when an application under section 6(1) of the Act is made by a party to an arbitration agreement it is incumbent upon the court to which such application is made to deal with it so as to discover whether or not a dispute or differences arises within the arbitration agreement for if it does then it is for the opposing party to show cause why effect should not be given to the agreement. Indeed once parties to an agreement have chosen to determine their disputes or differences through a domestic forum other than resorting to the ordinary courts of law that choice should not be easily pushed aside.

The case of **KEA N. BARUA AND AURELIA WAWESYSKA VERSUS TOWN CONSTRUCTION COMPANY LTD. NAIROBI CIVIL APPLCIATION 325 OF 1998** where one of the parties applied under section 6 (1) of the Arbitration Act 1995 to stay the proceedings to enable the parties go to arbitration in terms of clause 36 of the building contract. The superior court refused application for stay of proceedings. On appeal in the judgment of Latha Judge of appeal as he then was at page 3 after revisiting clause 36 of the building contract and section 6 (1) of the Arbitration Act stated at page 3 line 13 from the bottom that “it is not in dispute that this arbitration agreement is one to which the section applies. The section is mandatory and the court has no discretion to refuse a stay unless the case falls within one of the exceptions in the section. The important words for the present purpose are “Any matter agreed to be referred and there is not infact any dispute between the parties in regard to the matter agreed to be referred. The background information was that the construction of the flats was completed in July 1997 and possession handed over to the employers. A sum of Ksh. 25 million was paid to the contractor. The employers entered into an agreement of sale on April 16 1998 for the sale of the property at a sum of 51 million and the purchasers there under are in possession. Upto the date the contractor filed the suit the employers had made no complaint about the construction work. All the above fact show that the employers had no dispute with the contractor arising from the building contract or in connection therewith. Furthermore in terms of clause 30 (b) of the building contract the sum due had become a civil debt payable by the employers to the contractor. It was the undisputable debt which the employers admitted to be payable” At page 4 paragraph 2 line 19 from the bottom quoting from the case of **LONDON AND NORTH WESTERN AND GREAT JOINT RLYCOS VERSUS J. H. BILLINGTON LTD. (1989) A.C. 79 OF 821** it was observed “that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county courts or by writ in the superior courts. Any contention that the parties could when they are sued for the price of the services raise then for the first time the question whether or not the

charges were reasonable and that therefore they have a right to go to an arbitrator seems to me to be absolutely untenable”

On the basis of the above the court was unable to see that that claim could be said to arise under the building contract or be connected therewith. Accordingly it is not a matter agreed to be referred to arbitration in terms of clause 36 of the building contract. That the Learned Judge may well have been right in ruling as he did that there was no dispute.

The contractor who has done its work in unchallenged and unquestioned until well after the suit was instituted ought not to be kept out of its money a moment longer. The application to be allowed to appeal was dismissed.

The case of **CORPORATE INSURANCE COMPANY VERSUS LOISE WANJIRU WACHIRA NAIROBI CA 151 OF 1995** in which a preliminary objection was raised asking for the suit to be struck out on the ground that it had been prematurely brought without the dispute first being referred to arbitration as stipulated by clause 10 of the policy. The judge overruled the objection because he found as a fact that the appellant had not complied with the mandatory provisions of section 6 of the Arbitration Act Cap 49. The appellant after filing an appearance delivered a defence and no made application for stay and when the case came up for hearing 12 years later is when the counsel raised the issue of arbitration. At page 5 of the judgement it is stated “ these clauses (arbitration clauses) do more than provide that disputes shall be referred to arbitration. They also stipulate that the award of an arbitration is to be a condition precedent to the enforcement of any rights under the contract so that a party has no cause of action in respect of a claim falling within the clause unless and until a favourable award has been obtained while we agree with the proposition that of Scott versus 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 obligated 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. .... Ascott v. Avery clause performs two different functions. First it creates an obligation to arbitrate and as such it gives the defendant in a High Court action the right to apply for a stay of the proceedings.

Second it creates a condition precedent to the plaintiff 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 abide 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 cause is for him to apply for a stay.”

The case of **ABOK JAMES ODERA AND ASSOCIATES VERSUS KENYA POSTS AND TELECOMMUNICATIONS CORPORATION NAIROBI CA 206 OF 1996** where it was also pleaded in the defence in the alternative that the conditions provided for arbitration in case of disputes and since this had not been resorted to the respondent would but did not crave leave of the court to have the dispute referred to arbitration. At page 3 line 14 from the bottom it is noted that the learned judge went on to stay further proceedings in the suit and to make an order for the suit to be referred to arbitration. At page 4 the court revisited the old section 6 (1) in the repealed Arbitration Act which stated “Any party to these proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings apply to that court to stay the proceedings. In the case under consideration the defendant had entered appearance and filed defence followed by an application to go to arbitration. The court followed the reasoning in the case of **MALUKI VERSUS ORIENTAL FIRE AND GENERAL INSURANCE (1973) EA 162** where it had been held that if the respondent when it filed its defence on 7th February had not yet applied to the court for a stay then having filed a pleading it was not entitled to the order for stay of proceedings the subject of this appeal. Secondly it is at least arguable that in filing a defence which inter alia joined issues on the merits while an application for stay was pending the respondent could be taken to have waived that application.

Following that ruling the court in the case of **ABOK JAMES ODERA** stated at page 5 of the judgement line 4 from the top it was stated “we think that in considering the application before us it can be said that

it is at least arguable even though the defence was filed before the application for stay, that the fact that it joined issue on matters of merit to the extent of denying the legal existence or validity of the contract of service makes the application for stay that was subsequently filed one that was not filed in good faith or one which was an abuse of the process of the court we are not inclined to hold the view that simply because section 6 (1) of the new Arbitration Act constitutes a carte blanche its application cannot therefore be subject to abuse ..... But we do not wish to confine ourselves only to this point and in doing so we would now look at the following wording of section 6 of the new Arbitration Act in pursuance of which the Learned Judge made his order of stay and the remedial of the dispute to arbitration (Provision of the section set out)” At page 6 the second paragraph it is stated “ Here the most important words are the words shall if a party so applies not later than” But what exactly do they mean with in the context of the present application? If the respondent had when it filed its notice of appearance and not later actually applied for stay the court should subject to the provisions of sub sections (1) (a) and (b) grant stay. Similarly the same should apply if the respondent had filed its application for stay not later than when it filed its defence but which is not what happened or if it had filed which was the case, its application for stay not later than when it filed its grounds of objection which is “any pleadings” to the applicants motion for summary judgement.

The learned judge in coming to the conclusion that he did and in determining his competency to do so did not seem to have taken into consideration the provision of section 6 (1)(a) of the new Arbitration Act as to whether the arbitration agreement which the respondent itself had previously asserted was illegal and null and void or was not. He did not also consider whether the arbitration agreement was in operable or not, that is to say whether prior conditions that would give rise to arbitration had been fulfilled or otherwise “ At page 7 of the judgement paragraph 2 it is stated “ The learned judge also seems to have based his decision to make the order that he made on the basis that even though the respondent had filed its application for stay after it had filed its defence the delay involved had been accounted for and was not inordinate and that in any case it had been hinted in the defence that the respondent would in the future seek a stay of the proceedings and the remittal of the dispute to arbitration which is really not the same thing as actually making the application as envisaged under section 6 (1) of the Arbitration Act. If the defence constitutes the “any pleadings” of or any other step in the proceedings taken by the respondent as the learned judge seemed to think and the application for stay was made later than any of them it would be arguable having regard to the first of the observation of law. Judge of Appeal in the Maluki case (Supra) already referred to to say that the learned judge had no jurisdiction to hear the application.

Indeed the learned judge did not consider the effect of the respondents grounds of objection to the applicants motion for summary judgment as any pleadings or any other step in the proceedings which occurred after the filing of the respondents application for stay. Page 8 line 1 it is stated “we are strengthened in this view by the very wording of section 6 (2) of the new Arbitration Act which we have already set out and which is to the effect that notwithstanding that a matter may be pending before the superior court as it is in this case so long as an application has been brought under section 6 (1) of the new Arbitration Act. Arbitration proceedings may be commenced and continued and an award given. In the absence of any evidence to the contrary this is what may well happen and the applicant would have been deprived of having his suit determined by a court of law if his intended appeal succeeds”

The case of **MOTOKOV VERSUS AUTO GARAGE LTD AND OTHERS (1970) EALR 249** where it was held inter alia that a stay would be refused because the facts that the defence and the counter claim were so inextricably mixed there was a substantial risk that two tribunals could reach conflicting conclusions. The plaintiff had chosen to sue in the court despite the availability of arbitration and the plaintiff had delayed in applying for a stay.

The case of **MALIKI VERSUS ORIENTAL FIRE AND GENERAL INSURANCE (1973) EA 162** where it was held inter alia that as the application was made after the filing of the defence a stay should not have been granted. The case of **W. J. TAME LTD VERSUS ZAGORITIS ESTATE LTD. (1960) EA 370** where it was held inter alia that however on a true construction of the arbitration constitution agreement the question stated to have been referred to a legal advisor never arose and ought not to have been referred a mistake as to the territorial law applicable in such an error of law as will justify the court in setting aside the award.

The case of **OMEGA ENTERPRISES (K) LTD VERUS THE KENY TOURIST DEVELOPMENT CORPORATION AND 2 OTHERS NAIROBI CA 57 OF 1973.**

As per the judgement of Tunoi Judge of Appeal at page 3 of the judgement line 8 from the top it is stated “thus the ex parte order made by the learned judge was made without jurisdiction since the maximum period for the validity of the interim order of 14 days was exceeded. I think also that the said order must be without any legal basis and hence null and void ..... There cannot be as far as third parties are concerned interference with due administration of justice when the ex parte order made is without any legal basis and is of no legal effect and as regards the portion to this suit it cannot be said that there was disobedience of an order which was in the first place null and void.” Line 10 from the bottom quoting from the case of MALFOY VERSUS UNITE AFRICA CO. LTD.

(1961) 3 ALL ER 1169 it was stated “if an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. At page 4 of the judgement paragraph 3 it was stated “it follows therefore in my judgement that all the proceedings before the learned judge which were based upon the null and void order having been allegedly disobeyed are a complete nullity since with such faulty foundation the entire house of cards must collapse without much ado.”

As per the judgement of E. Gicheru Judge of Appeal quoting from the case of **ISAACS VERSUS ROBERTSON (1984) 3 A ER 142 AT PAGE 143** it is stated “there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make the judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order onto the category that attracts ex debito justitiae the right to have it set aside save that specifically it includes orders that have been obtained in breach of rules of natural justice” at page 8 line 2 from the top that “hence the order of the superior court dated 15th January 1993 that the public auction of the property known as **LR ELDORET MUNICIPALITY/BLOCK 4/69** together with the improvements thereon including the business, carried thereon under the name of Eldoret Sirikwa Hotel LTD. was illegal, invalid and of no effect and the confirmation of the certainly irregular ex parte injunction order of 18th December 1992 which was to continue until the determination of the substantive suit was as it affected the interest of and without the appellant being given an opportunity to be heard clearly in breach of the rules of natural justice and attracts ex debito justitiae the right to have it set aside.”

In Jolowitz legal dictionary the word Appeal has been defined at page 15 as follows

1. The right of appeal is only by statute. It is not in itself a necessary part of the proceedings in an action but is the right of entering a superior court and invoking its aid and inter position to redress the error of the court below.
2. An appeal strictly so called is one in which the question is whether the order of the court from which the appeal is brought was right on the materials which that court had before it.
3. A right of appeal where it exists is a matter of substance and not a procedure. It is not confined to actions where there is from their inception a right of appeal but extends to actions in which there has been given leave to appeal.

In the case of **GHARIB MOHAMMED CHARIB VERSUS ZULEKHA MOHAMMED NAAMAN MOMBAS CA (CIVIL APPLICATION 4/99)** where the party filed an appeal but on advise of senior counsel he abandoned the appeal and applied for review which was heard and dismissed. He then turned to pursue the appeal which he had abandoned. It was held that it would be wrong for the court to exercise a discretion in favour of the applicant. He really has no further right of appeal except the right to appeal

against the decision dismissing the application for review. Further that by applying for review the applicant had made his election and was bound by it. On the courts assessment of the facts herein it is clear that there is no doubt that courts of law are abstracts objects manned by human beings. The legislature was wise enough to realize that human beings were prone to error and an erring human being is a normal human being and there is nothing special about that. To keep an erring human being who is manning a court under check the legislature gave such a human being immense powers or discretion to deal with court matters. But at the same time put in place checks and balances, safety valves, bottle necks, panya routes, slip rules, side flow roads in order to keep that discretion in check to ensure that the same is exercised properly, judicially, fairly and in the best interest of all the parties who come before the court of law seeking resolution of their disputes such as the disputants herein. In summary the defendant applicant is of the view that throughout the entire proceedings the court did not address its mind properly both to the facts and the law and therefore did not exercise its discretion properly thereby resulting in injustice to the defendant who has been greatly prejudiced by the various decisions made in this matter but more particular by the most grievous decision which gave birth to the grieving decree sought to be reviewed. The defence counsel has attempted to show that at each step taken in the matter the court seized of the matter exercised its discretion either wrongly or improperly and further that these wrong or improper decisions have prejudiced the defendant and that is why they have come back to this same court to undo them.

The application being objected to is cemented on section 80 of the Civil Procedure Act and Order 44 of the Civil Procedure Rules. The said provisions are of great notoriety to any judicial mind but for purposes of the record there is no harm in setting them out here for purposes of the record. Section 80 states

*“Any person who considers himself aggrieved (a) by a decree order from which an appeal is allowed by this Act but from which no appeal has been preferred or (b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgement to the court which passed the decree or made the order and the court may make such order as it thinks fit”*

The authorities which were referred to the court and which have been set out above have shown that Order 44 of the Civil Procedure Rules draws its strength from Section 80 of the Civil Procedure Act. Order 44 Rule 1 (1) states “Any person considering himself aggrieved (a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred or (b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay” From the foregoing it is clear that the condition precedent before review that a party has to consider before embarking on review are:

1. The party must consider himself aggrieved by the said judgement or order.
2. It must be a judgement or order from which an appeal is allowed by the Act and for which no appeal has been preferred.
3. It must be a judgement or order from which no appeal is allowed by the Act. Herein there is no assertion that the ruling from which the decree was drawn was one in which no appeal was allowed. Subsequent events in the proceedings following pronouncement of that ruling and subsequent decree show that the same was appellable and infact such steps were taken as will be shown later on in this ruling.

The bone of contention herein is that having taken such steps the defendant cannot come back and seek review. While the defence argument is that there was no appeal in the strict sense of that word and so review lies in their favour.

Before the court decides which argument is to be upheld it is important to set out the undisputed facts herein.

1. There is no dispute that the plaintiff filed a plaint herein on 19th July 1995 seeking a claim of 1,935,987/- being balance of sums due and payable by the defendant to the plaintiff in respect of construction work done by the plaintiff for the defendant on the defendant's plot No. 6/190 Eldoret full particulars whereof were within the knowledge of the defendant. There is no dispute that although the issue of construction work was mentioned there is no mention in the plaint of the existence of an arbitration clause in the contract of work done, there is also no mention that a dispute had arisen under the said contract which needs to be referred to arbitration and also there is no plea that the matter be referred to arbitration under the contract for a resolution.
2. There is no doubt that if there had been an arbitration plea then the provisions which would have applied to the parties would have been the provisions of the old Arbitration Act which required that whoever wishes to avail himself of an arbitration clause in the contract has to do so after the defendant enters appearance and takes no further step in the matter. The defendant filed his defence on 29th August 1995. He too did not mention about the existence of the arbitration clause. He too if he had wanted to avail himself of the arbitration clause under the old law he was required only to enter appearance and then apply for the matter to be referred to arbitration. It would appear from the cited authorities that once the defence was filed then the doors to arbitration were closed to the parties under the old law and what was to be resorted to is for the parties to battle it out in court and have the matter ruled upon effectively by a court of law.
3. There is no dispute that following the filing of the defence the plaintiff moved to court and filed an application to strike out the defence filed on 27th September 1995 and that summary judgment be entered in favour of the plaintiff. The contract document annexed as an exhibit. The defendant filed a replying affidavit and in paragraph 3 thereof he deponed "I agreed with the plaintiff to pay them Ksh. 25,637,623.00. In paragraph 4 thereof he deponed that the agreed total has been paid to the plaintiff and even the plaintiff has signed the final certificate and handed over the hotel to the defendant" There was no mention about the matter being referred to arbitration. It was in the course of the argument in respect of this application that the issue of clause 36 of the contract came up and it was mentioned in submission by the defendant that the matter should have been referred to arbitration. The court in its wisdom read the arbitration clause and interpreted the same to mean that anything arising from the contract has to go to arbitration first before parties can come to court clause 36 states "Provided always that in case any dispute or difference shall arise between the employer or architect on his behalf and the contractor either during the progress or after the completion or abandonment of the works as to the construction of this contract or as to any matter or thing of whatsoever nature arising there under 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 measurements and valuation mentioned in clause 30 (5) (a) of these conditions for the rights and liabilities of the parties under clauses 25, 26, 33 and 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 or filing agreement within 14 days after either party has given to the other written request to concur in the appointment of an arbitrator a person to be appointed on the request of either party by the chairman or a vice chairman for the time being of the East African Institute of Architects who will when appropriate delegate such appointment to be made by the chairman or vice chairman of the local (National society of Architects)' This court gave a ruling whose salient points have already been set out earlier in this ruling requiring the parties to comply with clause 36 of the Contract Agreement first before coming back to court. There is no dispute that neither party appealed against that ruling or sought its review to the effect that matters complained of do not fall within the ambit of clause 36 of the contract agreement. Also there is no dispute that the said ruling bears two dates. The date when it was written and the date when it was delivered.
4. There is no dispute that no stay of proceedings order was sought by either party pending arbitration and none was made by the court. Subsequent events and submissions of the defence

lawyer show that the defendant did not participate in the arbitration proceedings. According to him the said proceedings were improper and he was not bound to be a party to them. It is however clear that despite that knowledge the defendant did not take appropriate steps to terminate the same. There is no dispute that the plaintiff came back to court armed with an award seeking its adoption vide an application filed on 3rd February 1998. Once against the parties argued that application on merits and its ruling has already been set out in this ruling. It too had 2 dates 18.12.95 and 15.2.96 it is evidently clear that this is the time the court, realized that the proceedings had not been stayed and advised the plaintiff to apply for a deeming order that the proceedings were deemed to have been stayed. The defendant too participated in those proceedings. It is noted that it too had 2 dates 26.5.98 and 30.6.98 the date it was written and the date it was delivered. Once again neither party appealed against that ruling or applied for review.

5. There is no dispute that the plaintiff followed the advise given by the court and then filed the application filed on 27th July 1998. It is on record that the defendant who had been previously acting in person engaged counsel who entered appearance and filed opposing papers. The matter was heard on merit and it gave birth to the ruling delivered on 4th October 1999. It too had two dates one dated 29th day of July when it was written and 4th October when it was delivered.

There is no dispute that the defendant was aggrieved by that ruling because it is the one which confirmed the award which confirmation gave birth to the decree herein. Having been aggrieved by that decision the defendant had two options open to him to remedy that grievance by availing himself of the remedies under section 80 of the Civil Procedure Act and Order 44 Civil Procedure Rules by either appealing or applying for review.

6. There is no dispute that the record shows that the defendant made an election by choosing to appeal against the said grieving orders. He took the first step by filing a notice of appeal dated 5th October 1999 filed on the same date of 5th October 1999. The law required him to serve it on the opposite party within 14 days of filing the same. Subsequent events show that this was not done.

7. There is no dispute that the defendant took a second step by filing an application for stay of execution pending appeal which application was filed on 5th January 2000 dated 5th January 2000. That application was argued on merit and dismissed on 20th day of January 2000. 8. There is no doubt that the defendant took a 3rd step by obtaining a certificate of duly showing that proceedings were ready for collection on 1st February 2000 and the certificate was issued on the same date.

9. There is no dispute that the defendant took a 4th step by filing civil application No. Nairobi 77 of 2000 in the Court of Appeal seeking leave of the Court of Appeal to serve the notice of appeal out of time.

10. There is no dispute that the defendant took a 5th step in the matter by having that application argued before one judge of the Court of Appeal which was heard by Hon. Mr. Justice E. O. Okubasu and delivered on 23rd day of June 2000. That ruling was in civil application Nairobi 77 of 2000. The salient features of the same are the following words "Having considered the explanation given for the delay and in view of what was stated in above cited authority, I am of the view that this is a fit case in which I should exercise my discretion in favour of the applicant. Hence the period for serving notice of appeal is extended by seven days from the date of this ruling and the period for lodging and serving records of appeal is also extended by seven day from the date of this ruling. And finally notice of appeal is deemed to have been served in time and the record of appeal is also deemed to have been lodged and served in time. Costs of this motion shall abide the result of the intended appeal dated and delivered at Nairobi this 23rd day of June 2000. E. O. Okubasu, Judge of appeal.

11. There is no dispute that the defendant took a 6th step in the matter by filing a new notice of appeal on 28th June 2000 which notice was dated 27th June 2000. 12. There is no dispute that following the orders of the single judge of appeal of 23rd day of June 2000 and following the filing of the notice of appeal on 28.6.2000 an appeal in the name style and description of Civil Appeal

No. 32 of 2000 was filed being between Jassan K. Koskei versus Vishva Builders Ltd. This was the 7th step taken by the defendant.

13. There is no dispute that the defendant took an 8th step on the matter by participating in the proceedings by way of reference before a bench of 3 judges of the court of appeal in Nairobi 77 of 2000 where by the bench of three judges reviewed the decision of Okubasu Judge of appeal in No. 10 above. The said order of the single judge was set aside by the three judges and the application made for extension dismissed with costs. That ruling of the three judges is dated 29th day of September 2000.

14. There is no dispute that the defendant took a 9th step in the matter by having the appeal filed by him No. 32 of 2000 struck out with costs to the respondent which order is dated 28th September 2001.

It is against the foregoing background that the plaintiff/respondent through his counsel filed the preliminary objection subject of this ruling against the application for review by the defendant. It is worth noting that the defence lawyer has argued ably setting out the errors, commission and omissions committed by the presiding judge just to name a few.

(a) She had no business introducing matters into the pleadings of the parties which had not been pleaded by them namely the issue of arbitration which had neither been pleaded by the plaintiff or the defendant. (b) It was wrong for the judge to order a reference to arbitration when neither party had applied for such a reference more so when under the old Arbitration Act by filing the defence by the defendant the doors for arbitration were closed to both parties and the court should have proceeded with the matter as a civil debt.

(c) That since the process of arbitration were illegally and unlawfully invoked by the court on its own motion the defendant was not bound to participate in them and was not even bound to move to court to apply for the arbitration award to set aside as the same was a nullity and there was no award at all.

(d) That the court was wrong in dating the grieving ruling twice and by doing so the said ruling was a nullity and an order or ruling which is a nullity cannot give rise to any valid appeal. It follows that all the steps taken by the defendant in purporting to appeal are all null and void and parties are restored to the position they were in on the day the said grieving ruling was read and therefore the relief of review is available to the defendant as sought in the application objected to.

(e) That the judge responsible for the said errors is the proper one to remedy them and has jurisdiction to do that through review to avoid great prejudice and injustice to the defendant.

The brief response of the plaintiff objector to the above are that indeed the defendant was aggrieved by the orders complained of and having been so grieved he had an election to make under section 80 of the Civil Procedure Act and Order 44 of the Civil Procedure Rules by choosing to appeal or apply for review against the said orders. That there is no doubt that the defendant elected to appeal against those orders and went as far as filing an appeal which was still pending decision on its fate as at the time of argument of objection. That having chosen the process of appeal the defendant had no option but to pursue that to its logical conclusion and cannot come back and seek review which he had abandoned.

In response to that the defence counsel submitted that the plaintiffs counsel was trying to throw the defendant and cut him off completely from avenues of justice as in the Court of Appeal they were seeking to strike out the appeal and thus shut him out from pursuing his rights through that process and when he comes back to the court that gave the grieving orders for a remedy they come back to the same court and argue that review is not available and by doing so they want to shut both avenues. With that in mind the defence counsel urged the court to stand for substantial justice as opposed to technicalities and rule in favour of the defendant, dismiss the preliminary objection and allow the review application to be argued in view of the illegalities and nullity effect of the procedures followed herein.

This court has carefully considered the arguments of both counsels and it is of the view that the answer was in the Court of Appeal authorities referred to this court. The principles on each have already been set out in this ruling. Authority No. 1 – 20 by the defence counsel deals with irregularities touching on failure to approve decree, want of jurisdiction and the court determining issues not before it. Number 22 – 27 deal with arbitration issue. Authority number 29 of **OMEGA ENTERPRISES VERSUS KENYA TOURIST DEVELOPMENT CORPORATION AND OTHERES NAIROBI CA 59 OF 1993** sheds light to the issues in contention herein that an order which is null and void it is automatically null and void though it is sometimes convenient to have the court to declare it to be so. Authority No.3 in the defendants list already set out herein shows clearly that an order or a judgement which had two dates is a nullity. This is one of the stronghold of the defence argument. The question to be paused by this court is whether this court has jurisdiction at this juncture to allow review and set aside that order.

An answer can be found in the case of **KISYA INVESTMENTS LTD. VERSUS THE ATTORNEY GENERAL AND R. I. ODUPOY NAIROBI CA 131/95** whose central theme is that review has to be presented before an appeal is preferred and argued before appeal is argued. If application for review is filed earlier but not argued and then appeal is heard first then the application for review cannot be argued. The grounds for review will be incorporated in the grounds of appeal.

Assistance also can be derived from the case of **WILLIAM KARANI AND 47 OTHERS VERSUS MICHAEL WAMALWA KIJANA AND 2 OTHERS NAKURU CA 43 AND 153 OF 1986**. The central message is that the two processes cannot be invoked at the same time. A party has to make an election as to which process to follow.

The case of **RICHARD SAIDI VERSUS SEMBI MOTORS KISUMU CA 9 OF 1991** where the central message is that review is limited to a party which has no right of appeal but where a party has a right of appeal review is applicable where a party has not taken up his right of appeal.

Also in the case of **MOTEL SCHWELTZER VERSUS THOMAS EDWARD CUNNINGHAM AND MARIUS LEON ESTIENNE (1955) 22 EACA** it gives the ingredients for existence of an appeal which are that an appeal is lodged when a record of appeal is lodged in its registry, fees are paid and security as to costs lodged.

The definition of an appeal is given in authority No, 31 for the defence which is to the effect that an appeal is given by statute and it is a right of entering a superior court and invoking its aid and inter position to redress the error of the court below.

Applying the above to the facts of this objection proceedings it is clear that the authorities referred to this court do not give a distinction between an invalid appeal and one which is not invalid. The deciding factor is whether a party has made an election to proceed on appeal to redress his grievances. Once that election is made and it fruitifies it matters not that the appeal filed eventually turns out to be invalid. Once the process of appeal is taken the process of review is shut out. Herein there is no doubt that the defendant had genuine grievances to be addressed either on appeal or review. His bid for appeal failed on points of technicalities. That notwithstanding by taking that step the door for review by this court was also closed. There is nothing this court can do for the defendant however sympathetic it may be to the plight of the defendant. Being a junior court to the Court of Appeal it cannot go round the authorities of the Court of Appeal on the subject. The defendant has no alternative but to find his way back to the Court of Appeal to see if the matter can be reopened for him to enable him remove the twists, turns and webs which he alleges to have been woven around him by the proceedings herein. For now the court has no alternative but to uphold the preliminary objection that the relief of review is not available to the defendant. He came too late after failing in the Court of Appeal.

The preliminary of objection is allowed with costs to the plaintiff objector.

As per observation by the Court of Appeal in the case of **MANCHESTER OUTFITTERS SUITING DIVISION LIMITED NOW CALLED KING WOOLLED MILLS LIMITED AND ANOTHER VERSUS STANDARD CHARTERED FINANCIAL SERVICES LTD. AND ANOTHER NAIROBI**

**CA NO. 88 OF 2000** the reasons for the delay in the writing of the ruling are as follows:

1. The file has been being called for before the Court of Appeal every now and then,
2. A request by the judge then seized of the matter to be given two months to clear pending work before proceeding on transfer to a new station was turned down.
3. Several requests to proceed on leave and utilize a part of the leave to clear the pending work was also turned down.
4. The flow of work at the station transferred to was overwhelming thus leaving no spare time to write the rulings and judgments for the former stations.
5. Litigants and counsels from the station transferred to always insisted that their matters be given priority when it comes to writing of judgments and rulings. 6. Request for a relieving judge to be send to cover the station transferred to enable the judge then seized of the matter create time to clear pending work for the former station was also not heeded.

Dated, read and delivered at Eldoret this .....Day of .....

R. NAMBUYE

JUDGE

Dated and delivered at Eldoret this 2nd day of November 2004

JEANNE GACHECHE

**JUDGE**

In the presence of :

Mr. Gicheru for the respondent

No appearance for the applicant